A-570-028
CIRC - Unpatented R-421A
Public Document
E&C/OII: MR

February 25, 2020

MEMORANDUM TO: Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Preliminary Decision Memorandum for Scope Ruling and Anti-Circumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China; Unpatented R-421A

I. SUMMARY

In November 2017, Choice Refrigerants (Choice) filed a scope ruling request[1] seeking that the Department of Commerce (Commerce) determine if unpatented R-421A, a blend of hydrofluorocarbon (HFC) components R-125 and R-134a, imported from China qualifies for exclusion from the antidumping duty (AD) order on HFC blends.[2] Based, in part, on a plain reading of the scope language itself, we determine that R-421A, whether patented or unpatented, is not within the scope of the *Order* within the meaning of 19 CFR 351.225(k).

Further, in response to a request from the American HFC Coalition (the petitioners), we initiated an anti-circumvention inquiry, pursuant to section 781(a) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.225(g),[3] to determine if imports of unpatented R-421A, exported from China, and further processed in the United States to create subject HFC blends, are subject to the *Order*. Based on the information submitted by interested parties and the analysis below, we recommend that, pursuant to section 781(a) of the Act, Commerce preliminarily find that imports of unpatented R-421A from China are circumventing the *Order*.

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[1] *See* Choice Refrigerant's Letter, "Application for Scope Ruling on Exclusion of Patented HFC Blends from Antidumping Duty Order A-570-028: Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China," dated November 30, 2017 (Choice Scope Ruling Request).
[2] *See Hydrofluorocarbon Blends from the People's Republic of China: Antidumping Duty Order*, 81 FR 55436 (August 19, 2016) (*Order*).
[3] *See Hydrofluorocarbon Blends from the People's Republic of China: Initiation of Anti-Circumvention Inquiry of Antidumping Duty Order; Unpatented R-421A*, 84 FR 28281 (June 18, 2019) (*Notice of Initiation*).

II. BACKGROUND

Scope Inquiry, Covered Merchandise Referral, and Circumvention Allegation

On November 30, 2017, Choice Refrigerants (Choice) filed a scope ruling request that Commerce determine if unpatented R-421A HFCs imported from China qualify for the exclusion in the scope of the *Order* on HFC blends from China.[4] On December 4, 2017, Commerce received a covered merchandise referral from CBP regarding CBP Enforce and Protect Act (EAPA) Investigation No. 7212.[5] On December 27, 2017, LM Supply Inc. (LM Supply) submitted comments on Choice's scope request.[6] On March 5, 2018, Commerce published a notice of covered merchandise referral, providing parties notice of the referral and inviting participation from interested parties.[7] Also on March 5, 2018, Commerce aligned Choice's scope inquiry with the covered merchandise referral from CBP, as they cover the same product.[8]

On April 4, 2018, we sent a questionnaire to LM Supply regarding the product included in the referral from CBP;[9] on April 27, 2018, we received a response to the questionnaire from LM Supply.[10] On May 11, 2018, the American HFC Coalition and its individual members[11] filed deficiency comments as well as factual information in response to LM Supply's April 27, 2018 submission.[12]

On August 15, 2018, the petitioners filed a request that, pursuant to section 781(a) of the Act, Commerce initiate an anti-circumvention inquiry regarding imports of unpatented R-421A (a blend of HFC components R-125 and R-134a) from China that are further processed into finished HFC blends in the United States, which the petitioners allege are circumventing the *Order*.[13] On September 6, 2018, LM Supply filed an objection to the petitioners' request for an

[4] *See* Choice Scope Ruling Request; *see also* the *Order*.
[5] *See* CBP's Letter, "EAPA Case Number: 7212; Scope Referral Request for merchandise under EAPA Investigation 7212, imported by LM Supply, Inc. and concerning the investigation of evasion of the antidumping duty order on hydrofluorocarbon blends from the People's Republic of China (A–570–028)," dated December 4, 2017 (CBP EAPA Referral Letter) and accompanying Attachments.
[6] *See* LM Supply's Letter, "Comments in response to Kenneth Ponder's and Choice Refrigerants' November 30, 2017 Application for a Scope Ruling," dated December 27, 2017.
[7] *See Hydrofluorocarbon Blends from the People's Republic of China: Notice of Covered Merchandise Referral*, 83 FR 9277 (March 5, 2018).
[8] *See* Memorandum, "Alignment of Scope Inquiry and EAPA Referral on Unpatented R421A," dated March 5, 2018.
[9] *See* Commerce's Letter, "Hydrofluorocarbon Blends from the People's Republic of China – Scope Ruling Supplemental Questionnaire," dated April 4, 2018.
[10] *See* LM Supply's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Supplemental Questionnaire Response," dated April 27, 2018 (LM Supply's April 27, 2018 SQR).
[11] The American HFC Coalition includes: Arkema Inc., the Chemours Company FC LLC, Honeywell International Inc., and Mexichem Fluor Inc. (the petitioners).
[12] *See* Petitioners' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Submission of Factual Information in Response to Scope Exclusion Request," dated May 11, 2018.
[13] *See* Petitioners' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Scope Investigation Regarding Certain Unpatented HFC Blends: Request to Apply Section 781(a) to Prevent Circumvention," dated August 15, 2018 (Initiation Request).

anti-circumvention inquiry.[14] Also on September 6, Choice filed a response to the petitioners' allegation of circumvention, in which it reiterated its request that Commerce issue a determination in the scope ruling inquiry immediately, and also voiced its belief that LM Supply was circumventing the *Order*.[15] On September 24, 2018, Commerce received rebuttal comments to LM Supply's objection to the application of section 781(a) from the petitioners.[16]

Initiation and Respondent Selection

On June 18, 2019, Commerce initiated the anti-circumvention inquiry with respect to unpatented R-421A from China that are further processed into finished HFC blends in the United States.[17] On June 24, 2019, we requested comments from interested parties on respondent selection and the period of inquiry (POI).[18] In July 2019, we received comments on respondent selection and the POI from the petitioners, BMP USA Inc. (BMP USA) and iGas USA, Inc. (IGas)[19] and T.T. International Co., Ltd. (TTI).[20] BMP requested treatment as a mandatory respondent.[21]

On October 31, 2019, we placed on the record CBP data for U.S. imports under Harmonized Tariff Schedule of the United States (HTSUS) numbers 3824.78.0020 and 3824.78.0050, and solicited comments on these data.[22] We issued quantity and value (Q&V) questionnaires to nine companies on the same date.[23]

