A-570-028
CIRC – HFC Components
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August 13, 2020

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

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

SUBJECT: Final Issues and Decision Memorandum for Anti-Circumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China: HFC Components

## I. SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the anti-circumvention inquiry of the antidumping duty (AD) order on hydrofluorocarbon (HFC) blends from the People's Republic of China (China).[1] In addition, we have analyzed the July 6, 2020 letter from the United States International Trade Commission (ITC), in which the ITC notified the Department of Commerce (Commerce) that it believed that inclusion of the merchandise subject to this inquiry within the scope of the *Order* would raise a serious injury issue,[2] as well as the comments of interested parties on the ITC Letter. We recommend that you approve the positions contained within the "Discussion of the Issues" section of this Issues and Decision Memorandum.

## II. BACKGROUND

On April 6, 2020, pursuant to section 781(e)(1)(A) of the Tariff Act of 1930, as amended (the Act), Commerce notified the ITC of its affirmative *Preliminary Determination*.[3] Commerce also informed the ITC of the its ability under the Act to request consultations with Commerce

[1] *See Hydrofluorocarbon Blends from the People's Republic of China: Antidumping Duty Order*, 81 FR 55436 (August 19, 2016) (*Order*).
[2] *See* ITC's Letter, "Anticircumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China, A-570-028; HFC Components from China," dated July 6, 2020 (ITC Letter).
[3] *See Hydrofluorocarbon Blends from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order for HFC Components; and Extension of the Time Limit for Final Determination*, 85 FR 20248 (April 10, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM); and Commerce's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Preliminary Determination of Circumvention of the Antidumping Duty Order with Respect to HFC Components Imported from China and Blended in the United States," dated April 6, 2020 (Commerce's Letter to ITC).

regarding Commerce's proposed inclusion of HFC components within the scope of the *Order* under the authority of section 781(a) of the Act.[4] On April 10, 2020, Commerce published the *Preliminary Determination* in the *Federal Register*.[5] In accordance with 19 CFR 351.309, we invited parties to comment on our *Preliminary Determination*. On May 8, 2020, A-Gas USA Inc., d/b/a A-Gas Americas (A-Gas); the American HFC Coalition (the petitioner);[6] BMP;[7] Daikin America, Inc. (Daikin); Hudson Technologies Company (Hudson); Kivlan and Company, Inc. and FluoroFusion Specialty Chemicals Inc. (collectively, Kivlan); National Refrigerants, Inc. (National); Weitron, Inc. (Weitron); and Zhejiang Quzhou Juxin Fluorine Chemical Co., Ltd. (Juxin) filed case briefs.[8] On May 22, 2020, the petitioner; A-Gas; BMP; Hudson; Juxin; Kivlan; and National filed rebuttal briefs.[9] On June 11, 2020, Commerce officials held consultations with officials from the ITC regarding the instant inquiry.[10] On July 6, 2020, Commerce received a letter from the ITC informing Commerce that the ITC believed there was a significant injury issue present with respect to the *Preliminary Determination*.[11] On July 13, 2020, the petitioner; A-Gas; BMP; Hudson; Juxin; Kivlan; and National filed comments in

