A-570-028
CIRC - Unpatented R-421A
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May 28, 2020

MEMORANDUM TO: Joseph Laroski
Deputy Assistant Secretary
for Policy and Negotiations

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

SUBJECT: Final 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

We have analyzed the case and rebuttal briefs of interested parties in the anticircumvention inquiry of the antidumping duty order on hydrofluorocarbon blends (HFCs) from the People's Republic of China (China).[1] We have not departed from our conclusions in the *Preliminary Determination*.[2] We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this anticircumvention inquiry for which we received comments and rebuttal comments from interested parties:

Comment 1:	Preliminary Scope Ruling
Comment 2:	Whether the Process of Assembly or Completion of R-421A Into HFC Blends in the United States is Minor and Insignificant
Comment 3:	Value Analysis
Comment 4:	Use of Surrogate Values to Value Material Inputs
Comment 5:	Certification Requirements

[1] *See Hydrofluorocarbon Blends from the People's Republic of China: Antidumping Duty Order*, 81 FR 55436 (August 19, 2016) (*Order*).
[2] *See Hydrofluorocarbon Blends from the People's Republic of China: Scope Ruling on Unpatented R-421A; Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order for Unpatented R-421A; and Extension of Time Limit for Final Determination*, 85 FR 12512 (March 3, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

II. BACKGROUND

On June 18, 2020, the Department of Commerce (Commerce) 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 March 17, 2020, the HFC Coalition (the petitioners), BMP[3] and Choice Refrigerants (Choice) filed case briefs.[4] On March 27, 2020, the petitioners, BMP and Choice filed rebuttal briefs.[5] On April 9, 2020, we held a phone call in lieu of a hearing with Choice, to discuss issues that Choice raised in its case brief.[6]

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,[7] 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*.[8]

[3] LM Supply Inc., Cool Master USA, LLC, and their affiliated blenders, BMP USA Inc. and IGas Inc. (collectively, BMP).

[4] *See* Petitioners' Case Brief, "Hydrofluorocarbon Blends from the People's Republic of China: Case Brief and Request for a Hearing," dated March 17, 2020 (Petitioners' Case Brief); *see also* BMP's Case Brief, "Hydrofluorocarbon Blends from the People's Republic of China: Case Brief," dated March 17, 2020 (BMP's Case Brief); and Choice's Case Brief, "Hydrofluorocarbon Blends from the People's Republic of China: Scope Ruling on Unpatented R-421A; Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order for Unpatented R-421A," dated March 16, 2020 (Choice's Case Brief).

[5] *See* Petitioners' Rebuttal Brief, "Hydrofluorocarbon Blends from the People's Republic of China: Rebuttal Brief," dated March 27, 2020 (Petitioners' Rebuttal Brief); *see also* BMP's Rebuttal Brief, "Hydrofluorocarbon Blends from the People's Republic of China: Rebuttal Case Brief," dated March 27, 2020 (BMP's Rebuttal Brief), and Choice's Rebuttal Brief, "Hydrofluorocarbon Blends from the People's Republic of China: Scope Ruling on Unpatented R-421A; Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order for Unpatented R-421A," dated April 3, 2020 (Choice's Rebuttal Brief). Choice timely filed its rebuttal brief on March 27, 2020. However, due to the inclusion of a new argument raised in its rebuttal brief, Commerce rejected Choice's rebuttal brief and requested that it re-file the rebuttal brief omitting the untimely new argument. *See* Commerce's Letter, "Hydrofluorocarbon Blends from the People's Republic of China Unpatented R-421A Anti-Circumvention Inquiry: Rejection of Rebuttal Brief," dated April 2, 2020. Also, on April 6, 2020, Choice filed comments requesting that Commerce reject BMP's rebuttal brief because it maintained that it included new affirmative arguments. On April 7, 2020, we responded to Choice's comments in a letter and determined not to reject BMP's rebuttal brief. *See* Commerce's Letter, "Hydrofluorocarbon Blends from the People's Republic of China Unpatented R-421A Anti-Circumvention Inquiry: Response to Request by Choice Refrigerants to Reject Certain Rebuttal Arguments from the Anti-Circumvention Record," dated April 7, 2020.

[6] *See* Memorandum, "Ex Parte Phone Call with Choice Refrigerants," dated April 10, 2020. Other than Choice, only the petitioners had requested a hearing, and they subsequently withdrew their request, on April 3, 2020. Because no other party requested a hearing, we did not hold a hearing.

[7] R-125 is also known as Pentafluoroethane, and R-134a is also known as 1,1,1,2-Tetrafluoroethane.

[8] 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.

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.[9] 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.[10]

IV. SCOPE OF THE *ORDER*

The products subject to this order are HFC blends. 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 percentages of single component refrigerants by weight may vary by plus or minus two percent points from the nominal percentage identified above.[11]

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.

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[9] *See* Choice'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 at 5.

[10] *Id.*

[11] 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.

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.[12]

V. DISCUSSION OF THE ISSUES

Comment 1: Preliminary Scope Ruling

In the *Preliminary Determination,* Commerce found, based on a plain reading of the scope language, and consistent with statements made by Commerce in the underlying investigation, that the *Order* includes five blends: R-404A, R407A, R-407C, R-410A, and R-507A; and that R-421A, whether patented or unpatented, is not within the scope of the *Order*.[13]

Choice's Arguments

- Commerce should reconsider its position in the *Preliminary Determination* to find that non-patented versions of R-421A, or imports of patented R-421 imported by importers without patent rights, are subject to the *Order*.[14] Commerce's *Preliminary Determination* does not adequately consider the entire record of this proceeding and underlying public policy.[15] Additionally, Commerce staff have stated that the ruling was "already decided," which raises concerns that the outcome for the final determination will be pre-judged.[16]

- The plain language of the scope does not support a finding that the *Order* covers only the five named HFC blends. Thus, Commerce's interpretation of the scope language is legally and logically unsupportable.[17] Rather, the language in the scope suggests that the *Order* covers all HFC blends and the five listed blends are meant to be an illustrative, not exhaustive, list of HFC blends.[18] Further, the *Order* language sets out several exclusions from the category of HFC blends, that would be entirely unnecessary if the scope was limited to five named blends.[19] If Commerce wanted to limit the scope to five blends, it should have phrased the language to specifically state the *Order* covers "only" the five listed blends. Additionally, the text of the *Order* must be interpreted with a view to the structure of the *Order*, which establishes an in-scope class, then expressly excludes certain subsets of that

[12] *See Order*.
[13] *See Preliminary Determination* PDM at 1 and 8-9.
[14] *See* Choice's Case Brief at 4-19.
[15] Choice claims that Commerce failed to properly address one of its submissions in its ruling. *See* Choice's Case Brief at 5-6 (citing *Preliminary Determination* and Choice's Letter, "Additional Comments on Scope Inquiry for 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 April 17, 2019) (Choice's April 17, 2019 Letter)).
[16] *Id*. at 6 and footnote 2.
[17] *Id.* at 6.
[18] *Id.* at 7. To support this claim, Choice references the scope language: "{t}he products subject to this order are HFC blends. HFC blends covered by the scope are R-404…R-407A…R-407C…R-410A…R-507."
[19] *Id*. at 7-8. In support of this argument, Choice points out that there would be no basis for exclusion language for other HFC blends, such as R-421A, if they were already not within the scope of the *Order*, since R-421A is clearly not one of the five blends specified in the scope description. Further, the exclusion for other blend types (*i.e.*, CFCs, HCFCs) would also be unnecessary.

class.[20] Thus, based on the structure of the order, imports of non-patented R-421A are within the scope because they are not specifically excluded.

- Commerce does not have the authority to change an antidumping duty order[21] or interpret the scope language in a way contrary to its terms (*i.e.*, Commerce cannot change the scope to exclude an article that was included within the scope of an underlying determination).[22] The understanding in the U.S. refrigerant industry, including participants that submitted scope rebuttal comments against Choice's request, is that all imported HFC blends are subject to the *Order*, unless the merchandise is expressly excluded from it.[23]

- The intent of the HFC blends investigation was to stop dumping of all HFC blends being imported from China.[24] The actions taken by the petitioners and industry participants also support a general understanding that the scope broadly includes all types of HFC blends.[25] The Petition's original scope language shows that the petitioners requested language encompassing the class of HFCs, subject to exclusions, and that this class included five specifically named HFCs, which were those that were being imported at the largest volumes.[26] In the scope language, Commerce eventually omitted the word "including" but never indicated on the record that it intended to fundamentally re-write the scope proposed by the petitioner as it applied to patented HFCs.[27] Further, Commerce did not change other portions of the scope language, including the description of the class of in-scope HFC blends or the exclusions that would have been unnecessary if the scope only pertained to five blends.

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[20] *Id*. at 8 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (Fed. Circ. 2019) stating that an agency must use tools of construction when interpreting regulations to resolve any apparent ambiguity and the court should only defer to an agency's determination on an ambiguous decision after it carefully considers the text, structure, history and purpose of the regulation.).

[21] *Id.* at 8 (citing *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (*Ericsson GE Mobile*)).

[22] *Id*. (citing *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Circ. 1990) (*Corona Corp.*); *see also Alsthom Atlantique v. United States*, 787 F.2d 565, 571 (Fed. Cir. 1986) (*Alsthom Atlantique*)).

[23] *Id.* at 6 (citing LM Supply's Letter, "Comments in response to Kenneth Ponder's and Choice's November 30, 2017 Application for a Scope Ruling," dated December 27, 2017).

[24] *Id*. (citing Petitioners' Letter, "Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China; Antidumping Duty Petition," dated June 25, 2015 (Petition)).

[25] *Id.* at 11. Choice argues that the petitioners requested exclusions from the broad category of HFC blends to exclude patented blends that would have otherwise been included in the *Order*. Choices also claims that this was followed by other industry participants, such as Kivlan, that requested similar express exclusions for patented products like R-421A, under the assumption that if these patented blends were not explicitly excluded they would be covered by the scope. *See* Petition at 24-26; *see also* Kivlan and Company, Inc. (Kivlan)'s Letter, "Hydrofluorocarbon Blends and Components from the People's Republic of China, Case No. A-570-028," dated July 31, 2015 (Kivlan's Letter).