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[14] *See* LM Supply's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Scope Investigation Regarding Certain Unpatented HFC Blends: Objection to Petitioners' Request to Initiate Anti-Circumvention Proceedings Pursuant to Section 781(a)," dated September 6, 2018 (LM Supply's Anti-Circumvention Rebuttal).
[15] *See* Choice's Letter, "Response of Choice Refrigerants to the American HFC Coalition's Request to Apply Section 781(a) to Prevent Circumvention; *Hydrofluorocarbon Blends from the People's Republic of China: Antidumping Duty Order*, DCK. A-570-028, 81 Fed. Reg. 55436 (Aug. 19, 2016)," dated September 6, 2016.
[16] *See* Petitioners' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Scope Investigation Regarding Certain Unpatented Blends: Response to LM Supply Inc.'s Objection to Application of Section 781(a) to Prevent Circumvention," dated September 24, 2018.
[17] *See Notice of Initiation*.
[18] *See* Memorandum, "Anti-Circumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China – Unpatented R-421A Anti-Circumvention Inquiry: Request for Comments on Period of Investigation and Respondent Selection," dated June 24, 2019.
[19] LM Supply, Cool Master, and their affiliated blenders, BMP USA and IGas share common ownership and have provided a single response; therefore, for the purposes of this anti-circumvention inquiry, we are treating these companies as a single entity, hereinafter referred to as "BMP." *See* BMP's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Initial Questionnaire Response," dated January 17, 2020 (BMP's January 17, 2020 QR).
[20] *See* Petitioners' Letter, "Hydrofluorocarbon Blends from the People's Republic of China; Unpatented R-421A Anti-Circumvention Inquiry: Comments on the Period of Investigation and Respondent Selection," dated July 10, 2019; BMP's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Comments on Period of Investigation and Respondent Selection," dated July 5, 2019 (BMP Respondent Selection Comments); and TTI's Letter, "Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China: Unpatented R-421 Anti-Circumvention Inquiry; Comment on Period of Investigation and Respondent Selection," dated July 10, 2019.
[21] *See* BMP Respondent Selection Comments.
[22] *See* Memorandum, "Anti-Circumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China – Unpatented R-421A: Release of U.S. Customs and Border Protection Data and Clarification of Quantity and Value Questionnaires," dated October 31, 2019 (CBP Data Memo).
[23] *Id*.

Commerce received responses substantiating claims that certain firms neither exported nor imported unpatented R-421A. However, Commerce did not receive Q&V responses from Jinhua Yongan Electronic & Electrical Appliance Manufacture Co., Ltd. (Jinhua Yongan), and Ningbo Koman's Refrigeration Industry Co., Ltd. (Ningbo Koman).[24]

On November 7, 2019, we received comments on the CBP data from Zhejiang Quhua Fluor-Chemistry Co., Ltd. (Quhua).[25] The Q&V questionnaire responses indicate that, of the five companies responding, LM Supply and Cool Master USA, LLC (Cool Master) are the only importers of unpatented R-421A blends, and TTI is the only exporter/producer of unpatented R-421A blends, after the imposition of the *Order*.

Questionnaires and Responses

On December 13, 2020, we selected the Chinese exporter, TTI, and U.S. importers LM Supply and Cool Master, and their affiliated blender, BMP USA, as the mandatory respondents in this inquiry.[26] On that same date we issued an initial questionnaire to TTI and the U.S. importers.[27] On January 8, 2020, TTI notified Commerce that it did not intend to respond to the initial questionnaire issued by Commerce[28] (we collectively refer to TTI, Jinhua Yongan and Ningbo Koman as the non-responsive companies).[29] On January 17, 2020, we received a response from LM Supply and Cool Master, and their affiliated blenders, BMP USA and IGas.[30]

Surrogate Country and Surrogate Value Submissions

On December 17, 2019, Commerce placed on the record a list of countries that are at the same level of economic development as China, for use in this proceeding, and invited interested parties to submit comments on the list, selection of surrogate countries, and surrogate values.[31] Between January 3, 2020, and January 13, 2020, the petitioners submitted comments on surrogate country

[24] *See* Memorandum, "Quantity and Value Delivery Confirmation in the Anti-Circumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China: Unpatented R-421A," dated December 6, 2019. We note that this memorandum contained status confirmations from two companies (*i.e.*, Zhejiang Sanye Fuxin Motorcycle Co., Ltd and Sinochem Environmental Protection Chemicals (Taicang) Co., Ltd.) showing that those companies' Q&Vs were "In Transit" and "Pending" as of December 4, 2019.
[25] *See* Quhua's Letter, "Quhua Comments on CBP Data: Hydrofluorocarbon Blends from the People's Republic of China; Anti-circumvention Inquiry Covering Unpatented R-421a, A-570-028," dated November 7, 2019.
[26] *See* Memorandum, "Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China: Unpatented R-421A Anti-Circumvention Inquiry; Respondent Selection," dated December 13, 2019.
[27] *See* Commerce's Letter, "Anti-Circumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China: Unpatented R-421A Blends Initial Questionnaire," dated December 13, 2019.
[28] *See* TTI's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Unpatented R-421A Blends Anti-Circumvention Inquiry; Notification of TTI's Intent Not to Respond to Department Questionnaires," dated January 8, 2020 (TTI Notification of Intent Not to Respond).
[29] *See* the "Application of Facts Available and Adverse Inferences" section *infra* for further discussion regarding the non-responsive companies.
[30] *See* BMP's January 17, 2020 QR.
[31] *See* Commerce's Letter, "Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China: Unpatented R-421A Anti-Circumvention Inquiry," dated December 17, 2019.

selection and surrogate values, respectively.[32] Between January 3, 2020 and January 13, 2020, BMP submitted comments on surrogate country and surrogate values, respectively.[33] On January 9, 2020, the petitioners submitted surrogate country rebuttal comments.[34] No other party submitted comments or rebuttal comments on the selection of a surrogate country or on surrogate values.

III. MERCHANDISE SUBJECT TO THE SCOPE AND ANTI-CIRCUMVENTION INQUIRY

The scope and anti-circumvention inquiry cover imports of unpatented R-421A, a blend of HFC components R-125 and R-134a,[35] from China. As part of the anti-circumvention inquiry, the petitioners alleged that the unpatented R-421A – which is not subject to the exclusion for patented R-421A – is being further-processed in the United States to create HFC blends that are subject to the *Order*.[36]

According to Choice (*i.e.*, the patent holder for R-421A), unpatented R-421A is chemically similar, but not identical, to Choice® R-421A, which is specifically excluded from the order.[37] Choice® R-421A is a proprietary refrigerant blend made of approximately 58 percent pentafluoroethane and approximately 42 percent 1,1,1,2-tetrafluoroethane, with a lubricating oil up to 20 percent of the refrigerant gases, comprised of 65-88 percent hydrotreated light napthenic distillate and 10-20 percent solvent refined light napthenic distillate petroleum.[38]

IV. SCOPE OF THE ORDER:

HFC blends covered by the scope are R-404A, a zeotropic mixture consisting of 52 percent 1,1,1 Trifluoroethane, 44 percent Pentafluoroethane, and 4 percent 1,1,1,2-Tetrafluoroethane; R-407A, a zeotropic mixture of 20 percent Difluoromethane, 40 percent Pentafluoroethane, and 40 percent 1,1,1,2-Tetrafluoroethane; R-407C, a zeotropic mixture of 23 percent Difluoromethane, 25 percent Pentafluoroethane, and 52 percent 1,1,1,2-Tetrafluoroethane; R-410A, a zeotropic mixture of 50 percent Difluoromethane and 50 percent Pentafluoroethane; and R-507A, an azeotropic mixture of 50 percent Pentafluoroethane and 50 percent 1,1,1-Trifluoroethane also known as R-507. The foregoing percentages are nominal percentages by weight. Actual

[32] *See* Petitioners' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Initial Surrogate Country Selection Comments," dated January 3, 2020 and Petitioners' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Surrogate Values Submission," dated January 13, 2020.
[33] *See* BMP's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Surrogate Country Comments," dated January 3, 2020 (BMP's Surrogate Country Comments) and BMP's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Surrogate Value Comments," dated January 13, 2020.
[34] *See* Petitioners' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Rebuttal Surrogate Country Comments," dated January 9, 2020.
[35] R-125 is also known as Pentafluoroethane, and R-134a is also known as 1,1,1,2-Tetrafluoroethane.
[36] The *Order* covers five HFC blends (*i.e.*, R-404A, R-407A, R-407C, R-410A, and R-507/R-507A); R-421A is not one of the covered blends.
[37] *See* Choice Scope Ruling Request at 5.
[38] *Id*.

percentages of single component refrigerants by weight may vary by plus or minus two percent points from the nominal percentage identified above.[39]

Any blend that includes an HFC component other than R-32, R-125, R-143a, or R-134a is excluded from the scope of the *Order*.