[4] *See* Commerce's Letter to ITC.
[5] *See Preliminary Determination*, 85 FR at 20248.
[6] The American HFC Coalition is comprised of the following companies: Arkema Inc.; The Chemours Company FC LLC; Honeywell International Inc.; and Mexichem Fluor Inc.
[7] BMP USA, Inc.; iGas USA Inc.; Assured Comfort A/C Inc.; BMP International; Inc., LM Supply Inc.; and Cool Master U.S.A., L.L.C. (collectively, BMP).
[8] *See* A-Gas' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order for HFC Components; Case Brief for A-Gas Americas," dated May 8, 2020; Petitioner's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Case Brief," dated May 8, 2020; BMP's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Case Brief," dated May 8, 2020; Daikin's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Case Brief of Daikin America, Inc.," dated May 8, 2020; Hudson's Case Brief, "Hydrofluorocarbon Blends from the People's Republic of China, Anti-Circumvention Inquiry – HFC Components (A-570-028): Hudson Technologies Company's Case Brief," May 8, 2020; Kivlan's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Case Brief," dated May 8, 2020; National's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Case Brief," dated May 8, 2020; Weitron's Letter, "Weitron's Direct Administrative Case Brief in the 781(a) Anti-Circumvention Inquiry of HFC Components for Hydrofluorocarbon Blends from the People's Republic of China," dated May 8, 2020; and Juxin's Letter, "Juxin's Direct Administrative Case Brief in the 781(a) Anti-Circumvention Inquiry of HFC Components for Hydrofluorocarbon Blends from the People's Republic of China," dated May 8, 2020.
[9] *See* Petitioner's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Rebuttal Brief," dated May 22, 2020; A-Gas' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order for HFC Components; Rebuttal Brief for A-Gas Americas," dated May 22, 2020; BMP's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Rebuttal Case Brief," dated May 22, 2020; Hudson's Case Brief, "Hydrofluorocarbon Blends from the People's Republic of China, Anti-Circumvention Inquiry – HFC Components (A-570-028): Hudson Technologies Company's Rebuttal Brief," dated May 22, 2020; Juxin's Letter, "Juxin's Rebuttal Administrative Case Brief in the 781(a) Anti-Circumvention Inquiry of HFC Components for Hydrofluorocarbon Blends from the People's Republic of China," dated May 22, 2020; Kivlan's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Rebuttal Case Brief," dated May 22, 2020; and National's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Rebuttal Brief," dated May 22, 2020.
[10] *See* Memorandum, "Anti-Circumvention Inquiry of Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China – HFC Components & Indian Blends: Consultations with the United States International Trade Commission," dated June 12, 2020 (Consultations Memorandum).
[11] *See* ITC Letter.

response to the ITC Letter.[12] On August 4, 2020, we held a public hearing via teleconference to discuss the issues raised in the case briefs, rebuttal briefs, and the comments in response to the ITC Letter.[13]

## III. MERCHANDISE SUBJECT TO THE ANTI-CIRCUMVENTION INQUIRY

The anti-circumvention inquiry covers imports of HFC components R-32 (difluoromethane), R-125 (pentafluoroethane), and R-143a (1,1,1-trifluoroethane) from China that are further processed in the United States to create an HFC blend that would be subject to the *Order*.[14]

## 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.[15]

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[12] *See* Petitioner's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Rebuttal to the ITC Letter," dated July 13, 2020 (Petitioner's Comments on ITC Letter); A-Gas' Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Letter from the International Trade Commission (ITC); Comments," dated July 13, 2020 (A-Gas' Comments on ITC Letter); BMP's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Comments on ITC Letter," dated July 13, 2020 (BMP's Comments on ITC Letter); Hudson's Letter, "Hydrofluorocarbon Blends from the People's Republic of China, Anti-Circumvention Inquiry – HFC Components (A-570-028): Hudson Technologies Company's Comments on the ITC's Letter," dated July 13, 2020 (Hudson's Comments on ITC Letter); Juxin's Letter, "Comments on the ITC's Notification Letter in the 781(a) Anti-Circumvention Inquiry of HFC Components for Hydrofluorocarbon Blends from the People's Republic of China," dated July 13, 2020 (Juxin's Comments on ITC Letter); Kivlan's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Comments on ITC Letter," dated July 13, 2020 (Kivlan's Comments on ITC Letter); and National's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Comments on ITC Letter," dated July 13, 2020 (National's Comments on ITC Letter).

[13] *See* Public Hearing Transcript, "The Anti-Circumvention Inquiry on the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China," dated August 4, 2020.

[14] The *Order* covers five HFC blends (*i.e.*, R-404A, R-407A, R-407C, R-410A, and R-507/R-507A).

[15] 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.