[26] *Id*. at 25-26. Choice refers to the language "{t}he products subject to this investigation are blended hydrofluorocarbons (HFCs) and single HFC components of those blends thereof, whether or not imported for blending, <u>including</u> the following: R-404A…R-407A…R-407C…R-410A…R-507A…R-507." Choice claims Commerce has a policy to accept the class or kind of merchandise alleged in the petition absent some overarching reason to modify that class or kind. *Id.* (citing *Eckstrom Industries, Inc. v. United States*, 27 F. Supp. 2d 217, 223 (CIT 1998) (*Eckstrom v. United States)*. Choice also notes that HFC components were subsequently dropped from the scope when the ITC failed to make an injury determination; a point that it finds is not relevant except to reinforce that when Commerce intended to alter the scope, it removed language rather than creating an exclusion.

[27] *Id*. at 10.

- In Commerce's *LTFV Prelim*, Commerce acknowledged that the scope language for HFC blends required an exclusion for patented versions of HFC blends, even for patented HFC blends that were not one of the five HFC blends it lists in the scope.[28] If Commerce had intended only to cover the five chemicals mentioned in the scope, but not any other HFC blends, Commerce would have had no need to "modify" the scope to exclude the patented HFC blends because those were not one of the five named blends listed in the Petition.[29] Commerce's interpretation that the scope covers five blends is inaccurate and was previously opposed by the petitioners out of concerns over the potential for evasion schemes.[30]

- Numerous portions of the record (some of which were inappropriately overlooked by Commerce in the *Preliminary Determination*) conflict with Commerce's belated statement that the scope language as originally drafted was limited only to the five named HFC blends. Specifically, Commerce's decision to limit the scope to five blends does not appear to be supported by the text of the documents cited, and no excerpted passages were provided; further the statements that Commerce uses to support its interpretation are inconclusive.[31]

- Ultimately, Commerce must address whether HFC blends that are listed as scope exclusions are in-scope if the merchandise did not qualify for the exclusion.[32] If Commerce finds that unpatented versions of patented HFC blends listed as exclusions are out-of-scope, it renders the scope exclusions meaningless.[33] Commerce's scope interpretation in the *Preliminary Determination* will result in an influx of unpatented chemicals being dumped into the U.S. market. If importers had known, at the time of the investigation, that they could import any blend not listed as one of the five HFC blends, they would have labeled their merchandise as an unspecified HFC blend not listed in the scope. Instead, importers manipulated their customs paperwork to make the shipments appear to be the exempt patented R-421A and to disguise the true nature of their shipments.[34] Thus, Commerce's scope ruling rewards companies that cheat U.S. trade laws. This ruling is inconsistent with the United States' President's efforts to enforce U.S. trade laws, combat illegal dumping, and protect American intellectual property.[35]

Petitioners' Rebuttal Arguments

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[28] *Id.* at 12 (citing *Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Preliminary Determination of Sales at Less than Fair Value: 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) (*LTFV Preliminary Determination*), and accompanying PDM at 7, and the underlying Petition). To support its rationale, Choice states that Commerce acknowledged that all blends were included when it responded to Kivlan's argument to include R-421A in the scope by stating, "{w}ith respect to Kivlan's argument, the petitioner has no objection to modifying the scope to exclude the patented blends R-421A and R-421B. Accordingly, we have modified the scope to exclude these blends because this modification is consistent with the intent of the Petition."
[29] *Id*. at 12-13.
[30] *Id.* at 14 (citing Petitioners' letter, "The Antidumping Duty Investigation of Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China," dated May 16, 2016 at 20-21).
[31] *Id.* at 15 (citing *Preliminary Determination* PDM at 9 footnote 51).
[32] *Id.* at 15-16.
[33] *Id.* at 17-18.
[34] *Id*.
[35] *Id*. at 18-19.

- The petitioners did not comment on this issue.

BMP's Rebuttal Arguments

- Commerce appropriately concluded that R-421A, whether patented or unpatented, is not within the scope of the *Order* based on the plain language of the scope and (k)(1) factors under 19 CFR 351.225(k)(1).[36] Commerce applied the appropriate interpretive framework outlined in the regulations and made its decision in accordance with decisions of the U.S. Court of International Trade (CIT) and U.S. Court of Appeals for the Federal Circuit (Federal Circuit).[37]

- The language of the scope limits the five named HFC blends to R-404A, R-407A, R-407C, R-410A, and R-507A and the phrase "HFC blends are covered by the scope are…" clearly demonstrates that the five blends are the only blends and not merely illustrative of a subset of HFC blends as claimed by Choice.[38] Thus, the list of patented HFC blends cannot be interpreted to improperly expand the scope to include more than the five listed blends.[39] Even if Commerce accepted Choice's argument that the examples of patented blends creates some ambiguity in the scope language, the record of the investigation supports the fact that the scope only includes the five named blends.[40]

- According to 19 CFR 351.225(k)(1), where the plain language of the scope is ambiguous, Commerce must consider "descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." In this case, Commerce reviewed these sources in the *LTFV Final* and determined that the scope only covers the five blends explicitly listed in the first paragraph of the scope.[41]

- Choice raises an issue that has long been decided, which contradicts its claim that there is a common understanding in the industry that all HFC blends are in-scope. Thus, Choice has overlooked the first paragraph of the scope or Commerce's explanation in the *LTFV Final*.[42]

Commerce's Position:

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[36] *See* BMP's Rebuttal Brief at 1-5.
[37] *Id*. at 2 (citing *Meridian Prods., LLC v. United States*, 851 F. 3d 1375, 1381 (Fed. Cir. 2017); *see also Mid Continent Nail Corp. v. United States*, 725 F. 3d 1295, 1302 (Fed. Cir. 2013); *Tak Fat Trading Co. v. United States*, 396 F. 3d 1378, 1383 (Fed. Cir. 2005); and *ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F. 3d 82, 84 (Fed. Cir. 2012)).
[38] *Id*. at 2 (citing *Order*).
[39] *Id*. at 2.
[40] *Id*. at 3 (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) (*LTFV Final*), and accompanying Issues and Decision Memorandum (IDM) at Comment 5).
[41] *Id.*
[42] *Id*. at 5.

In the *Preliminary Determination*, we examined the language of the *Order* and the description of the product contained in Choice's scope ruling request, as well as the description of the merchandise set forth in the Petition, the underlying investigation and as used by the International Trade Commission (ITC) for its injury determination. We found that these sources are, together, dispositive as to whether the product at issue is subject merchandise, in accordance with 19 CFR 351.225(k)(1). Choice does not present any new arguments that would cause us to reverse our decision for the final determination.[43]

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.[44] 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 investigations, and prior scope determinations made for the same product.[45] 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. Where the descriptions of the subject merchandise are not dispositive, Commerce will consider the following factors provided at 19 CFR 351.225(k)(2): (i) the physical characteristics of the product; (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 displayed.

In accordance with 19 CFR 351.225(c) and (d), Commerce has reviewed the request in light of the description of the merchandise subject to the *Order*, as this description is set forth in the petition, the initial investigation, and the determinations of the Secretary (including all prior scope determinations) and the ITC. Based on this review, we find that the issue of whether the product in this scope request is within the scope of the *Order* can be determined solely upon the application and the descriptions of the merchandise referred to in section 351.225(k)(1) of Commerce's regulations. *See* 19 CFR 351.225(d). Therefore, Commerce finds it unnecessary to consider the additional factors under 19 CFR 351.225(k)(2).

The scope language covering HFCs from China, is dispositive as to whether the product at issue is subject merchandise. Further, we find that the factual record in this case, as well as statements by Commerce and the ITC in the underlying investigation (*see* below), support a finding that R-421A does not fall within the scope of the *Order*, in accordance with 19 CFR 351.225(k)(1).

The scope of the *Order* defines HFC blends as follows:

> The products subject to this order are HFC blends. 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

[43] *See Preliminary Determination* PDM at 8-10.
[44] *See Walgreen Co. v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010).
[45] *See* 19 CFR 351.225(k)(1).

> 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 percentages of single component refrigerants by weight may vary by plus or minus two percent points from the nominal percentage identified above.[46]

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*. This finding is consistent with our finding in the *LTFV Final*, and the record of the underlying investigation.[47] This language is also 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)."[48]

The scope also contains an exclusion for patented HFC blends:

> 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.[49]

Based on this language, there is no dispute that Choice® R-421A is excluded from the scope because the scope specifically excludes all patented HFC blends. However, the relevant question is whether an unpatented version of a patented HFC blend falls within the scope of the HFC blends *Order*. As discussed in the *Preliminary Determination*, and for the reasons explained above, we determined that it does not.[50]

In the underlying investigation, we determined that the scope only includes five HFC blends (R-404A, R407A, R-407C, R-410A, and R-507A). In the *LTFV Final*, we stated that:

> The scope in the Petition defined the covered products, in relevant part, as follows:

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[46] 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.

[47] *See LTFV Final* 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)).

[48] *See LTFV Preliminary Determination* PDM at 6-8.

[49] *See Order*.

[50] *See Preliminary Determination* PDM at 9.

> The products subject to this investigation are HFCs and single HFC components of those blends thereof, whether or not imported for blending. HFC blends covered by the scope are R-404A; . . . R-407A; . . . R-407C; . . . R-410A; . . . and R-507A, . . . also known as R-507.
>
> Also excluded from this investigation are patented HFC blends, such as ISCEON® blends, including MO99™ (RR-438A), MO79 (R-422A), MO59 (R-417A), MO49Plus™ (R-437A) and MO29™ (R-422D), Genetron® Performax™ LT (R-407F), Choice® R-421A, and Choice® R-421B.
>
> 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.[51]

Similarly, the ITC defined its domestic like product as the same five blends, noted in Commerce's scope language,[52] and in the *ITC Final*, the ITC appropriately recognized Commerce's interpretation of the scope stating, "{t}he five in-scope blends are the major commercial refrigerant blends sold in the U.S. market for use in stationary air conditioning and refrigeration applications." The *ITC Final* further stated that:

> {t}he subject merchandise is referred to as….'in-scope blends' (R-404A, R407A, R-407C, R410A, and R-507A)…and '{o}ut-of-scope blends' or 'refrigerant blends' refer to any refrigerant blend that uses at least one in-scope HFC component and is not one of the five in-scope blends listed above. These include all other refrigerant blends, including HFC, CFC, HCFC, and HFO blends, both proprietary and patented refrigerant blends."[53]

Further, the Petition clearly set forth the same blends listed in the current scope. For instance, the language in the Petition states "HFC blends covered by the scope are R-404A; . . . R-407A; . . . R-407C; . . . R-410A; . . . and R-507A, . . . also known as R-507."[54]

Therefore, based on the foregoing, Commerce's determination that unpatented R-421 is non-subject merchandise because it is not one of the five blends listed in-scope is consistent with sources enumerated under 19 CFR 351.225(k)(1) including the Petition, the underlying investigation, and the ITC's determination. Thus, our *Preliminary Determination* was made in accordance with Commerce's regulations for interpreting the language of the scope of an order

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[51] *See LTFV Final* IDM at Comment 5.