Excluded from the *Order* are blends of refrigerant chemicals that include products other than HFCs, such as blends including chlorofluorocarbons (CFCs), hydrochlorofluorocarbons (HCFCs), hydrocarbons (HCs), or hydrofluoroolefins (HFOs).

Also excluded from the *Order* are patented HFC blends, including, but not limited to, ISCEON® blends, including MO99™ (R-438A), MO79 (R-422A), MO59 (R-417A), MO49Plus™ (R-437A) and MO29™ (R-4 22D), Genetron® Performax™ LT (R-407F), Choice® R-421A, and Choice® R-421B.

HFC blends covered by the scope of the *Order* are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 3824.78.0020 and 3824.78.0050. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.[40]

V. STATUTORY AND REGULATORY FRAMEWORK FOR SCOPE INQUIRY

When a request for a scope ruling is filed, Commerce examines the scope language of the order at issue and the description of the product contained in the scope ruling request.[41] Pursuant to Commerce's regulations, Commerce may also examine other information, including the description of the merchandise contained in the petition, the records from the investigation, and prior scope determinations made for the same product.[42] If Commerce determines that these sources are sufficient to decide the matter, it will issue a final scope ruling as to whether the merchandise is covered by an order.

Conversely, where the descriptions of the merchandise in the sources described in 19 CFR 351.225(k)(1) are not dispositive, Commerce will consider the five additional factors set forth at 19 CFR 351.225(k)(2). These factors are: (i) the physical characteristics of the merchandise; (ii) the expectations of the ultimate purchasers; (iii) the ultimate use of the product; (iv) the channels of trade in which the product is sold; and (v) the manner in which the product is advertised and

[39] R-404A is sold under various trade names, including Forane® 404A, Genetron® 404A, Solkane® 404A, Klea® 404A, and Suva®404A. R-407A is sold under various trade names, including Forane® 407A, Solkane® 407A, Klea®407A, and Suva®407A. R-407C is sold under various trade names, including Forane® 407C, Genetron® 407C, Solkane® 407C, Klea® 407C and Suva® 407C. R-410A is sold under various trade names, including EcoFluor R410, Forane® 410A, Genetron® R410A and AZ-20, Solkane® 410A, Klea® 410A, Suva® 410A, and Puron®. R-507A is sold under various trade names, including Forane® 507, Solkane® 507, Klea®507, Genetron®AZ-50, and Suva®507. R-32 is sold under various trade names, including Solkane®32, Forane®32, and Klea®32. R-125 is sold under various trade names, including Solkane®125, Klea®125, Genetron®125, and Forane®125. R-143a is sold under various trade names, including Solkane®143a, Genetron®143a, and Forane®125.

[40] *See Order*.

[41] *See Walgreen Co. v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010); *see also* 19 CFR 351.225(k).

[42] *See* 19 CFR 351.225(k)(1).

displayed. The determination as to which analytical framework is most appropriate in any given scope proceeding is made on a case-by-case basis after consideration of all evidence before Commerce.

VI. INTERESTED PARTY SCOPE COMMENTS

Choice

In its November 30, 2017, scope request, Choice asked Commerce to clarify that: (1) unpatented HFC blends (however labeled or described) generally cannot meet the exclusion for HFC patented blends; and (2) the unpatented version of Choice® R-421A in particular does not meet this exclusion.[43] Choice points out that the scope language explicitly excludes its patented HFC blend Choice® R-421A, and it argues that this implies that a similar blend without a patent would be subject to the *Order*. Therefore, Choice argues that Commerce should find any Chinese imports of unpatented R-421A, which are similar to its patented product, Choice® R-421A, are in-scope merchandise.[44]

Additionally, Choice requests that, in order for imports to be eligible for the patented blend exclusion, Commerce should require importers at the time of importation to demonstrate that the products in their shipments are licensed as patented blends and/or to provide documentation of an applicable patent or patent license in the name of the importer.

ICOR

ICOR contends that acceptance of Choice's request would improperly expand the scope to include all unpatented blends in the *Order*, despite the fact that the scope currently excludes "blends of refrigerant chemicals that include products other than HFCs." ICOR points out Commerce directly considered the exclusion language for unpatented HFC blends that also contain products other than HFCs during the original investigation and found that these products are not covered by the *Order*.[45] Therefore, ICOR requests that Commerce not expand the scope in this manner now.

LM Supply

LM Supply argues that the scope of the order excludes all R-421A that meets the terms of the "'706" patent (*i.e.*, the patent held by Choice), irrespective of whether it carries Choice's trademark. LM Supply believes this interpretation is consistent with Commerce's past rulings.[46]

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[43] *See* Choice Scope Ruling Request at 2.
[44] *Id*.
[45] *See* ICOR's Letter, "HFC Blends and Components from the PRC: Response to Kenneth Ponder's and Choice Refrigerants' November 30, 2017 Application for a Scope Ruling," dated December 5, 2017 at 2 (citing *Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 42314 (June 29, 2016), (*Final Determination*) and accompanying Issues and Decision Memorandum (IDM) at Comment 5).
[46] *See* LM Supply's Letter, "HFC Blends and Components from the PRC: Comments in Response to Kenneth Ponder's and Choice Refrigerants' November 30, 2017, Application for a Scope Ruling," dated December 27, 2017 (LM Supply's Comments) at 5 (citing Memorandum, "Final Scope Ruling on Ancra International's Lift-A-Deck II

According to LM Supply, if Choice's concerns are related to patent infringement or patent protection, a scope ruling is the wrong venue to address these concerns because litigating patent disputes is not within Commerce's jurisdiction.

Choice Rebuttal Comments

Choice refutes LM Supply's argument that a product that meets the terms of the '706 patent is a patented product and, therefore, excluded from the scope. Choice claims that LM Supply's argument implies that it does not have a patent for its imported R-421A, and, thus, its product is ineligible for an exclusion that applies solely to a patented blend. Furthermore, Choice claims that LM Supply's imports do not meet the description of the '706 patent because they are missing a key ingredient used in the production process of R-421A. Choice also points out that LM Supply's reference to *Lift-A-Deck II Foot Assembly* and *Tool Chests*,[47] are not applicable because those cases did not address if an imported good was a patented product. Further, in *Lift-A-Deck II Foot Assembly* the product at issue was already determined to have a patent.[48]

As a final point, Choice agrees with LM Supply that Commerce should not litigate a patent dispute, but requests that Commerce clarify the meaning of the word "patented" and require supporting documentation from importers for patent ownership as an eligibility requirement for a scope exclusion.