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

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

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

HFC blends covered by the scope of the *Order* are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 3824.78.0020 and 3824.78.0050. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.[16]

## V. DISCUSSION OF THE ISSUES

### A. Legal Framework

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

> (1) In general. If
> (A) merchandise sold in the United States is of the same class or kind as any other merchandise that is the subject of
> (i) an antidumping duty order issued under section 736,
> (ii) a finding issued under the Antidumping Act, 1921, or
> (iii) a countervailing duty order issued under section 706 or section 303,
> (B) such merchandise sold in the United States is completed or assembled in the United States from parts or components produced in the foreign country with respect to which such order or finding applies,
> (C) the process of assembly or completion in the United States is minor or insignificant, and
> (D) the value of the parts or components referred to in subparagraph (B) is a significant portion of the total value of the merchandise,
>
> the administering authority, after taking into account any advice provided by the Commission under subsection (e), may include within the scope of such order or finding the imported parts or components referred to in subparagraph (B) that are used in the completion or assembly of the merchandise in the United States at any time such order or finding is in effect.

[16] *See Order*.

(2) Determination of whether process is minor or insignificant. In determining whether the process of assembly or completion is minor or insignificant under paragraph (1)(C), the administering authority shall take into account

(A) the level of investment in the United States,

(B) the level of research and development in the United States,

(C) the nature of the production process in the United States,

(D) the extent of production facilities in the United States, and

(E) whether the value of the processing performed in the United States represents a small proportion of the value of the merchandise sold in the United States.

(3) Factors to consider. In determining whether to include parts or components in a countervailing or antidumping duty order or finding under paragraph (1), the administering authority shall take into account such factors as

(A) the pattern of trade, including sourcing patterns,

(B) whether the manufacturer or exporter of the parts or components is affiliated with the person who assembles or completes the merchandise sold in the United States from the parts or components produced in the foreign country with respect to which the order or finding described in paragraph (1) applies, and

(C) whether imports into the United States of the parts or components produced in such foreign country have increased after the initiation of the investigation which resulted in the issuance of such order or finding.

Section 781(e)(1) of the Act provides, in relevant part, that before making an anti-circumvention determination with respect to section 781(a) (merchandise completed or assembled in the U.S. (other than minor completion or assembly)) with respect to an AD or countervailing duty (CVD) order as to which the ITC has made an affirmative injury determination, Commerce must notify the ITC of the proposed inclusion of such merchandise in the order. Section 781(e)(2) of the Act provides that the ITC may request consultations with Commerce regarding the proposed inclusion of merchandise within the scope of an AD or CVD order, following Commerce's notification of the ITC under section 781(e) of the Act. If, following consultations with Commerce, the ITC believes a significant injury issue is present, section 781(e)(3) of the Act allows the ITC to provide Commerce with written advice as to whether the proposed inclusion of the merchandise under investigation within the scope of the order pursuant to section 781(a) would be inconsistent with the ITC's prior affirmative injury determination upon which the order is based.

The legislative history of the Omnibus Trade and Competitiveness Act of 1988 (Conference Report 100-576), under which the anti-circumvention provisions in the statute were enacted, restates that "{b}efore making any determination regarding a proposed inclusion with respect to which the ITC has indicated its intention to provide written advice, {Commerce} shall take into account such written advice."[17] Further, Conference Report 100-576 provides that "the purpose of this provision. . . is to ensure that any anti-circumvention action taken is consistent with U.S. international obligations."[18] Additionally, Conference Report 100-576 states that:

[17] *See* Omnibus Trade and Competitiveness Act of 1988 (Public Law No. 100-418), Conference Report 100-576 (1988) (Conference Report 100-576) at 602 (1988).

[18] *Id.*

> {I}t is the expectation of the conferees that findings by the ITC that the inclusion of the merchandise is inconsistent with the prior injury determination would be relatively unusual, since the anti-circumvention provisions are intended to address efforts to import the same class or kind of merchandise in slightly modified form and should typically fall within the ITC's prior finding of injury.[19]

With respect to anti-circumvention findings under section 781(a) of the Act, Conference Report 100-576 provides in relevant part:

> In particular, the application of the U.S. finishing or assembly provision will not require new injury findings as to each part or component. The anti-circumvention provision is intended to cover efforts to circumvent an order by importing disassembled or unfinished merchandise for assembly in the United States. Hence, the ITC would generally advise as to whether the parts and components "taken as a whole" fall within the injury determination. If more than one part or component is proposed for inclusion, the ITC would not make separate findings as to each part or component but instead would determine whether the imported parts and components can be constructively assembled so as to constitute a like product for purposes of the original order. With respect to finishing in the United States, the ITC would advise whether the ITC examined the semi-finished product in the prior investigation or regards the semi-finished product as a like product.
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> The ITC would advise as to whether the inclusion of the parts or components, taken as a whole, would be inconsistent with its findings in the prior injury determination. The conferees expect a relatively narrow set of issues to arise: (1) whether the assembly being undertaken would qualify the assembler or finisher as a part of the U.S. industry under the prior industry definition; (2) whether the parts, components, or semi-finished products were treated as a distinct like product by the ITC in the prior injury determination and were therefore expressly or implicitly excluded from the order; and (3) whether the parts, components, or semi-finished products constitute a distinct like product, with distinct characteristics and uses, and therefore were not encompassed by the prior injury determination. While other issues could arise, the conferees expect that the bulk of the ITC's advisory functions will deal with these issues.[20]

Lastly, Conference Report 100-576 states that:

> {T}he conferees expect that in many cases, the relevant consultations can be handled informally, through a telephone call, or a meeting if more formal discussions are necessary. The ITC should only provide formal written advice when it determines that a significant injury issue is presented. Since most issues can be dealt with through consultations, resort to formal written advice will be the exception, not the rule. If ITC provides written advice on which Commerce bases

[19] *Id.* at 602-03.
[20] *Id.* at 603.

> a scope determination, the ITC would be responsible for defending such advice in any relevant judicial proceeding.[21]

### B. Relevant Factual Background

In the original investigation of HFC blends from China, the ITC determined that HFC blends and HFC components constituted two distinct domestic like products.[22] Thus, the ITC determined that there were two distinct domestic industries. Consequently, the ITC defined the domestic HFC blends industry as "consisting of all domestic producers of HFC blends."[23] Notably, the ITC did not draw a distinction of from where the domestic blends industry sourced the requisite components for blending subject HFC blends. As a result, all blenders of the five subject HFC blends located within the United States were considered as part of the domestic HFC blends industry. Separately, the ITC defined the domestic HFC components industry as "all domestic producers of HFC components."[24] Therefore, the ITC conducted separate injury analyses resulting in differing injury determinations with respect to HFC blends and HFC components:

> Based on the record in the final phase of this investigation, we determine that an industry in the United States producing {HFC} blends is materially injured by imports of HFC blends from China found by {Commerce} to be sold in the United States at less than fair value ("LTFV"). We further determine that an industry in the United States producing HFC components is neither materially injured nor threatened with material injury by reason of imports of HFC components from China found by Commerce to be sold in the United States at LTFV.[25]

Accordingly, Commerce removed HFC components from the scope of the *Order*:

> {O}n August 5, 2016, in accordance with section 735(d) of the Act, the ITC notified {Commerce} of its final determination in this investigation. In its determination, the ITC found two domestic like products: (1) HFC blends, and (2) HFC components. The ITC notified {Commerce} of: Its affirmative determination that an industry in the United States is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act, by reason of LTFV imports of HFC blends from {China}; its negative determination that an industry in the United States is not materially injured or threatened with material injury by reason

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[21] *Id.* at 604.
[22] *See* Hydrofluorocarbon Blends and Components from China, USITC Pub. 4629, Inv. No. 731-TA-1279 (Final) (August 2016) at 10 ("Based on our analysis, we define two domestic like products, one comprised of HFC blends and one comprised of HFC components.").
[23] *Id.* at 15.
[24] *Id.* The ITC further noted about the domestic HFC components industry, "Each U.S. producer, however, reported imports of HFC components from China. . . In light of this, the use of imported HFC components did not distinguish any of the domestic HFC components producers from each other during the POI, much less serve to benefit one of the producers over its competitors." Thus, the ITC also did not distinguish between domestic component producers that exclusively produced and sourced components in the United Sates and domestic components producers which imported HFC components from China in addition to their domestic production.
[25] *Id.* at 1; and 31-44 for a full discussion of the factors leading to the ITC's negative injury determination with respect to HFC components.