[52] *See Hydrofluorocarbon Blends and Components from China; Investigation No. 7312-TA-1279 (Preliminary) August 2015* (*ITC Prelim*) at I-15*; see also Hydrofluorocarbon Blends and Components from China Investigation No. 731-TA-1279 (Final) USITC Pub. 4629 (August 2016)* (*ITC Final*) at I-13, tables I-2, I-25, III-11. *Id.* at II-6 showing in-scope blends as R-404a, R-407a, R-407c, R-507a, and R-410a and the column showing out-of-scope HFC substitutes in-scope blends, one of which is R-421a, an out-of-scope HFC substitute for the in-scope blend R-407c.

[53] *See ITC Final* at I-1, footnote 2.

[54] *See LTFV Final* IDM at Comment 5 (citing the Petition).

and is in accordance with Federal Circuit decisions with respect to Commerce's discretion and procedures for interpreting the scope of orders administered by Commerce.[55]

In its comments, Choice maintains that the plain language of the scope and the underlying record of the investigation do not support Commerce's interpretation.[56] According to Choice, the scope language is written in such a way to suggest that HFC blends are covered, regardless of whether they are one of the five listed blends, unless expressly excluded from the scope.[57] Thus, Choice asserts that unpatented R-421A must be in scope, because it is an HFCs blend and is not expressly excluded.[58] According to Choice, this is the only logical interpretation from the sources enumerated in 19 CFR 351.225(k)(1).[59] Choice finds that this interpretation matches the tone of the Petition, accurately reflects intentions of the petitioners, and the general understanding of industry representatives.[60] Based on its understanding, Choice believes that Commerce erroneously interpreted the language of the scope and the intent of the petitioners in the underlying investigation.[61]

Regarding Choice's arguments, we disagree. We find that Choice's interpretation of the scope language is flawed, overlooks previous determinations on what constitutes in-scope merchandise, and is not supported by record evidence.[62] As noted above, the Petition clearly set forth the same blends listed in the current scope. For instance, the language in the Petition states "HFC blends covered by the scope are R-404A; . . . R-407A; . . . R-407C; . . . R-410A; . . . and R-507A, . . . also known as R-507."[63] Therefore, it is unreasonable to accept an interpretation that the Petition intended that other blends be covered, or that the resulting *Order* covers other blends not specifically listed within the scope language. Further, as explained *supra*, Commerce has consistently interpreted the scope to only include the five named blends; in the *LTFV Final*, we stated that "{i}t is clear… 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."[64]

Choice maintains that, in the Petition, the petitioners had intended to include all HFC blends.[65] We disagree with Choice, as we already addressed this argument in the *LTFV Final*:

> We disagree with the petitioners that they intended to include additional blends in the Petition, or that the intent of the Petition was altered in any way by the addition of language suggested by {Commerce}. The petitioners agreed to change the "includes" language at {Commerce}'s suggestion prior to initiation, it

[55] *See, e.g., Arcelormittal Stainless*; *see also Duferco.*
[56] *See* Choice's Case Brief at 6-7.
[57] *Id.* at 7-8.
[58] *Id.* at 5 and 16-17.
[59] *Id.* at 9-17.
[60] *Id.*
[61] *Id.*
[62] In Choice's Case Brief, it claims that Commerce failed to consider Choice's April 17, 2019, Letter. We agree that we inadvertently overlooked this submission. Because Choice has incorporated those arguments in its Case Brief we address them in our determination.
[63] *See LTFV Final* IDM at Comment 5 (citing the Petition).
[64] *See LTFV Final* IDM at Comment 5 (citations omitted).
[65] *See* Choice's Case Brief at 6 and 11.

stated that "{t}he Coalition understands that this change was not intended to narrow or circumscribe the scope of the investigation, such that HFC blends or single component HFCs would be more narrowly defined or excluded from the investigation."[66] The Petition clearly sets forth the same blends and components listed above as an exhaustive list,[67] and all discussion of the physical characteristics and uses of HFC blends is framed in terms of these products.[68,69] While the original Petition does suggest scope language which "includes" the five blends,[70] we find that this language lacks the specificity found throughout the Petition, given that the Petition elsewhere defines the blend portion of the scope solely in terms of the five named blends.

Further, on several occasions during the course of this investigation, {Commerce} interpreted the scope language as including only the five named blends and three components, and excluding all patented blends,[71] and the petitioners have not objected to these characterizations or offered any clarification. For example, in their case brief related to scope issues, the petitioners did not comment on {Commerce}'s statements, but merely requested that {Commerce} alter one word to its proposed definition of "semi-finished blends." *See* Comment 2, {in *LTFV Final* IDM}, above.

In fact, the petitioners themselves have affirmatively stated on at least one occasion that patented blends are out of the scope,[72] and on another objected to the exclusion from the scope of products which have patents pending but took no affirmative position on already-patented blends (beyond listing "various HFC

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[66] *See* Petition Supplement at 3.

[67] *See* Petition at 11.

[68] *Id.* at 11-25. For example, the Petition at 12 states that "an antidumping order covering HFC blends should also cover the HFC components used in those blends, as well as semi-finished blends that, when imported, are not yet in the correct proportions for R-404A, R-407A, R-407C, R-410A or R-507A," and the Petition also states on the same page that "{t}he five HFC blends covered by this petition are the major commercial refrigerants …" (emphasis added in both places).

[69] The petitioners' intent to cover only the five named blends can also be seen in their proposed scope language related to semi-finished blends. Specifically, this language limits semi-finished blends to those blends of PRC components used to produce the subject blends . . .that have not been blended to the specific proportions required to meet the definition of one of the subject HFC blends described above (R-404A, R-407A, R-407C, R-410A, and R-507A)." *See* Initiation Notice, 80 FR at 43388.

[70] *See* Petition at 25, which states:

> The products subject to this investigation are blended hydrofluorocarbons ("HFCs") and single HFC components of those blends thereof, whether or not imported for blending, including the following: R-404A . . .

[71] *See, e.g.*, Refrigerant Solutions Scope Memorandum at 2 (stating "In the Petition, the petitioners stated that they intended to cover five HFC blends (*i.e.*, R-404A, R-407A, R-407C, R-410A, and R-507A) and three single HFC components of these blends (*i.e.*, R-32, R-125, and R-143a). The petitioners also stated that they intended to exclude patented HFC blends, and they provided a short list of patented products as examples" (footnotes omitted and emphasis added)); *see also* Preliminary Scope Memorandum at 13, which states "According to the petitioners, most out-of-scope blends are covered by patents, and, thus, are explicitly excluded" (emphasis added).

[72] *See* Petitioners' Rebuttal Scope Comments at 2 (FN2) where the petitioners stated: On July 31, 2015, Kivlan and Company, Inc., filed comments requesting that certain patented HFC blends, namely R-421A and R-421B, be excluded from the scope of this investigation. These patented blends are already excluded by the scope language. The HFC Coalition therefore does not object to the request (emphasis added).

> blends" that were excluded from the scope).[73] Moreover, when {Commerce} solicited comments on the appropriate product characteristics in this investigation,[74] the petitioners limited their comments to container type[75]; we find this significant because {Commerce}'s proposal was to define the specific products included in the investigation as an exhaustive list of the five blends and three components, with a catchall category for "other."[76]
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> Indeed, it was not until the rebuttal brief that the petitioners raised what is tantamount to a wholly new argument, that the scope is broader than its plain language and includes blends and components which were not specifically named in the Petition. According to this new argument, the scope has always covered components such as R-152a, and R-227ea, and blends such as R-422b, R-422c, and R-417c.[77] However, we note that this argument is not supported by the evidence on the record for the reasons noted above. Further, we note that this argument is contradicted by the petitioners themselves in their June 2, 2016, Excluded Products Letter, where the petitioners explicitly indicated that the scope of this investigation does not, in fact, include R-422b, R-422c, and R-417c.[78,79]

Based on our analysis in the *LTFV Final*, the petitioners acknowledged that the scope did not include all HFC blends, and it is apparent that the scope does not cover all HFC blends for which a specific exclusion is not in the scope language (*i.e.*, R-422b, R-422c, and R-417c). Further, as noted above, the petitioners did not object to Commerce's characterization of the scope language throughout the investigation and there is nothing in the underlying investigation that supports Choice's claims that the petitioners intended to include all blends or other blends besides the five specifically mentioned blends. Thus, we disagree with Choice that our interpretation is inconsistent with either the Petition or the petitioners' intentions.[80]

Further, we do not find that the structure of the scope itself provides an indication that all HFC blends are covered. Choice fails to read the scope language as a whole focusing, instead, only on the first sentence of the scope (*i.e.*, "{t}he products subject to this order are HFC blends"). It is clear from the second sentence (*i.e.*, "HFC blends covered by the scope are…") that the scope only covers five blends and that these blends are not an illustrative, but exhaustive list. In the

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[73] *See* Petitioners' Letter, "Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Submission of Factual Information in Response to Scope Exclusion Request," dated June 2, 2016 (Excluded Products Letter) at 2 and Attachment I. This letter is the same as a letter of the same name filed on April 19, 2016, except that the petitioners disclosed certain information for which they had initially requested business proprietary treatment.

[74] *See* Petitioners' Letter, "Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Comments on Product Characteristics," dated August 17, 2015.

[75] *See* Commerce's Letter, "Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China," dated August 12, 2015.

[76] *Id.* at Attachment.

[77] *See* Petitioners' Rebuttal Brief at 25-26.

[78] *See* Excluded Products Letter at Attachment.

[79] *See LTFV Final* IDM at Comment 5 (emphasis added).

[80] We note that the petitioners did not comment on the interpretation of the scope in the *Preliminary Determination* in either its case or rebuttal briefs, which cuts against Choice's arguments regarding the petitioners' intentions. *See* Petitioners' Case Brief and Petitioners' Rebuttal Brief.