Petitioners' Comments

The petitioners filed comments supporting Choice's interpretation of the scope.[49]

VII. COMMERCE'S SCOPE DETERMINATION

Commerce examined the language of the *Order*, the description of the product contained in this scope request, and Commerce's determination in the underlying investigation. In accordance with 19 CFR 351.225(k)(1), we find that the scope language and Commerce's determination in the underlying investigation are dispositive as to whether the product at issue is subject merchandise. The scope of the *Order* provides that:

> HFC blends covered by the scope are R-404A, a zeotropic mixture consisting of 52 percent 1,1,1 Trifluoroethane, 44 percent Pentafluoroethane, and 4 percent 1,1,1,2-Tetrafluoroethane; R-407A, a zeotropic mixture of 20 percent

Foot Assembly," dated June 20, 2016 (*Lift-A-Deck II Foot Assembly*) at 3; and Memorandum, "Certain Tool Chests and Cabinets from the People's Republic of China and the Socialist Republic of Vietnam: Scope Comments Decision Memorandum for the Final Determinations," dated November 22, 2017 (*Tool Chests*). LM Supply did not provide a copy of this ruling, however; therefore, there is no evidence on the record to support its claim.).

[47] *See* LM Supply's Comments at 5-6 (citing *Lift-A-Deck II Foot Assembly* at 3; and *Tool Chests* at comment 4).

[48] *See* Choice's Letter, "Rebuttal of Kenneth Ponder and Choice Refrigerants to LM Supply's December 27, 2017 Comments on Application for Scope Ruling; Hydrofluorocarbon Blends from the People's Republic of China: Antidumping Duty Order, Dck. A-570-028, 81 Fed. Reg. 55436 (August 19, 2016)," dated January 16, 2018 (Choice Rebuttal Comments) at 3-6.

[49] *See* Petitioners' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Support of the American HFC Coalition for the Scope Request by Choice Refrigerants," dated March 1, 2018.

> Difluoromethane, 40 percent Pentafluoroethane, and 40 percent 1,1,1,2-Tetrafluoroethane; R-407C, a zeotropic mixture of 23 percent Difluoromethane, 25 percent Pentafluoroethane, and 52 percent 1,1,1,2-Tetrafluoroethane; R-410A, a zeotropic mixture of 50 percent Difluoromethane and 50 percent Pentafluoroethane; and R-507A, an azeotropic mixture of 50 percent Pentafluoroethane and 50 percent 1,1,1-Trifluoroethane also known as R-507.[50]

Thus, the scope of the *Order* includes the following five blends: R-404A, R407A, R-407C, R-410A, and R-507A. Because R-421A is not one of these blends, we find that it does not fall within the scope and thus is not covered by the *Order*.[51]

Further, we find that the scope language is dispositive as to which products qualify for a patent exclusion. The scope of the order provides that:

> Also excluded from this order are patented HFC blends, including, but not limited to, ISCEON® blends, including MO99™ (R-438A), MO79 (R-422A), MO59 (R-417A), MO49Plus™ (R-437A) and MO29™ (R-4 22D), Genetron® Performax™ LT (R-407F), Choice® R-421A, and Choice® R-421B.[52]

Thus, LM Supply's argument that the "including, but not limited to" language provides an exclusion for un-patented blends that copy a held patent's blend is erroneous.[53] Indeed, this language merely indicates that the list of patented blends excluded from the scope is non-exhaustive. This is consistent with statements made during the HFCs investigation, where Commerce stated that, "patented HFC blends, without limitation, are excluded," and "the Department interpreted the scope language as including only the five named blends… and excluding all patented blends."[54]

In addition, we disagree with LM Supply's claim that all R-421A meeting the terms of the '706 patent, irrespective of whether it carries Choice's trademark, necessarily qualifies as patented R-421A pursuant to the terms of the exclusion language in the scope.[55] Rather, the scope excludes patented blends; not patented blends and their parallels. We find that simply meeting the same, or similar, physical characteristics of a patented product is not equivalent to actually being patented, and, thus, would not qualify for the patent exclusion.

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[50] *See Order*, 68 FR at 39519.

[51] This language is consistent with statements made during the HFCs investigation, where Commerce stated that "the blend portion of the scope is limited to five named HFC blends (*i.e.*, R-404A, R-407A, R-407C, R410A, and R-507)." *See* Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, in Part, and Postponement of Final Determination, 81 FR 5098 (February 1, 2016), and accompanying Preliminary Decision Memorandum at 6-8. *See also Final Determination* IDM at Comment 5 ("It is clear from this language that the blend portion of the scope is limited to five named HFC blends (*i.e.*, R-404A, R-407A, R-407-C, R410A, and R-507). It is also clear that patented HFC blends, without limitation, are excluded." (citations omitted)).

[52] *See Order*, 81 FR at 55436.

[53] *See* LM Supply's Comments at 6.

[54] *See Final Determination* and accompanying IDM at Comment 5.

[55] *See* LM Supply's Comments at 5-6.

Therefore, in light of Commerce's previous findings,[56] and under a plain reading of the scope, the exclusion is solely for patented HFC blends. As a patent is an exclusive right by the inventor to manufacture, use, or sell a product, if a company is not the holder, or licensee of a patent for the blend in question, then it is not granted the patent exclusion.

We also find that ICOR's concerns that this ruling will improperly expand the scope to include all un-patented blends in the *Order* is unfounded, regardless of the exclusion for blends containing products other than HFCs. The scope of the *Order* remains dispositive, and the exclusion for blends containing products other than HFCs, such as blends including CFCs, HCFCs, HCs, or HFOs, is unaffected by this scope ruling.

Regarding Choice's request that Commerce require importers to submit documentation of a patent or patent license in the name of the importer at the time of entry, Commerce intends to consider whether to require importers of patented R-421A who claim their merchandise is not subject to the *Order* to maintain certification that the imported product is Choice® R-421A, and thus, meets the terms of the exclusion. As noted below, Commerce is inviting comments on this issue.

Finally, given that the product subject to the scope inquiry is not covered by the *Order* under our analysis pursuant to 19 CFR 351.225(k), we find Choice's remaining arguments to be moot. However, as noted in our analysis below, because imports of unpatented R-421A from China are further processed into finished HFC blends in the United States, we find that imports of unpatented R-421A, from China, should be included in the *Order*, pursuant to 781(a) of the Act and 19 CFR 351.225(g).

VIII. PERIOD OF ANTI-CIRCUMVENTION INQUIRY

For purposes of examining the patterns of trade for imports of unpatented R-421A, we examined the time period from January 1, 2011 through June 30, 2019. For surrogate values (*i.e.*, for the Chinese export prices) and U.S. sales values, we used the time period December 1, 2016 through March 31, 2018. For the purposes of examining U.S. further manufacturing costs, we used the time period of January 1, 2017 through December 31, 2017.

IX. SURROGATE COUNTRIES AND METHODOLOGY FOR VALUING INPUTS FROM CHINA

As explained *infra*, section 781(a)(1)(D) of the Act requires Commerce to determine whether the value of merchandise in the foreign country to which an order applies is a significant portion of the total value of the merchandise further manufactured and sold in the United States. This analysis requires an exercise that is similar to the determination of normal value in Commerce's typical AD methodology for price comparison purposes.

BMP argues that the use of a surrogate value for the valuation of the unpatented R-421A used in the production of HFC blends is inappropriate in the instant case.[57] Commerce disagrees with

[56] *See Final Determination* IDM at Comment 5.
[57] *See* BMP's Surrogate Country Comments.

BMP's claims that using surrogate values in the context of an anti-circumvention case is not permitted by the statute.[58]

Consistent with prior cases, we find that using surrogate values in this case is appropriate, because although actual prices paid for China-produced inputs are typically used in the cost buildup for market economy (ME) companies in ME proceedings, the instant inquiry is an anti-circumvention proceeding initiated under the HFCs *Order*, which is a non-market economy (NME) proceeding.[59] Commerce is attempting to determine whether Chinese-produced merchandise is being sold to the United States in circumvention of the HFCs *Order*, which requires an analysis of certain input costs. That analysis of the respondent's China-origin input costs appropriately falls under the purview of Commerce's NME methodology, which by statute presumes that NME costs and prices are inherently unreliable.[60]

Commerce is valuing the China-origin unpatented R-421A using, to the extent possible, the prices or costs of factors of production in one or more ME countries that are at the same level of economic development comparable to the NME country and are significant producers of comparable merchandise in accordance with section 773(c)(4) of the Act. Based on record evidence, Commerce is preliminarily selecting Mexico as the surrogate country for China because: (1) it is at a similar level of economic development pursuant to section 773(c)(4) of the Act; (2) it is a significant producer of comparable merchandise; (3) we have reliable data from Mexico; and (4) there is no record evidence calling into question the reliability of Mexican surrogate value data.[61] Therefore, we calculated the value of the China-origin unpatented R-421A using a surrogate price from Mexico.

X. STATUTORY AND REGULATORY FRAMEWORK FOR ANTI-CIRCUMVENTION INQUIRY

A. The Act

Section 781(a) of the Act, dealing with merchandise completed or assembled in the United States, states:

> (1) In general. If
> (A) merchandise sold in the United States is of the same class or kind as any other merchandise that is the subject of
> (i) an antidumping duty order issued under section 736,
> (ii) a finding issued under the Antidumping Act, 1921, or
> (iii) a countervailing duty order issued under section 706 or section 303,

[58] *Id.*

[59] *See, e.g., 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), and accompanying Issues and Decision Memorandum at Comment 2.

[60] *Id.*

[61] *See* BMP's Surrogate Country Comments at 4 stating "as indicated in Exhibit 1, Mexico, Malaysia, and Russia have a high export volume of blends and could be viable alternatives." Further, we selected Mexico as the surrogate country in the underlying investigation.

(B) such merchandise sold in the United States is completed or assembled in the United States from parts or components produced in the foreign country with respect to which such order or finding applies,
(C) the process of assembly or completion in the United States is minor or insignificant, and
(D) the value of the parts or components referred to in subparagraph (B) is a significant portion of the total value of the merchandise,

the administering authority, after taking into account any advice provided by the Commission under subsection (e), may include within the scope of such order or finding the imported parts or components referred to in subparagraph (B) that are used in the completion or assembly of the merchandise in the United States at any time such order or finding is in effect.

(2) Determination of whether process is minor or insignificant. In determining whether the process of assembly or completion is minor or insignificant under paragraph (1)(C), the administering authority shall take into account
(A) the level of investment in the United States,
(B) the level of research and development in the United States,
(C) the nature of the production process in the United States,
(D) the extent of production facilities in the United States, and
(E) whether the value of the processing performed in the United States represents a small proportion of the value of the merchandise sold in the United States.

(3) Factors to consider. In determining whether to include parts or components in a countervailing or antidumping duty order or finding under paragraph (1), the administering authority shall take into account such factors as
(A) the pattern of trade, including sourcing patterns,
(B) whether the manufacturer or exporter of the parts or components is affiliated with the person who assembles or completes the merchandise sold in the United States from the parts or components produced in the foreign country with respect to which the order or finding described in paragraph (1) applies, and
(C) whether imports into the United States of the parts or components produced in such foreign country have increased after the initiation of the investigation which resulted in the issuance of such order or finding.

B. Commerce's Regulations

19 CFR 351.225(a) states:

> Issues may arise as to whether a particular product is included within the scope of an antidumping or countervailing duty order or a suspended investigation. Such issues can arise because the descriptions of subject merchandise contained in the Department's determinations must be written in general terms. At other times, a domestic interested party may allege that a change to an imported product or the place where the imported product is assembled constitutes circumvention under

> section 781 of the Act. When such issues arise, the Department conducts circumvention inquiries that clarify the scope of an order or suspended investigation with respect to particular products.

19 CFR 351.225(g) states:

> Under section 781(a) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order imported parts or components referred to in section 781(a)(1)(B) of the Act that are used in the completion or assembly of the merchandise in the United States at any time such order is in effect. In making this determination, the Secretary will not consider any single factor of section 781(a)(2) of the Act to be controlling. In determining the value of parts or components purchased from an affiliated person under section 781(a)(1)(D) of the Act, or of processing performed by an affiliated person under section 781(a)(2)(E) of the Act, the Secretary may determine the value of the part or component on the basis of the cost of producing the part or component under section 773(f)(3) of the Act.

XI. USE OF FACTS AVAILABLE WITH AN ADVERSE INFERENCE

With respect to the non-responsive companies, Commerce finds it necessary to rely on facts available pursuant to section 776(a) of the Act because these companies failed to provide necessary information upon which Commerce could rely and, thereby, withheld information requested by Commerce, failed to provide requested information within the established deadlines, and significantly impeded this anti-circumvention inquiry. Further, as discussed *infra*, we find it appropriate to apply facts available with an adverse inference (AFA), pursuant to section 776(b) of the Act, to non-responsive companies because these companies failed to cooperate by not acting to the best of their ability to comply with Commerce's requests for information in this anti-circumvention inquiry.

A. Legal Standard

Section 776(a)(1) and 776(a)(2) of the Act provide that Commerce shall, subject to section 782(d) of the Act, apply facts otherwise available in reaching the applicable determination if necessary information is not on the record, or if an interested party: (A) withholds information requested by Commerce; (B) fails to provide such information by the deadlines for submission of the information, or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act.

Section 782(c)(1) of the Act states that Commerce shall consider the ability of an interested party to provide information upon a prompt notification by that party that it is unable to submit the information in the form and manner required, and that party also provides a full explanation for the difficulty and suggests an alternative form in which the party is able to provide the information. Section 782(e) of the Act states further that Commerce shall not decline to consider submitted information if all of the following requirements are met: (1) the information is

submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act provides that, if Commerce finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, Commerce may use an inference adverse to the interests of that party in selecting from among the facts otherwise available.[62] In so doing, Commerce is not required to determine, or make any adjustments to, a weighted-average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.[63] In addition, the Statement of Administrative Action explains that Commerce may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[64] The Court of Appeals for the Federal Circuit, in *Nippon Steel*, explained that the ordinary meaning of "best" means "one's maximum effort," and that the statutory mandate that a respondent act to the "best of its ability" requires the respondent to do the maximum it is able to do.[65] Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.[66] It is Commerce's practice to consider, in employing adverse inferences, the extent to which a party may benefit from its own lack of cooperation.[67]

B. Use of Facts Available with an Adverse Inference

Commerce preliminarily finds that the non-responsive companies failed to provide necessary information, withheld information requested by Commerce, failed to provide information in a timely manner, and significantly impeded this proceeding by not submitting the requested information. Accordingly, Commerce preliminarily determines that use of facts available is warranted in making a determination with respect to these non-responsive companies, pursuant to sections 776(a)(1) and (a)(2)(A)-(C) of the Act. Further, Commerce finds that these non-responsive companies did not cooperate to the best of their ability by failing to provide the requested information. Therefore, we preliminarily find that an adverse inference is warranted in selecting from the facts otherwise available with respect to these non-responsive companies in accordance with section 776(b) of the Act and 19 CFR 351.308(a).