LTFV Final, we addressed the same argument and disagreed that the language suggested that the five named blends are an illustrative, non-exhaustive, list of a larger category of HFC blends. As noted above, in our *LTFV Final*, we stated:

> The Petition clearly sets forth the same blends and components listed above as an exhaustive list, and all discussion of the physical characteristics and uses of HFC blends is framed in terms of these products.[81]

Considering that we addressed which blends constitute subject merchandise in the *LTFV Final*, and this interpretation was reinforced by the ITC in the *ITC Final*, it is unlikely that the U.S. refrigerant industry understood that all imported HFC blends, not listed as an exclusion, are subject to the *Order*. In fact, the record supports the opposite conclusion. For instance, in ICOR's scope ruling comments it cites to the *LTFV Final*[82] and in the underlying investigation, ICOR argued that its three proprietary blends were outside the scope because it understood that since these blends are "…finished but not one of the named blends, they fall outside of the scope."[83]

In essence, Choice is requesting that Commerce revisit its previous determination, hoping for a different outcome.[84] We find that by interpreting the language to include blends (whether patented or not), not explicitly identified in the scope language, we would broaden the scope, beyond what was intended in the underlying investigation. As stated by Choice, Commerce does not have the authority to change an antidumping duty order or interpret the scope language to narrow or expand the scope in a way that was not originally intended.[85] Therefore, since we are interpreting the scope in accordance with 19 CFR 351.225(k)(1), and not recommending any changes from the *LTFV Final*, we find that Choice's reliance on *Ericsson GE Mobile*, *Alsthom Atlantique* and *Corona Corp.* are inapposite.

As noted above, given that the record does not support that the scope includes all HFC blends, additional arguments proposed by Choice are misplaced. For instance, Choice claims that when Commerce revised the scope to omit the word "including" it failed to properly acknowledge whether unpatented versions of patented products were also excluded.[86] We find that there was

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[81] *See LTFV Final* IDM at Comment 5.

[82] *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 *LTFV Final* IDM at Comment 5).

[83] *See LTFV Final* IDM at Comment 5 (citing ICOR International Inc. (ICOR)'s Letter, "Case Brief of ICOR International Inc. Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China," dated May 11, 2016).

[84] Choice makes an unsupported argument in its case brief that staff indicated that outcome was "already decided." Thus, they found the decision to be prejudged. Choice provides no evidence to support this assertion, but we note, to the extent we have already addressed the same arguments Choice raises in previous findings, we find that the decision has been predetermined.

[85] *See, e.g.*, *Wheatland Tube Co. v. United States*, 161 F. 3d 1365, 1370 (Fed. Circ. 1998) and *Ericsson GE Mobile*, 60 F. 3d at 782.

[86] Choice's argument suggesting that the scope from the Petition was revised by Commerce or fundamentally altered in a way contrary to the petitioners' intentions is misconstrued because Commerce did not rewrite the scope or omit the word "includes." The petitioners agreed to change the scope language at Commerce's suggestion prior to initiation because the Petition indicated elsewhere that it only covered five blends. In response to this suggestion,

no reason to address the outcome of unpatented versions of patented products when the scope only identifies the five blends that covered by the *Order*. If we intended to include unpatented versions of patented blends, not specifically mentioned in the scope, we would have addressed this in the investigation.

Choice's arguments rest on the assumption that the exclusion listed in the scope for patented blends indicates that unpatented versions of those same blends must be excluded, otherwise the exclusion is meaningless since it is not one of the five named blends. Here, we find that Choice mischaracterizes the intent of the exclusion language for patented HFC blends. The scope language, "{a}lso excluded from the *Order* are patented HFC blends, including, but not limited to…" was intended to exclude all patented HFC blends. The non-exhaustive list of patented HFC blends (*i.e.*, for blends such as MO99™ (RR-438A), MO79 (R-422A)) that follows emphasizes that any blend with a patent is excluded.[87] In some cases, the names of patented HFC blends were included for clarity at the request of interested parties, in order to emphasize that the blends were specifically excluded from the *Order*.[88] However, by including the blends in the illustrative list of patented blends that were excluded, we did not imply that such blends would otherwise have been included; only that doing so would provide a clear indicator for CBP's enforcement of the scope of the order. For example, in the *LTFV Preliminary Determination*, Commerce noted that "Kivlan requested that the scope of the investigation explicitly exclude blends that are currently under patent protection, including Choice R-421A and Choice R-421B."[89] The petitioners did not object to the modification to explicitly exclude HFC blends R-421A and R-421B from the scope; consequently, Commerce modified the scope to explicitly exclude R-421A and R-421B, because we found such an exclusion to be consistent with the intent of the Petition.[90] Commerce's determination was unchanged in the *LTFV Final*.[91]

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the petitioners stated that "{t}he Coalition understands that this change was not intended to narrow or circumscribe the scope of the investigation, such that HFC blends or single component HFCs would be more narrowly defined or excluded from the investigation." *See LTFV Final* IDM at Comment 5. Because the petitioners made this modification based on our suggested language, and; thus, was not in contravention of the petitioners' intentions, we find Choice's reference to *Eckstrom v. United States* (*i.e.*, Commerce's practice for accepting the petitioner(s) scope language) does not apply.

[87] *See LTFV Final* IDM at Comment 5, footnote 108 (citing Memorandum, "Antidumping Duty Investigation of Hydrofluorocarbon Blends and Components (HFCs) from the People's Republic of China (PRC): Analysis of Scope Comments Made by Refrigerant Solutions Limited," dated May 3, 2016, stating "In the Petition, the petitioners stated that they intended to cover five HFC blends (*i.e.*, R-404A, R-407A, R-407C, R-410A, and R-507A) and three single HFC components of these blends (*i.e.*, R-32, R-125, and R-143a). The petitioners also stated that they intended to exclude patented HFC blends, and they provided a short list of patented products as examples). Thus, we do not agree that by finding that unpatented versions of patented HFC blends listed as exclusions are out-of-scope, it renders the scope exclusions meaningless. The inclusion of patented versions of unpatented blends as examples for clarification purposes does not alter the meaning or intention of the scope language in any manner.

[88] *See* Kivlan's Letter at 1.

[89] *See LTFV Preliminary Determination* PDM at 7.

[90] *Id*.

[91] *See LTFV Final* IDM at Comment 5, footnote 109 (citing Petitioners' Letter, "Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Response to Scope Comments," dated August 17, 2015, at 2 stating "{o}n July 31, 2015, Kivlan and Company, Inc., filed comments requesting that certain patented HFC blends, namely R-421A and R-421B, be excluded from the scope of this investigation. These patented blends are already excluded by the scope language. The HFC Coalition therefore does not object to the request.").

Although Commerce does not, generally, include unnecessary exclusions for products which are not be covered by a scope, Commerce does include explicit exclusions for products which may be on the edge of the scope and which may risk being misinterpreted as in-scope merchandise.[92] Commerce also considers interested party comments in proceedings, and may include explicit exclusions for products for which interested parties request an exclusion. This practice does not render the exclusions "meaningless" if the intent is to reduce confusion or to reinforce the language in the scope. Additionally, the record does not contain implicit or explicit evidence supporting that we acknowledged an exclusion was necessary for patented blends even if they were not one of the five named blends. Ultimately, we find that it would be inappropriate to use an exclusion as means to expand the scope beyond the language listed in the scope.

Further, and importantly, Choice does not acknowledge the history of the scope covered by this *Order*. For the duration of the investigation, the scope also covered components and unfinished blends of HFCs. When Commerce re-wrote the language for the *Order*, after the ITC's final determination, Commerce kept much of the existing structure, while only excising portions pertaining to components. Thus, rather than combine the first two sentences of the scope of the *Order* to state that the order only covers the five listed HFC components, Commerce re-wrote the first sentence to remove references to components:

Original *LTFV Final* Scope Excerpt	Final *Order* Scope Excerpt
"The products subject to this investigation are HFCs and single HFC components of those blends thereof, whether or not imported for blending. HFC blends covered by the scope are…"[93]	"The products subject to this order are HFC blends. HFC blends covered by the scope are…"[94]

Further, at the time of the investigation, it was conceivable that certain blends of HFCs could have been construed as unpatented blends of HFCs, because the scope also included "semi-finished blends of Chinese HFC components."[95] This language pertaining to unfinished blends was removed, in its entirety, from the language of the *Order*, to accommodate the ITC's final injury determination.[96]

[92] *See, e.g., Stainless Steel Sheet and Strip in Coils from the Republic of Korea: Preliminary Results of Countervailing Duty Changed Circumstances Review*, 71 FR 75937 (December 19, 2006). The scope language states, "the subject sheet and strip is flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled." In the list of scope exclusions it states "{e}cluded from the scope of this order are the following: (1) sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) plate (*i.e.*, flat-rolled stainless steel products of a thickness of 4.75 mm or more), (4) flat wire (*i.e.*, cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5mm." The products in the first, third, and fourth exclusions fall squarely outside the definition of in-scope merchandise, the first because it relates to product that is not annealed and pickled and the latter two because they involve merchandise of more than 4.75 mm in thickness or of not more than 9.5 mm in width.

[93] *See LTFV Final*, 81 FR at Appendix I – Scope of the Investigation.

[94] *See Order*, 81 FR at Scope of the Order.

[95] *See LTFV Final*, 81 FR at Appendix I – Scope of the Investigation.

[96] *See Order*, 81 FR at Scope of the Order.

Finally, Choice makes a number of unsupported arguments about the outcome of Commerce's ruling such as: (1) there will be an increase in the dumping of unpatented chemicals; (2) importers will mislabel merchandise as an unspecified non subject HFC blend; (3) importers will manipulate their customs paperwork to circumvent the *Order*; and (4) the ruling will reward companies that cheat U.S. trade laws in contravention of the United States' President's efforts to enforce U.S. trade laws. To the extent that our ruling on unpatented R-421A would lead to improper conduct by any importers or exporters, we have already addressed Choice's concern with respect to imports of unpatented R-421A with a finding of an affirmative anticircumvention determination.[97] Further, we have several ongoing anti-circumvention proceedings examining various circumvention schemes by exporters/importers related to the HFCs *Order* in which we address similar concerns. In this case, we have interpreted the scope of the *Order* in a manner that is consistent with the underlying investigation. Based on this, we find no reason to alter our *Preliminary Determination*.

Comment 2: Whether the Process of Assembly or Completion of R-421A Into HFC Blends in the United States is Minor and Insignificant

In determining whether the process of assembly or completion in the United States is minor or insignificant, Commerce conducted its analysis using the interpretative framework outlined in sections 781(a)(1)(C) and 781(a)(2) of the Act. Based on this evaluation, in the *Preliminary Determination*, we determined (1) that BMP's level of investment is minimal when compared to the level of investment required to build and maintain a components factory;[98] (2) the nature of BMP's production process in the United States is not significant;[99] and (3) BMP's response confirms that its research and development (R&D) expenses are negligible.[100]

BMP's Arguments

- The process of producing HFC blends is not "minor or insignificant" because: (1) the level of investment in the United States is significant;[101] (2) the blending process is not simple;[102] and (3) the level of R&D in the United States is inconclusive.[103]

- Commerce's analysis of BMP's investments in the United States (*i.e.*, comparison of component production cost with the cost of blending operations) is flawed because the benchmark it uses for component production of "hundreds of millions of dollars" from an ITC statement is unreasonable.[104] To establish this benchmark, Commerce selectively quotes from the ITC that, although recognizing that an HFC blending facility costs significantly less than an HFC components facility, still found that the process to transform HFC components into HFC blends substantial.[105]

[97] *See Preliminary Determination* PDM at 1 and 22.
[98] *Id*. at 18.
[99] *Id*. at 19.
[100] *Id*.
[101] *See* BMP's Case Brief at 2-3.
[102] *Id*. at 2-3.
[103] *Id*. at 4.
[104] *See* BMP's Case Brief at 2.
[105] *See ITC Final* at 12-13.

- Record information shows that the amount of initial investment made by BMP for equipment is significant, especially for a small company without considering the investment in a skilled workforce and testing facilities, which were recognized by the ITC.[106]

- Blending is not a simple process, as supported by the ITC's opinion, and record information showing that BMP USA's production process: (1) is not simple; (2) requires a large facility; and (3) requires significant training of skilled workers.[107]

- With respect to R&D expenditures, the blending industry is long-established, as evidenced by its existence during the original investigation. Thus, it is not surprising that significant R&D is not required for this industry and, therefore, should not be considered a determinative factor for purposes of Commerce's analysis.[108]

Petitioners' Rebuttal Arguments

- Commerce should continue to find that BMP's process of assembly or completion of HFC components into HFC blends in the United States is insignificant because, contrary to BMP's claims, its level of investment and R&D expenditures in the United States are minimal.[109]

- Commerce used the appropriate analytical framework in the *Preliminary Determination* for evaluating the level of investment in the United States. This framework was consistent with the statute as well as Commerce's longstanding practice and is supported by substantial evidence.[110]

- BMP's arguments that the completion of HFC blends in the United States is not insignificant rely solely on its arguments that pertain to its level of investment and R&D. However, BMP overlooks that these factors are not dispositive, but are two of several factors Commerce uses to determine whether the process of assembly or completion is "minor or insignificant."[111] The statute does not instruct Commerce to use a particular method for evaluating the level of investment; therefore, Commerce may use any analysis it determines appropriate to assess whether the process of assembly or completion is "minor or insignificant."[112] Commerce's analytical framework was appropriate because it measured the level of investment in the United States against the full investment involved in the complete production of finished HFC blends.[113]

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[106] *See* BMP's Case Brief at 3 (citing 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) at 16, 24 and 26-27).
[107] *Id*. at 3-4.
[108] *See* BMP's Case Brief at 4.
[109] *See* Petitioners' Rebuttal Brief at 3-6.
[110] *Id*. at 6.
[111] *Id*. at 3.
[112] *See* Petitioners' Rebuttal Brief at 3 (citing *Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 FR 23895 (May 28, 2018) (*CORE from China*), and accompanying IDM at Comment 5).
[113] *Id*.

- The statute requires that Commerce measure "minor or insignificant" against the full investment involved in the completed production process and evaluate the pattern of trade to determine if there is any shifting between an affiliated Chinese exporter/producer and U.S. blender, and if any imports of components increased following the imposition of *Order*.[114] BMP misses the point that the analysis is not concerned with whether its investments in the United States are significant, but whether they are comparatively less significant than the investments required for production of finished HFC blends in China.[115] The statute requires this comparison to determine if circumvention is being achieved by shifting one or more of the last few minor or insignificant steps of the production process to the United States, and BMP provides no evidence for departing from this practice.[116]

- BMP cites to its claimed initial investment for blending equipment, which corroborates the evidence submitted by the HFC Coalition, showing that blending operations are insignificant.[117] This amount is undoubtedly dwarfed by "the hundreds of millions of dollars" the ITC stated was required to produce individual HFC components; a fact BMP admits in its case brief.[118]

- Commerce should reject BMP's argument that because the blending industry is long established there would be no need for this investment because: (1) Commerce did not give undue weight to R&D expenditures to determine whether the HFC blending process in the United States was minor or insignificant; (2) BMP does not dispute Commerce's statement that its R&D expenses are negligible; and (3) Commerce's analysis of BMP's R&D expenditures was reasonable and consistent with record evidence.[119]

Commerce's Position:

We continue to find, for this final determination, that the process of assembly or completion is minor or insignificant within the meaning of section 781(a)(1)(C) of the Act, as informed by the factors in section 781(a)(2) of the Act. As an initial matter, the SAA lists the five statutory criteria in section 781(a)(2) of the Act and states that, "{n}o single factor will be controlling."[120] The importance of any one of the factors listed under section 781(a)(2) of the Act can vary from case to case based on the particular circumstances unique to each anti-circumvention inquiry. In our *Preliminary Determination*, we examined each of the criteria under section 781(a)(2) of the Act, based on both qualitive and quantitative factors. We determined that (1) BMP's investment to blend HFCs in the United States is minimal in comparison to the investment require to create

[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id*.
[118] *See ITC Final* at 12-13.
[119] *Id.* at 12-13.
[120] *See* Statement of Administrative Action H.R. Rep. No. 103-316, Vol. 1 (1994) (SAA) at 893; *see also Preliminary Determination* PDM at 13.

components;[121] (2) BMP's R&D expenses are negligible;[122] (3) the nature of BMP's production process in the United States is not significant;[123] (4) BMP's production facility for completing finished HFC blends is not extensive;[124] and (5) the value of processing performed in the United States represents a small proportion of the value of the merchandise sold in the United States.[125] We focus on BMP's arguments pertaining to sections 781(a)(2)(A), 781(a)(2)(B), and 781(a)(2)(C) of the Act, below.

With respect to section 781(a)(2)(A) of the Act, we continue to find that BMP's investment to blend HFCs in the United States is minimal in comparison to the investment required to create the unpatented R-421A. BMP argues that Commerce's analysis is flawed because it evaluates the amount of investment for component production using an inappropriate benchmark from the *ITC Final*,[126] based on a quote from an industry representative stating component production costs "hundreds of millions of dollars."[127] According to BMP, Commerce overlooks that in the ITC Determination it found the amount to convert HFC components into HFC blends substantial.[128] Further, BMP argues that the record shows that the amount of investment related to equipment, testing facilities, and maintaining a skilled workforce, when taken together, is significant.[129]

However, the information provided by BMP demonstrates that not only is the level of investment insignificant, it is significantly less than the costs associated with starting a component production facility.[130] In this proceeding, BMP provided various figures in response to our inquiries with regard to the level of investment it incurred in the United States with respect to its process for completion of the unfinished HFC blends. In its January 17, 2020 submission, BMP provided a table that outlines its level of investment, research and development expenditures in the United States from 1990 through 2019.[131] Based on the level of investment detailed in our BPI Analysis Memorandum, we found that this figure calculated by BMP accurately represents

[121] *See Preliminary Determination* PDM at 18; *see also* 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 February 25, 2020 (BPI Analysis Memorandum) at 2-3.
[122] *See Preliminary Determination* PDM at 18; *see also* BPI Analysis Memorandum at 3.
[123] *See Preliminary Determination* PDM at 19; *see also* BPI Analysis Memorandum at 3-4.
[124] *See Preliminary Determination* PDM at 19; *see also* BPI Analysis Memorandum at 4.
[125] *See Preliminary Determination* PDM at 20; *see also* BPI Analysis Memorandum at 5 and Attachment 1.
[126] *See* BMP's Case Brief at 2.
[127] *See Preliminary Determination* PDM at 15 and 18 (citing ITC Hearing Transcript in the Matter of Hydrofluorocarbon Blends and Components from China Investigation No. 731-TA-1279 (Final), dated June 21, 2016 at Exhibits 1-4 and 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 at 15 and Exhibit 3); *see also* BPI Analysis Memorandum at 3.
[128] *See* BMP's Case Brief at 3.
[129] *Id.*
[130] As noted in the BPI Analysis Memorandum, R-421 is composed of HFC components R-125 and R-134a. The production of the components used to make R-421A occurs in China. Also, as stated in the *Preliminary Determination*, "after importation into the United States from China, BMP uses unpatented R-421A, and other components from China, to produce HFC blends that are covered by the *Order*," since it does not actually produce any components (or blends made from self-produced components) on its own. *See* the BPI Analysis Memorandum at 3-5; *see also Preliminary Determination* at 17.
[131] *See* BMP's January 17, 2020 QR at Exhibit 12.

the initial investment BMP undertook in order to establish the business of converting R-421A into finished HFC blends.

Thus, we determined it was appropriate to compare the amount specified by the petitioners (*i.e.*, data from the ITC determination) regarding the initial amount required to start up the production of HFC components in China with the amount reported by BMP because both amounts represent the initial investment required to start the HFC blend production and the conversion process.