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[62] *See* 19 CFR 351.308(a).
[63] *See* section 776(b)(1)(B) of the Act.
[64] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994) at 870.
[65] *Id*.
[66] *See Nippon Steel*, 337 F.3d at 1382-83; *see also Antidumping Duties*; *Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997).
[67] *See, e.g., Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying Preliminary Decision Memorandum (PDM) at 4, unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476 (March 14, 2014).

Thus, as set forth in greater detail below, relying on our application of AFA for the non-responsive companies, we preliminarily find that unpatented R-421A is exported from China in order to circumvent the HFCs *Order*, and we are applying these findings on a country-wide basis.

XII. ALLEGATIONS OF CIRCUMVENTION AS IDENTIFIED IN THE INITATION OF INQUIRY

As stated above, the petitioners filed a request for a circumvention determination, in which petitioners point to proprietary information to claim that imported unpatented R-421A, a blend of HFC components R-125 and R-134a, produced in China is further processed into finished HFC blends covered by the scope of the *Order*.[68] The petitioners allege that the imported unpatented R-421A blend is not sold in the United States, but, rather, is consumed by BMP to make in-scope blends, which are resold in the United States.[69] According to the petitioner, the process of blending unpatented R-421A into finished blends is "minor and insignificant" within the meaning of 781(a)(2), and the resulting finished product is squarely within the scope of the antidumping duty order.[70]

Citing the International Trade Commission (ITC)'s hearing transcript, the petitioners explain that: (1) the blending process does not require major investment, complex equipment or research and development (R&D); (2) the production facilities for blending consist of only a handful of employees and some isotanks; and (3) the value of processing components into blends performed in the United States is a small proportion of the value of the finished HFC blend.[71] The petitioners state that, consistent with the information from the ITC, record information shows that BMP's blending operations are relatively minor, the production facilities do not require a lot of sophisticated equipment or large numbers of personnel and the value of processing in the United States is insignificant in comparison to the product produced in China.[72] Additionally, the petitioners argue that the value of the Chinese R-421A blend is a "significant" portion of the total value of the merchandise. Finally, the petitioners insist that the *Order* will be invalidated if R-421A can be re-blended into subject merchandise in the United States in order to escape the HFC blends *Order*.[73]

BMP contends that R-421A is a semi-finished blend made of HFC components R-125 and R-134a. BMP asserts that semi-finished blends are not covered by the scope, based on the ITC's negative determination which specifically excludes HFC components and points out that Commerce recognized this determination when it deleted language from Commerce's final *Order* that pertained to semi-finished blends. Thus, a finding that BMP's imports circumvent the *Order* would improperly expand the *Order's* scope to include products where no material injury

[68] *See* Initiation Request at 10-12.
[69] *Id.* at 11.
[70] *Id.* at 13.
[71] *Id.* at 14-18, ITC Hearing Transcript in the Matter of: Hydrofluorocarbon Blends and Components from China, Investigation No. 731-TA-1279 (Final), dated June 21, 2016 (ITC Final Transcript) at Exhibits 1-4.
[72] *Id.* at 9 and 11-19.
[73] *Id.* at 19-21.

was found. BMP argues that Commerce should not permit an anti-circumvention proceeding to avoid or disregard a negative ITC determination.[74]

Moreover, BMP argues that the petitioners fail to demonstrate that its imports of R-421A are circumventing merchandise within the meaning of section 781(a) of the Act, because the process of assembly or completion of the finished blends is not minor or insignificant. Citing to the ITC's report, BMP claims that its production of blends in the United States and blending process require: (1) significant investment; (2) a high level of R&D; (3) a highly skilled workforce; and (4) a significant proportion of production in the United States. Thus, BMP claims that its post-importation blending of semi-finished blends is neither minor nor insignificant; therefore, the anti-circumvention allegation must be dismissed for failure to meet the requirements of section 781(a) of the Act.[75]

XIII. ANTI-CIRCUMVENTION ANALYSIS

A. The Merchandise Sold in the United States Is of the Same Class or Kind As Merchandise Subject to the *Order*

The petitioners state that the unpatented R-421A that is re-blended after importation and sold in the United States is of the same class or kind as the subject merchandise.[76] In its April 27, 2018 submission, BMP stated that it imported R-421A which it describes as a blend of HFC components in the ratio of 58 percent R-125 and 42 percent R-134a.[77] BMP also stated that it imports the following components: R-125; R-32; R-143a;[78] and that BMP purchases the components from Chinese suppliers. The imported HFC components and the unpatented R-421A, from China, were used to create HFC blends. BMP then sold the HFC blends to customers in the United States.[79] BMP states that after importing the unpatented R-421A into the United States, it converts it into HFC blends, using a proprietary and confidential manufacturing process,[80] and that this process is relatively straightforward.[81]

Thus, record evidence indicates that after conversion, the HFC blends that BMP finishes in the United States would be subject to the antidumping duty order if they were imported in this finished condition, because such HFC blends meet the physical characteristics outlined in the scope of the *Order*. For these reasons, we preliminarily determine that the merchandise produced from the imported unpatented R-421A, and sold in the United States, are HFC blends of the same class or kind as the subject merchandise.

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[74] LM Supply's Anti-Circumvention Rebuttal at 6-9.
[75] *Id*. at 11-13.
[76] *See* Initiation Request at 5.
[77] *See* LM Supply's April 27, 2018 SQR at 1; *see also* Choice Refrigerants' Letter, "Application for Scope Ruling on Exclusion of Patented HFC Blends from Antidumping Duty Order A-570-028: Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China," dated November 30, 2017 at 3 and BMP's January 17, 2020 QR at 34.
[78] *See* LM Supply's April 27, 2018 SQR at 3.
[79] *See* BMP's January 17, 2020 QR at 3.
[80] *Id*. at 4.
[81] *Id*. at 3.

B. The Merchandise Sold in the United States Is Completed from Parts or Components Produced in China, the Foreign Country

The petitioners cite to LM Supply's April 27, 2018 SQR submission to support their claim that imports of unpatented R-421A are completed in the United States from parts and components produced in China.[82] Performing the final blending operations in the United States turns the product into subject HFC blends.[83]

BMP's January 17, 2020 QR, confirms the petitioners' claim that the imports of unpatented R-421A are used in the United States to assemble HFC blends.[84] Specifically, BMP explains that after importation into the United States from China, BMP uses the unpatented R-421A, and other components from China, to produce HFC blends that are covered by the *Order*.[85] Thus, we preliminarily determine that the imports of unpatented R-421A blends are completed and sold in the United States from parts or components produced in the foreign country with respect to which such order or finding applies.