After comparing the amount to produce HFC components and semi-finished blends with the amount BMP calculated for its investment, we found that the level of investment is significant in China compared to the reported level of investment in the United States.[132] Specifically, we estimated that the level of investment in China represents a significant portion of the total investment required for these types of businesses.[133] While BMP argues that its investments are significant, especially for a small company,[134] we find that even with the inclusion of BMP's expenditures for labor and testing facilities the amount of investment required for blending operations was several orders of magnitude lower than for component operations.[135]

BMP argues that the analysis described above is flawed, based on the source proposed by the petitioners for investment costs for component production.[136] However, we find that this is the most appropriate source because the exporter of unpatented R-421A selected for review in this anticircumvention case failed to provide any information from which to evaluate the costs of production.[137] Additionally, BMP also failed to provide additional information with which to value imports of unpatented R-421A or cite to anything on the record of this proceeding showing the costs for R-421A or the underlying component production used to make the R-421A. Thus, we selected the information proffered by the petitioners, as it was the only available information on the record. Furthermore, while BMP argues that the ITC found that the cost for blending operations is not insignificant, BMP overlooks that the ITC was concerned with an analysis of determining class and kinds of merchandise, and not with circumvention. Even assuming, *arguendo*, that the ITC found blending operations to be significant, this statement is not borne out by the data provided by BMP.[138]

With respect to section 781(a)(2)(B) of the Act, we continue to find that BMP's R&D expenditures in the United States are negligible. BMP argues that the blending industry is long-

[132] *See Preliminary Determination* PDM at 18; *see also* BPI Analysis Memorandum at 2-3.
[133] *See* BPI Analysis Memorandum for the figures underlying the Commerce's conclusion.
[134] *See* BMP's Case Brief at 3.
[135] *See* BPI Analysis Memorandum at 4 showing the total payroll and number of current workers is not significant even in conjunction with its investments in equipment and testing facilities; *see also* BPI Analysis Memorandum at 3; and BMP's January 17, 2020 QR at Exhibit 3 BMP USA's 2018 financial statements at 2 and Exhibit 3 IGas's 2018 financial statements at 4.
[136] *See* BMP's Case Brief at 3.
[137] *See Preliminary Determination* PDM at 4 and 14 (noting that T.T. International declined to provide a questionnaire response to the initial questionnaire it was issued on December 13, 2019. *See* T.T. International'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, 2019.).
[138] *See* BPI Analysis Memorandum.

established, as evidenced by its existence during the original investigation.[139] Thus, BMP argues that significant R&D is not required for this industry and, therefore, should not be considered a determinative factor for purposes of Commerce's analysis.[140]

As an initial matter, BMP does not produce HFC components, and, therefore, does not have any specific information from the producer regarding its R&D expenditures in China.[141] However, in BMP's response, it provided information that outlines its research and development expenditures along with the level of investment it incurred in the United States since its inception.[142] The specific figures provided by BMP are proprietary, however we note that, as a general matter, BMP reported negligible R&D expenditures.[143] Based on this information, we found that the HFC blending operations appeared to be activities that do not require significant research and development initiatives and expenditures.[144] Thus, with respect to section 781(a)(2)(B) of the Act, we determined that the level of R&D initiatives and expenditures in the United States is limited when compared to the R&D initiatives and expenditures likely necessary in China.

We agree with BMP's assertion that no R&D is required since, as discussed below, it only mixes the imported R-421A with imported components in a tank. However, the point of the analysis is not whether BMP's R&D expenditures in the United States are significant or insignificant, but whether the R&D expenditures associated with converting the imported R-421A into finished HFC blends in the United States is significant in comparison to the investments that would be required for production of the imported R-421A.[145] Therefore, we disagree with BMP's argument that we should disregard BMP's R&D as a factor, because it is unnecessary for the blending industry. Rather, the fact that blenders incur minimal R&D expenditures confirm Commerce's affirmative circumvention finding. Further, as pointed out by the petitioners, we considered the totality of factors in our affirmative circumvention finding and did not place emphasis solely on this factor.

With respect to section 781(a)(2)(C) of the Act, we continue to find that the nature of BMP's production process in the United States is not significant. BMP argues that the ITC found that the nature of blending process is not insignificant and argues that the record shows the process is not simple, requires a large facility, and requires significant training of skilled workers.[146]

We disagree, with BMP's arguments. BMP stated on the record that the blending process is relatively straightforward.[147] There is also no chemical reaction or temperature change involved

[139] *See* BMP's Case Brief at 4.
[140] *Id*.
[141] *See* BMP's January 17, 2020 QR at 3.
[142] For the proprietary figures underlying the Commerce's conclusion, *see* the BPI Analysis Memorandum at 3.
[143] *Id.*
[144] *Id.*
[145] *See CORE from China* IDM at Comment 5. Although the cited proceeding involved assembly or processing in a third country under section 781(b) of the Act, the language regarding section 781(b)(2) of the Act is essentially the same under both sections 781(a)(2)(C) and 781(b)(2)(C).
[146] *See* BMP's Case Brief at 3 (citing *ITC Final* at 12-13).
[147] *See* BPI Analysis Memorandum at 3 (citing LM Supply Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Supplemental Questionnaire Response," dated April 27, 2018 (LM Supply's April 27, 2018 SQR) at 3).

in blending HFCs.[148] After the blend is tested, it is extracted from the mixing tank and packaged into smaller cylinders for resale.[149] In addition, available information shows that production of HFC blends requires only basic setups (*i.e.*, tanks, pumps, and testing equipment) and a handful of workers.[150] Finally, information on the record demonstrates that BMP's production process is fairly limited with only a single facility and a small number of blending employees to handle its blending operations.[151] Based on the information BMP provided, this process requires less processing than production of the finished HFC blends in China.[152] The specific details provided by BMP are proprietary, however we note that, as a general matter, BMP's reporting confirmed that the production process is straight-forward and does not require the same level of activities that production of the underlying HFC components requires.[153]

Based on the aforementioned, and consistent with the conclusions reached in our *Preliminary Determination*,[154] we continue to find that record evidence demonstrates that BMP's level of investment for blending unpatented R-421A into finished HFC blends is minimal, the production process is not extensive, and that BMP has not undertaken a significant level of R&D in order to process unpatented R-421A into finished HFC blends subject to the *Order*.[155] As noted above, no single factor is controlling and the importance of any one of the factors listed under section 781(a)(2) of the Act can vary from case to case based on the particular circumstances unique to each anti-circumvention inquiry. We find that the evidence placed on the record overwhelmingly supports that the process of assembly or completion is minor or insignificant within the meaning of section 781(a)(1)(C) of the Act, as informed by the factors in section 781(a)(2) of the Act. Therefore, we find that there is no reason to change our affirmative circumvention finding for the final determination.

Comment 3: Value Analysis

In accordance with sections 781(a)(1)(D) and 781(a)(2)(E) of the Act, in the *Preliminary Determination*, Commerce examined the figures placed on the record by participating parties and found 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, and 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.[156]

BMP's Arguments

[148] *Id*. at 3.
[149] *Id*.; *see also* LM Supply's April 27, 2018 SQR at 4.
[150] *See* BPI Analysis Memorandum at 4; *see also* BMP's January 17, 2020 QR at 16.
[151] *See* BMP's January 17, 2020 QR at 16.
[152] *See* the BPI Analysis Memorandum at 4.
[153] For the proprietary figures and details underlying the Commerce's conclusion, *see* BPI Analysis Memorandum at 3-6 and Attachment 1 and 2.
[154] *See Preliminary Determination* PDM at 18-20.
[155] *Id.* (citing BMP's January 17, 2020 QR at 16 Exhibits 12 and 20; BMP's January 17, 2020 QR at 16-17; and LM Supply's April 27, 2018 SQR at 4).
[156] *See Preliminary Determination* PDM at 20; *see also* BMP's January 17, 2020 Questionnaire Response (BMP's January 17, 2020 QR) at Exhibit 24; and BPI Analysis Memorandum.

- Commerce's methodology in the *Preliminary Determination* is unreasonable because it compared the value of all inputs from China to the total value of the finished blends. According to the statute, the parts and components used in the analysis will be the same ones subject to the circumvention inquiry (*i.e.*, R-421A).[157]

- The other components (*i.e.*, R-32 and R-143) used in the blending process are not a part of this circumvention inquiry. In addition, the only part or component that Commerce is proposing to include in the scope of the order is R-421A. Therefore, Commerce should only compare the value of the imported R-421A to the total value of the blends.

Choice's Arguments

- Commerce correctly found that BMP's imports of R-421A circumvented the HFC Blends Order.[158] BMP infringed on Choice's patent by importing patented R-421A into the United States without a license and clearly circumvented antidumping duties imposed on HFC blends and the HFC component R-134a. BMP fails to explain the reasoning behind importing the HFC blend R-421A and converting it into other HFC blends, rather than finishing the blending process in China or importing HFC components as blend feedstocks; it is clear that the reason was to avoid antidumping duties.[159]

- BMP fails to demonstrate, under section 781 of the Act, that the costs of converting R-421A into other HFC blends is significant. While BMP provides the asserted values of the R-421A imports and the final HFC blends, the marginal costs have not been provided. Rather, the marginal cost of producing BMP's blends should be zero because the added step to convert R-421A into a finished HFC blend is unnecessary. It is most economical for HFC blends to be blended at the point of manufacture. Therefore, BMP's marginal costs for its second blending step should be disregarded.[160]

- Commerce should also reject BMP's below-market valuation of imported R-421A. Instead, Commerce should obtain information on the market value of HFC blends and components in the relevant time frame. In addition, Commerce should consider the ownership of BMP affiliates and investigate the existence of preferential pricing from affiliated Chinese companies or subsidies from the Government of China.[161]

- IGas USA, and other newly formed shell companies in the BMP Group that imported and used R-421A without paying antidumping duties, should also be held liable since their only business is producing HFC blends.[162] Further, Commerce should consider the protection of U.S. intellectual property theft by foreign-backed enterprises. BMP admits that it does not

[157] *See* BMP's Case Brief at 5-6 (citing section 781(a) of the Act).
[158] *See* Choice's Case Brief at 19.
[159] *Id.* at 20.
[160] *Id.* at 21.
[161] *Id.*
[162] *Id.* at 22 (citing BMP's January 17, 2020 QR at 18).

hold a patent for R-421A or the license to use that patent.[163] Yet, even though BMP's exporter describes the imports as unpatented R-421A, BMP states that the imported R-421A was considered patented.[164] Therefore, Commerce and CBP should request all documentation of communication between BMP affiliates and its exporter to verify statements made on customs forms. It is not plausible that BMP does not maintain such business documentation.[165]

- Commerce should conduct a full forensic accounting of BMP's finances because the voluntary responses do not contain adequate information to determine the actual cost of finishing the HFC blends.[166] Data reveals that the use of the circumvented R-421A represented a significant percentage of BMP's overall business during the relevant time period. Choice estimates that such a scheme would have saved BMP nearly $100,000 for ever ISO container of HFC blend and could have resulted in BMP gaining market share in the U.S. refrigerant market.[167]

BMP's Rebuttal Arguments

- Contrary to Choice's allegations, BMP and its affiliates have not admitted that they illegally imported R-421A to avoid antidumping duties. There is no record evidence supporting Choice's claims that: (1) BMP or its affiliates committed patent infringement; (2) BMP can most economically blend HFC blends at the point of manufacture or that the marginal cost of blending should be zero; (3) the value of the imported R-421A is below-market; and (4) BMP made false statements to CBP.

- It is inapposite and without legal basis to request that Commerce investigate any Chinese government subsidies. Further, there is no need for a forensic accounting analysis since BMP fully answered Commerce's questions.[168]

Choice's Rebuttal Arguments

- While BMP argues that Commerce should compare only the value of the imported R-421A and ignore the cost of other blending components,[169] the statute requires that Commerce compare the value of the parts or components to the total value of the merchandise. The merchandise in this instance is the R-421A imported by BMP. If Commerce disregards other blending components, then the value of R-421A as a component is 100 percent of the value of R-421A as merchandise, thus indicating circumvention.