C. The Process of Assembly or Completion in the United States is Minor or Insignificant

According to the petitioners, the process of converting unpatented R-421A into finished HFC blends is minor or insignificant, particularly relative to the production process as a whole.[86] The petitioners assert that the blending operation is a simple process that does not require major investment, complex equipment, or research and development.[87] Blending HFC components only requires a holding tank for the finished HFC blend, some pipes, and valves.[88] According to the petitioners, to add a single HFC component to an R-125/R-134a blend only requires a holding tank into which the component would be introduced.[89]

BMP does not produce the unpatented R-421A and we do not have information from its producer regarding the production process as a whole, or the cost of HFC components.[90] However, BMP claims that, based upon the ITC's prior determinations, its post-importation blending of semi-finished blends is neither minor nor insignificant; thus, the anti-circumvention must be dismissed for failure to meet the requirements of section 781(a)(2) of the Act.[91] Specifically, BMP states that the ITC, in its determination, found that the post-importation blending process transforming HFC semi-finished blends into HFC blends was significant and that blending required significant investment, a high level of R&D, a highly skilled workforce, and a significant proportion of production in the United States.[92]

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[82] *See* Initiation request at 11.
[83] *Id*.
[84] *See* BMP's January 17, 2020 QR at 13, 22 and 29.
[85] *Id*. and at Exhibit 9.
[86] *See* Initiation Request at 2-3.
[87] *Id*. at 13-14.
[88] *Id*. at 14.
[89] *See* Initiation Request at 15.
[90] *Id*. at 3.
[91] *See* LM Supply's Anti-Circumvention Rebuttal at 11-13.
[92] *Id*.

Section 781(a)(2) of the Act instructs us to consider the following when determining whether the process of assembly or completion is minor or insignificant under 781(a)(1)(c):

> (A) the level of investment in the United States,
> (B) the level of research and development in the United States,
> (C) the nature of the production process in the United States,
> (D) the extent of production facilities in the United States, and
> (E) whether the value of the processing performed in the United States represents a small proportion of the value of the merchandise sold in the United States.

With regard to parts (A) through (E) under section 781(a)(2), because we have no information from the foreign producer, we are reliant on the information placed on the record by the participating parties. Thus, our analysis is based on information provided by both the petitioners and BMP.

With regard to part (A) under section 781(a)(2), the petitioners provided information demonstrating that blending requires less than a one million dollar investment, while a production facility to manufacture HFC components requires an investment of hundreds of millions of dollars in equipment needed to handle high-hazard reaction and purification processes.[93] The low level of required investment in the United States for production of blends is corroborated by BMP's response. In its January 17, 2020 submission, BMP provided a table that outlines its level of investment and R&D expenditures in the United States from 1990 through 2019.[94] Based upon BMP's level of investment, when compared to the investment required to build and maintain a components factory, we preliminarily find that the level of investment to blend HFCs in the United States is minimal, when compared to the level of investment required to manufacture the underlying components, and R-421A, which BMP is importing from China.[95]

With regard to part (B) under section 781(a)(2), the petitioners further argue that no research and development expenditures are required to perform the blending operations, as the technically complex research and development activities are performed prior to this stage and relate only to the production processes performed in China. The petitioners argue that it is the HFC component production process that is the focus of research and development activities in the HFCs industry.[96] BMP's response confirms that its R&D expenses are negligible.[97] Thus, with respect to section 781(a)(2)(B) of the Act, we preliminarily find that BMP's level of R&D spending is limited.

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[93] *See* Petitioners' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Scope Investigation Regarding Certain Unpatented HFC Blends: Request to Apply Section 781(a) to Prevent Circumvention," dated August 15, 2018 (Initiation Request) at 15 and Exhibits 1 and 3.
[94] *See* BMP's January 17, 2020 QR at Exhibit 12.
[95] *See* Memorandum, "Anti-Circumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China: Unpatented R-421A; Business Proprietary Memorandum," dated concurrently with this memorandum (BPI Analysis Memorandum) for the figures underlying Commerce's conclusion.
[96] *See* Initiation Request at 15-19.
[97] *See* BMP's January 17, 2020 QR at Exhibit 20; *see also* the BPI Analysis Memorandum for the figures underlying the Commerce's conclusion.

With regard to part (C) above, under section 781(a)(2) of the Act, the petitioners argue that the nature of U.S. production processing is extremely minor in scope and elementary in technique, particularly relative to the production process as a whole.[98] BMP's response confirms that the blending process is straightforward.[99] There is also no chemical reaction or temperature change involved in blending HFCs.[100] After the blend is tested, it is extracted from the mixing tank and packaged into smaller cylinders for resale.[101] Finally, BMP's response demonstrates that its production process only requires a small number of employees to handle the blending operations.[102] Based on the information BMP provided, this process requires less processing than production of the underlying components and R-421A that BMP imports from China to assemble into HFC blends in the United States.[103] Thus, with respect to section 781(a)(2)(C) of the Act, we preliminarily find that the nature of the production process in the United States is not significant.

With regard to section 781(a)(2)(D) of the Act, the petitioners argue that the necessary production facilities in the United States are minor because blending HFC components only requires a holding tank for the finished HFC blend, some pipes, and valves.[104] Further, the petitioners assert that production facilities can consist of ISO tanks and a handful of workers.[105] BMP's response confirms that this is the case for its blending operations in the United States.[106] Therefore, with respect to section 781(a)(2)(D) of the Act, we preliminarily find that BMP's production facility for completing finished HFC blends is not extensive.[107]

With regard to section 781(a)(2)(E) of the Act, the petitioners contend that the value of the processing performed in the United States represents a negligible proportion of the value of the merchandise sold in the United States.[108] The petitioners provided an analysis and supporting evidence showing that the blending and repackaging in the United States amounts to an insignificant percentage of the value of the imported R-421A.[109] With regard to this criterion, we preliminarily determine that the appropriate measure for valuing the processing performed in the United States is by comparing BMP's total processing costs with its average sales prices of the finished HFC blends in the United States over the same time period.[110] As discussed in our BPI Analysis Memorandum, our comparison of BMP's total processing costs (and the components thereof) indicates that the value of the processing performed in the United States represents a small proportion of the value of the merchandise sold in the United States.[111] Thus,

[98] *See* Initiation Request at 15-19.
[99] *See* LM Supply's April 27, 2018 SQR at 4.
[100] *See* Initiation Request at 14.
[101] *Id.*
[102] *See* BMP's January 17, 2020 QR at 16.
[103] *See* the BPI Analysis Memorandum for the figures underlying the Commerce's conclusion.
[104] *See* Initiation Request at 14.
[105] *Id*. at 16-17.
[106] *See* BMP's January 17, 2020 QR at 37.
[107] *See* the BPI Analysis Memorandum for further details underlying Commerce's conclusion.
[108] *See* Initiation Request at 12-13.
[109] *See* Initiation Request at 17-18 and Exhibit 5; *see also* Memorandum to the File, "Hydrofluorocarbon Blends from the People's Republic of China: Placement of CBP Letter and Attachments," dated March 6, 2018, enclosing LM Supply's response to a CBP Form 28, dated February 13, 2018 (and enclosed "Proforma Invoice").
[110] *See* BMP's January 17, 2020 QR at Exhibits 23 and 24.
[111] *See* the BPI Analysis Memorandum for details underlying Commerce's conclusion.

with respect section 781(a)(2)(E) of the Act, we preliminarily determine that the value of the processing performed in the United States represents a small proportion of the value of the merchandise sold in the United States.