[163] *Id.* (citing 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, at 4-7).
[164] *Id.* (citing BMP's January 17, 2020 QR at 20).
[165] *Id.* at 23 (citing BMP's January 17, 2020 QR at 21).
[166] *Id.* at 23-24.
[167] *Id.* at 24.
[168] *See* BMP's Rebuttal Brief at 5-6.
[169] *See* Choice's Rebuttal Brief at 3 (citing BMP's Case Brief at 5-6).

- BMP is incorrect that the merchandise should be the three-component HFC blends that it creates by blending the R-421A with additional HFC components. The statute does not specify a formula for determining what is significant and the courts have rejected interpretations of section 781 that "would render meaningless Congress's intent to address circumvention concerns."[170]

Petitioners' Rebuttal Arguments

- BMP's argument with respect to Commerce's value analysis pursuant to section 781(a)(1)(D) of the Act is unsupported by record evidence and precedent.[171] BMP incorrectly asserts that Commerce should focus only on the value of R-421A rather than comparing the value of all imported inputs from China to the total value of the finished blend. Commerce correctly calculated the value of the Chinese-origin unpatented R-421A using Mexican surrogate values.[172]

- Pursuant to section 781(a)(1)(D), Commerce concluded in the preliminary determination that the value of the components from China represented a significant portion of the total value of the merchandise sold in the United States.[173] Commerce's findings should be unchanged in the final determination.

Commerce's Position

Under section 781(a)(1)(D) of the Act, Commerce considers whether the value of the parts or components produced in the foreign country to which the order applies (*i.e.*, China) is a significant portion of the total value of the merchandise. In addition, section 781(a)(2)(E) of the Act directs Commerce to determine whether the value of processing performed in the United States represents a small proportion of the value of merchandise sold in the United States.

In the *Preliminary Determination*, with respect to the value analysis required by section 781(a)(1)(D) of the Act, we calculated the percentages of Chinese origin inputs, compared to the value of merchandise sold in the United States on a per-kilogram basis,[174] and determined that the value of the parts or components produced in China (*i.e.*, R-421A) represented a significant portion of the total value of merchandise sold in the United States (*i.e.*, R-407C, R-407A, and R-404A).[175] Since China is an NME, Commerce used a surrogate value methodology in order to value unpatented R-421A.[176]

[170] *Id.* at 3-4 (citing *Deacero S.A. v. U.S.*, 817 F. 3d 1332, 1338 (Fed. Cir. 2016)).
[171] *See* Petitioners' Rebuttal Brief at 9 (citing BMP's Case Brief at 5).
[172] *Id.* at 9-10 (citing BPI Analysis Memo and associated surrogate value data, dated February 28, 2020; *see also* Petitioners' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Surrogate Values Submission," dated January 13, 2019 at Exhibit 1; and BMP's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Surrogate Value Comments," dated January 13, 2020, at Exhibit 1).
[173] *Id.* at 10 (citing *Preliminary Determination* PDM at 10-11; *see also* BPI Analysis Memo at 5).
[174] *See* BPI Analysis Memorandum at 5 and Exhibit 2.
[175] *See Preliminary Determination* PDM at 20; *see also* Preliminary Decision Analysis Memo; and BMP's January 17, 2020 QR at Exhibit 24.
[176] *See* BPI Analysis Memorandum at 6 (citing Petitioners' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Initial Surrogate Country Selection Comments," dated January 3, 2020; and Petitioners' Letter,

In addition, with respect to the value-added analysis required by section 781(a)(2)(E) of the Act, we compared the further manufacturing costs to convert the imported R-421A into subject merchandise for each of the finished HFC blends with the total U.S. sales value of those same blends,[177] and determined the Chinese inputs as a portion of the U.S. sales value are significantly higher than the processing values as a portion of the U.S. sales value.[178] This means that the Chinese inputs constituted a more significant portion of the total value of merchandise than the costs of further manufacturing in the United States. We conducted our value analysis in accordance with the law and Commerce's normal practice. Our analysis demonstrated that (1) the value of unpatented R-421A was not a significant portion of the total value of the finished HFCs blends; and (2) the value of BMP's processing performed in the United States represents a small proportion of the value of the HFCs blends sold in the United States.[179]

It is important to note that Commerce's determination of circumvention is not based on any one criterion, but on the totality of circumstances. 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.

Therefore, when determining circumvention, the results of the input value and value-added analyses are considered in conjunction with the other the statutory prongs, including the level of investment, the level of research and development, the nature of the production process, and the extent of production facilities in the United States. Therefore, as noted above, our analysis demonstrates that (1) the value of unpatented R-421A was not a significant portion of the total value of the finished HFCs blends; and (2) the value of BMP's processing performed in the United States represents a small proportion of the value of the HFCs blends sold in the United States. Thus, these factors, together with the totality of the circumstances, support an affirmative determination of circumvention.

"Hydrofluorocarbon Blends from the People's Republic of China: Surrogate Values Submission," dated January 13, 2020).

[177] *Id.*at 5 and Attachment 1.

[178] *Id.* at 6 and Attachment 2.

[179] *Id.* at 5 and Attachment 1 (showing BMP's total cost for HFC blends R404A, R407C, and R407A represented 4.66, 10.37, and 6.55 percent of the total U.S. sales value, demonstrating that BMP's processing performed in the United States represents a small proportion of the value of HFCs blends sold in the United States.) *Id.* at 5 and Attachment 2 (showing that the value of Chinese merchandise as a portion of the total value of U.S. sales for HFCs blends R407C, R407A, and R404A represents 80.02, 80.10, and 93.54 percent of the total U.S. sales value.).

We reject BMP's argument that Commerce's value analysis is incorrect. BMP claims that Commerce's value analysis under section 781(a)(1)(D) is unreasonable because it compared the value of all Chinese-imported inputs to the value of the finished blends, rather than focusing on the value of R-421A, which is the subject of the circumvention inquiry.[180] Since China is an NME country, we valued R-421A using Mexican GTA data for HFC blends (*i.e.*, HS heading 38.24.7801).[181] Commerce has consistently used its surrogate value methodology in conducting circumvention proceedings for NME countries, and as discussed in Comment 4, we continue to find that it is appropriate to apply this methodology. Further, despite BMP's claims to the contrary, our analysis does not include the value of components other than the merchandise subject to this anti-circumvention inquiry.[182]

Similarly, we find that the value analysis conducted under section 781(a)(2)(E) of the Act, is reasonable because, as required by the Act, we determined 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, by using the value of the processing costs that were incurred by BMP in the United States as a proportion of the total value of BMP's sales for each specific blend. Although Choice argues Commerce should disregard any of BMP's further processing costs to convert R-421A into finished HFC blends in the United States, because the methodology applied in the *Preliminary Determination* demonstrates clear evidence of circumvention, we find that it is unnecessary to apply another methodology to calculate BMP's further processing costs for the final determination.[183]

Choice makes additional arguments which largely lack substantial record evidence (*e.g.*, Commerce should obtain information on the market value of HFC blends and components in the relevant time frame and should consider the ownership of BMP affiliates and investigate the existence of preferential pricing from affiliated Chinese companies or subsidies from the Government of China), but since (1) it is too late in the proceeding to collect additional information; and (2) we have already made a finding of anti-circumvention in the *Preliminary Determination*, and we have found no reason to change the results in the final determination, we find that it is unnecessary to consider additional information or conduct the further analyses hypothesized by Choice.

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[180] *See* BMP's Case Brief at 5-6.

[181] BMP's argument suggests that Commerce inappropriately included components that were not subject to the inquiry, but overlooks that the HS category used to value R-421A is the category placed on the record by parties in this proceeding and most closely represents the imported R-421A. Likewise, we did not include any additional components in our analysis under section 781(a)(1)(D). *See* BPI Analysis Memo at 6 (citing 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).

[182] *See* BPI Analysis Memorandum at 5-6, Attachment 2, and associated surrogate value data showing that we used only HS category 3824.78.01 (category representing an HFC blend) to value the unpatented R421A input.

[183] As noted above, *see* BPI Analysis Memorandum at Attachment 1 (showing BMP's total cost for HFC blends R404A, R407C, and R407A represented 4.66, 10.37, and 6.55 percent of the total U.S. sales value, demonstrating that BMP's processing performed in the United States represents a small proportion of the value of HFCs blends sold in the United States.) *Id.* at 5 and Attachment 2 (showing that the value of Chinese merchandise as a portion of the total value of U.S. sales for HFCs blends R407C, R407A, and R404A represents 80.02, 80.10, and 93.54 percent of the total U.S. sales value).

Comment 4: Use of Surrogate Values to Value Material Inputs

In the *Preliminary Determination* we noted that, because the purpose of this proceeding is to determine whether merchandise is being further-processed in the United States in order to circumvent the HFCs *Order* on China, an analysis of BMP's China-origin input costs falls under the purview of the Commerce's NME AD methodology. Therefore, we utilized a Mexican surrogate value to value the input in question to determine whether the value of the merchandise produced in China is a significant portion of the value of the merchandise sold in the United States, pursuant to section 781(a)(1)(D) of the Act.[184]

BMP's Argument

- Commerce must determine circumvention using the actual values for the imported R-421A.[185] Consequently, there is no legal basis for using surrogate values, since Commerce initiated the anti-circumvention inquiry pursuant to section 781 of the Tariff Act of 1930,[186] and is not calculating normal value, which is covered under section 773 of the Act[187] relating to NME proceedings.[188] Further, Commerce's regulations require that components are valued at the actual value at the time of import, except if the components were purchased from an affiliated person, which is not the case here.[189]

Petitioners' Rebuttal Argument

- Commerce should continue to use surrogate values for this anti-circumvention inquiry.[190] Neither the statute nor Commerce's regulations preclude the use of Commerce's NME methodology in anti-circumvention inquiries, including the use of surrogate values.[191] Further, using surrogate values in anti-circumvention inquiries is consistent with Commerce's practice.[192]

- As explained in the *Preliminary Determination*, Commerce found using surrogate values was appropriate because the inquiry is an anti-circumvention proceeding initiated under the HFCs *Order*, which is an NME proceeding.[193] Following BMP's interpretation of the statute, if Commerce relied on actual prices for Chinese HFC components, BMP and its suppliers could circumvent the *Order* simply be manipulating the price.[194] This approach would reward the