D. The Value of the Parts or Components Produced in the Foreign Country Is a Significant Portion of the Total Value of the Merchandise

Based on our analysis of the figures placed on the record by participating parties,[112] we preliminarily find that the value of the parts or components produced in the foreign country is a significant portion of the total value of the merchandise in question.[113]

E. Additional Factors to Consider

Section 781(a)(3) of the Act identifies additional factors that Commerce shall consider in determining whether to include parts or components in an antidumping duty order as part of a circumvention inquiry.

i. Pattern of Trade, Including Sourcing Patterns

The petitioners argue that consideration of changes in patterns of trade supports an affirmative finding of anti-circumvention.[114] According to the petitioners, after the initiation of the investigation, BMP began importing unpatented R-421A, and rerouted the imported merchandise from Jamaica into the United States.[115] According to the petitioners, this increase in imports from a Chinese exporter included in the original investigation by BMP, represents a change in patterns of trade, and is exactly what section 781(a) was meant to address.[116]

We initiated the less-than-fair-value investigation of this proceeding on July 22, 2015.[117] The import data provided by BMP indicate that BMP did not import unpatented R-421A prior to the *Order*.[118] Further, BMP sold HFC blends using unpatented R-421A after we initiated the less-than-fair-value investigation and the *Order* was in place.[119] Therefore, in light of record evidence, we preliminarily determine that the data provided on the record are conclusive, and that importation of unpatented R-421A into the United States represents a change in the pattern of trade. Consequently, our preliminary finding with regard to this factor supports our preliminary affirmative determination that unpatented R-421A from China are circumventing the *Order*.

[112] S*ee* BMP's January 17, 2020 QR at Exhibit 24.
[113] S*ee* the BPI Analysis Memorandum for the figures underlying the Commerce's conclusion.
[114] *See* Initiation Request at 19.
[115] *Id*. at 15.
[116] *Id*. at 20-21.
[117] *See Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Initiation of Less-Than-Fair-Investigation*, 80 FR 43387, 43388 (July 22, 2015) (*Initiation of Investigation*).
[118] *See* BMP USA's November 21, 2019 Q&V response; LM Supply's November 21, 2019 Q&V response; and Cool Master's November 21, 2019 Q&V response.
[119] S*ee* the BPI Analysis Memorandum.

ii. Affiliation

Under section 781(a)(3)(B) of the Act, Commerce shall take into account whether the producer or exporter of the parts or components is affiliated with the person who assembles or completes the HFC blends in the United States from the parts or components produced in the foreign country when making a decision in a circumvention inquiry. In September 2018, BMP USA stopped all business operations with respect to the importation, production, or sale of refrigerants and all of these operations transferred to IGas. IGas was not involved in the production or blending of unpatented R-421A, but it does import other components to produce HFC blends.[120] Further, IGas is now partially-owned by a Chinese company, which has subsidiaries that produce and export components and subject blends.[121] Consequently, this factor supports a finding of circumvention.

iii. Subsequent Import Volume

Under section 781(a)(3)(C) of the Act, another factor Commerce should consider is whether imports into the United States of the parts or components produced in the foreign country increased after the initiation of the investigation, which resulted in the issuance of the *Order*, when making a decision in a circumvention case.

We initiated the less-than-fair-value investigation in July 2015,[122] and published the *Order* in August 2016. BMP provided statistics of its imports of both HFC components and of finished HFC blends for the period January 1, 2016 to June 31, 2019.[123] According to BMP, from 2016 to 2019, (*i.e.*, after the *Order*) imports of HFC components and semi-finished blends increased.[124] Further, while BMP/IGas no longer imported unpatented R-421A after April 2018, IGas continues to import components for further processing in the United States. Thus, on the whole, this factor supports an affirmative finding of circumvention.

XIV. INTENT TO CONSIDER CERTIFICATION REQUIREMENT

In light of Commerce's preliminary finding of circumvention, Commerce intends to consider whether to require importers of patented R-421A who claim their merchandise is not subject to the *Order* to maintain certification that the imported product is Choice® R-421A; and thus, meets the terms of the exclusion.[125] Commerce invites comments on this issue.

[120] *See* BMP's January 17, 2020 QR at 3, 22 and 24.
[121] *Id.* at 19 and 22.
[122] *See Initiation of Investigation*.
[123] *See* BMP's January 17, 2020 QR at Exhibit 6; *see also* BMP USA's November 21, 2019 Q&V response; LM Supply's November 21, 2019 Q&V response; and Cool Master's November 21, 2019 Q&V response.
[124] *See* BMP's January 17, 2020 QR at Exhibit 6; *see* also BPI Analysis Memorandum.
[125] We note that, although BMP claims that its imports "{were} considered patented R-421A at the time of importation," evidence on the record demonstrates that the imported merchandise is not the patented Choice® R-421A and; thus, the product imported by BMP does not meet the terms of the exclusion of the *Order*. *See* BMP's January 17, 2020 QR at 20.

XV. COUNTRY-WIDE DETERMINATION

As noted above, Commerce has identified the universe of producers, exporters, and importers of unpatented R-421A using CBP entry data for U.S. imports of unpatented R-421A, and Q&V questionnaires.[126] We gathered information from the largest producers and exporters of unpatented R-421A, which account for the largest volume of unpatented R-421A exports to the United States, to extrapolate the best overall picture of the significance of further manufacturing on a country-wide basis. BMP is the only importer of unpatented R-421A in the United States during the period of this inquiry. As noted above, BMP reported using unpatented R-421A originating in China in its production of finished HFC blends in the United States subject to the *Order*, and provided a full response substantiating this fact. Further, TTI is the largest Chinese exporter of unpatented R-421A to the United States.[127] However, TTI did not submit a response to Commerce's anti-circumvention questionnaire. Given that TTI accounts for the largest volume of unpatented R-421A exported from China to the United States, and BMP accounts for the largest volume of imports, we find that BMP's and TTI's production processes are representative of other exporters from China and importers in the United States. Therefore, we are applying this affirmative preliminary finding to all shipments of unpatented R-421A from China, on or after June 18, 2019, the date of initiation of this anti-circumvention inquiry, in accordance with section 781(a) of the Act and 19 CFR 351.225(g).

XVI. RECOMMENDATION

For the reasons discussed above, and in accordance with 19 CFR 351.225(d) and (k)(1), we recommend finding that unpatented R-421A, which is not one of the HFC blends listed within the scope, is not within the scope of the *Order*. However, since the imports of unpatented R-421A, exported from China, are further processed by BMP in the United States into subject HFC blends, we recommend that, pursuant to section 781(a) of the Act and 19 CFR 351.225(g), Commerce issue a preliminary affirmative circumvention determination that imports of unpatented R-421A from China are circumventing the *Order*.

☒	☐
Agree	Disagree

2/25/2020

X 

Signed by: CHRISTIAN MARSH
Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance

[126] *See* CBP Data Memo.
[127] *See* TTI's November 21, 2019 Q&V response.