[184] *See Preliminary Determination* PDM at 10-11.
[185] *See* BMP's Case Brief at 5.
[186] *Id*. at 4 (citing Section 781 of the Act).
[187] *Id*. at 4 (citing Sections 773(c)(1) and 773(c)(2) of the Act).
[188] *Id*. at 5.
[189] *See* BMP's Case Brief at 5 (citing 19 CFR 351.225(g) and 773(f)(3) of the Trade Act).
[190] *See* Petitioners' Rebuttal Brief at 7-8 (citing 19 CFR 351.225(g) and 773(f)(3) of the Trade Act).
[191] *Id*. at 7 (citing Petitioners' Letter, "Rebuttal Surrogate Country Comments," dated January 2020 at 2-7).
[192] *Id.* at 7 (citing *Preliminary Determination* PDM at 10-11; *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 77 FR 47596 (June 6, 2012) (*Graphite Electrodes from China*), and accompanying IDM at Comment 2).
[193] *Id.* at 7-8.
[194] *Id.* at 8.

most egregious sales at less-than-fair-value, by excluding those components from the *Order*.[195]

Choice's Rebuttal Argument

- Commerce should reject BMP's arguments for the following reasons: (1) the record supports circumvention regardless of whether surrogate values or actual prices are considered;[196] (2) the CIT has explicitly approved using a surrogate value methodology in anti-circumvention proceedings;[197] (3) BMP was unable to provide evidence showing that it was not affiliated with its suppliers; and (4) BMP has maintained a non-arm's length relationship with T.T. International (TTI), as detailed in pending federal court litigation between BMP and TTI.[198]

Commerce's Position:

In the *Preliminary Determination*, to determine whether the process of assembly in the United States is minor or insignificant, we analyzed the five factors under section 781(a) of the Act. One of the factors we analyzed, involved a surrogate value methodology to determine whether the value of the parts or components referred to in subparagraph (B) (*i.e.*, parts or components produced in the foreign country with respect to which such order or finding applies) is a significant portion of the total value of the merchandise.[199] In the *Preliminary Determination*, consistent with our practice in prior circumvention cases involving non-market economies, we used a surrogate value methodology for this factor.[200] Because this analysis under section 781(a)(1)(D) of the Act involves an NME country (*i.e.*, China), we used a surrogate country (Mexico) to value the unpatented R-421A in question.[201]

While BMP claims that we have no authority to use a surrogate value methodology in anti-circumvention cases or that the facts are different here, we disagree. Circumvention analyses take into account the particular facts of each proceeding. In this case, we are analyzing the value of the inputs coming from China. Unpatented R-421A is produced in China, an NME country, and is further processed into subject HFC blends in the United States. While real prices paid for inputs are typically used in the cost buildup for ME companies in ME proceedings, this is an anti-circumvention proceeding that pertains to the HFC blends from China *Order*, which is an NME proceeding. The presence of government controls on various aspects of NMEs render calculation of production costs invalid under Commerce's normal methodologies. The purpose of anti-circumvention inquiries is to determine whether merchandise being sold to the United States is circumventing the HFC blends *Order* on China. Thus, the application of Commerce's

[195] *Id.* at 8 (citing *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1188 (Fed. Cir. 1990) showing that the Federal Circuit has previously rejected interpretations of the statue that would in effect reward companies who engage in dumping.).
[196] *See* Choice's Rebuttal Brief at 2.
[197] *Id*. at 2 (citing *U.K. Carbon and Graphite Co., Ltd. v. U.S.*, 931 F. Supp. 2d 1322, 1336 (CIT 2013) (*U.K. Carbon and Graphite*)).
[198] *Id.* at 2 (citing Complaint (ECF#1), *T.T. International Co., Ltd. v. BMP International Co, Ltd. et al.*, No. 19-02044 (M.D. Fla. field August 16, 2019)).
[199] *See* section 781(a)(1)(D) of the Act.
[200] *See Graphite Electrodes from China* IDM at Comment 2, as upheld by the Court in *U.K. Carbon and Graphite*.
[201] *See Preliminary Determination* PDM at 10-11.

NME methodology is appropriate to analyze the unpatented R-421A costs in China. Nothing in the statute precludes us from using a surrogate value methodology in a circumvention inquiry. Also, we have used a surrogate value methodology in prior circumvention analyses involving NME countries,[202] and the CIT has upheld this practice in our circumvention determinations.[203]

While BMP asserts that Commerce use its ME purchases to evaluate the value of Chinese inputs, BMP misses the point of our analysis of the value of the subject merchandise. We are not valuing BMP's cost of its components; rather we are valuing components produced in China, in accordance with section 781(a)(1)(D) of the Act. The ME purchases from other countries by a Chinese company do not represent the value of the merchandise produced in China, which is the goal of our analysis.

Further, we do not find BMP's argument that the regulations allow Commerce to resort to the methodology under section 773(f)(3) of the Act only when components were purchased from an affiliated person to be persuasive. As noted above, Commerce has a consistent practice to use a surrogate value methodology in anti-circumvention cases for NME countries, which has been upheld by the CIT. [204] Moreover, although BMP references section 773(f)(3) of the Act, that section is related to the calculation of normal value for market economies, and does not pertain to NME countries.[205] Even assuming, *arguendo*, we found the portion of the statute cited by BMP to be meaningful for our analysis, BMP was unable to provide evidence demonstrating that its purchases of R-421A were made on an arm's length basis or came from unaffiliated suppliers. On the contrary, record evidence shows that BMP has maintained a long-standing relationship with certain Chinese suppliers of the merchandise in question and one of its companies is partially-owned by a Chinese company, which has subsidiaries that produce and export HFC components and subject blends.[206] Therefore, we find no reason to change our valuation methodology for the final determination.

Comment 5: Certification Requirements

In the *Preliminary Determination* we stated that "{i}n 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."[207] Therefore, we invited interested parties to comment on this issue.

Petitioners Arguments

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[202] *See, e.g., Graphite Electrodes from China* IDM at Comment 2; *see also CORE from China* IDM at Comment 6.
[203] *See U.K. Carbon and Graphite*, 931 F. Supp. 2d 1322, 1336.
[204] *Id*.
[205] *See* 773(f)(3) with heading "{s}pecial Rules for Calculation of Cost of Production and for Calculation of Constructed Value. For purposes of subsections (b) and (e)." We note that NMEs fall under 773(c), not subsections 773(b) and 773(e).
[206] *See* BPI Analysis Memorandum at 7, showing that BMP maintained a long-standing customer-supplier relationship with one of the Chinese suppliers from the underlying investigation and one of BMP's companies is partially-owned by a Chinese company named Zhejiang Juhua Co. Ltd.
[207] *See Preliminary Determination* PDM at 21.

- Commerce should adopt a certification regime or use particularized 10-digit case numbers to ensure that it is able to collect cash deposits on imports of unpatented R-421A but does not unlawfully collect cash deposits on entries of non-subject, patented Choice® R-421A.[208]

- Similar to a certification regime adopted by Commerce and CBP in other anti-circumvention cases, Commerce should instruct CBP to collect cash deposits and suspend liquidation for all entries of R-421A that are not accompanied by a certification executed by the importer of record that should: (1) identify the importer of record; (2) identify the Chinese producer and the exporter; (3) prove the goods are properly patented; and (4) identify the license agreement authorizing the production of the goods being entered.[209]

- The importer of record should be prepared to provide the certification and supporting documentation to CBP and/or Commerce, upon request for a specific time period.[210] Alternatively, Commerce could isolate excluded entries by assigning foreign producers unique 10-digit case numbers for use within the AD/CVD Case Reference File, which is within ACE.[211] Such a case number could be assigned only to entries to the company that produces Choice® R-421A, ensuring that the exclusion would only apply to this product. Using a 10-digit case number has the following benefits: (1) it will be easier for CBP to enforce by not requiring the need for certifications or supporting documents; (2) because case numbers would be established within anti-circumvention determinations, interested parties would have an opportunity to weigh and comment on the merits of such assignments; and (3) where eligibility for a previously assigned 10-digit case number changes, interested parties, including the importer of record, could seek modification through a changed circumstances review.[212]

Commerce's Position:

We find that the implementation of certification requirements, as outlined by the petitioners, is appropriate in this instance. Additionally, these certification requirements provide a means for companies like Choice to avoid application of AD duties under the HFCs *Order* for Choice® R-421A and prevent companies from exporting/importing unpatented versions of this product without paying the appropriate duties.

For the purposes of this anti-circumvention final determination, we have included certification language in the *Federal Register* notice,[213] and we will also include such certification language in our customs instructions to CBP, requiring that the importer/exporter identify the importer of record and the Chinese producer/exporter; provide documentation showing the goods are properly patented; and identify the license agreement authorizing the production of the goods being entered. The certification requirements are similar to requirements adopted in numerous

[208] *See* Petitioners' Case Brief at 2-3.
[209] *Id.* at 2-3.
[210] *Id.* at 2-3.
[211] *Id.* at 4-5 (citing https://www.cbp.gov/sites/default/files/assets/documents/2017-Feb/ace-terminology-10digit-company-status-20170125.pdf, to show an explanation of CBP implementation of 10-digit case numbers provided by Commerce).
[212] *Id.* at 4-5.
[213] *See* Appendices II, III, and IV of the *Federal Register* notice that accompanies this decision memorandum.

other anti-circumvention inquiries.[214] We find that these requirements are appropriate to ensure that duties are only collected on unpatented R-421A that are subject to this anti-circumvention inquiry and not on patented Choice® R-421A, which is explicitly excluded from the order. In this regard, we note that the certifications require timely completion at the time of shipment. Thus, while the certifications are only provided to CBP and Commerce on request, the certifications must be completed in real time on an entry- and shipment-specific basis. Further, we are unable to use the 10-digit case number, as suggested by the petitioner because (1) there is no existing mechanism to track or update such a specialized case number; (2) it could provide Choice's exporter with a duty-free loop-hole to ship other HFC blends through; and (3) in the future, there may be other licensed exporters of Choice® R-421A, and/or the current license holder may lose its license to export Choice® R-421A.

VI. 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 scope ruling and anticircumvention inquiry in the *Federal Register*.

☒ Agree ☐ Disagree

5/28/2020

X

Signed by: JOSEPH LAROSKI

Joseph Laroski
Deputy Assistant Secretary
for Policy and Negotiations

[214] *See, e.g.*, *Certain Corrosion-Resistant Steel Products from Taiwan: Affirmative Final Determination of Circumvention Inquiry on the Antidumping Duty Order*, 84 FR 70937 (December 26, 2019).