> of imports of HFC components from {China}. . . Therefore, in accordance with section 735(c)(2) of the Act, we are issuing this antidumping duty order with respect to HFC blends.[26]

As stated above, we held consultations with officials from the ITC on June 11, 2020, with respect to the instant inquiry.[27] On July 6, 2020, the ITC, pursuant to section 781(e)(3) of the Act, informed Commerce that it believed that an affirmative final determination by Commerce on HFC components from China would raise a serious injury issue.[28] Specifically, the ITC stated in its written advice:

> {T}he {ITC} believes a final determination by Commerce that HFC components from China are covered by the scope of the HFC blends from China antidumping duty order under the anti-circumvention provisions of the statute would be inconsistent with the {ITC}'s final determination in its original HFCs investigation that the domestic HFC component industry in the United States was not materially injured or threatened with material injury by imports of those same components from China.[29]

### C. Arguments from Interested Parties

*Petitioner's Comments on ITC Letter*

- The ITC Letter states the view of the ITC that Commerce's *Preliminary Determination* is inconsistent with the ITC's determination that the domestic producers of HFC components were not injured at the time of the original investigation. This issue has been addressed by all sides at multiple points in this inquiry. The ITC Letter, however, does not add anything to this issue nor does it address the key issue identified by the statute of whether an affirmative finding of circumvention will restore the original antidumping duty order to provide relief to the domestic HFC blends industry. Moreover, while making an obvious observation, the ITC Letter provides no legal or factual basis for a negative finding under section 781(a) of the Act.[30]

- The ITC Letter does not address the issues identified by the statute. Specifically, section 781(e)(3) of the Act allows the ITC to notify Commerce as to "'whether the inclusion {of the components} would be inconsistent with the affirmative determination of the Commission on which the order or finding is based." Here, the ITC does not address its affirmative injury determination on HFC Blends, only its negative injury determination with respect to components. Thus, the ITC has not focused on the impact of the finished product after minor or insignificant U.S. processing.[31]

- Section 781(a) of the Act applies to blends finished in the United States which are the same class or kind of merchandise subject to the antidumping duty order, which is the

[26] *See Order*, 81 FR at 55437.
[27] *See* Consultations Memorandum.
[28] *See* ITC Letter.
[29] *Id.*
[30] *See* Petitioner's Comments on ITC Letter at 1-2.
[31] *Id.* at 2.

reason the ITC is invited to consider whether the affirmative injury finding is consistent with the findings of the anti-circumvention inquiry. In multiple other anti-circumvention inquiries Commerce has explained that the statute under the anti-circumvention provisions treats the imports of parts and components as constructively assembled subject merchandise.[32] This interpretation is fully consistent with the statute under section 781(a)(1)(A) of the Act.[33]

- The question here is whether the minor or insignificant blending operations produce a finished product within the same class or kind of merchandise as the *Order*, which "effectively nullifies the remedial effect" of the *Order*. The ITC Letter does not address the "constructively assembled" merchandise or even acknowledge past precedent or the language of the anti-circumvention provisions in the Act.[34]

- The ITC Letter provides no basis from departing from established interpretation of the statute, which has been affirmed by the Courts.[35] Moreover, the ITC Letter does not dispute Commerce's finding that the U.S. processing was "minor or insignificant" as provided in section 781(a)(2) of the Act, or the finding that the patterns of trade show that Chinese producers and exporters, and U.S. importers, we attempting to evade the *Order*.[36] The ITC Letter also does not dispute the ITC's finding that the majority of imports of Chinese HFC components are used to produce HFC blends.[37]

*A-Gas' Comments on ITC Letter*

- The ITC did not establish a factual or legal basis in its letter for the position it took, nor did it elaborate beyond merely stating its position.[38]

- Section 781 of the Act is a congressional mandate that allows Commerce to stop the circumvention of its antidumping duty orders. Thus, initiation of an anti-circumvention inquiry is within Commerce's authority under the statute and Commerce's regulations.[39] Moreover, as the U.S. Court of Appeals for the Federal Circuit (CAFC) held, Commerce

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[32] *Id.* at 3 (citing *Anti-Circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 63 FR 54672, 54673 (October 13, 1998) (*Pasta from Italy*) (quoted with approval in *Ausimont SpA v. United States*, 26 CIT 1357, 1363 (CIT 2002) (*Ausimont*)); *Initiation of Anticircumvention Inquiry on Antidumping and Countervailing Duty Orders on Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom and Germany*, 62 FR 34213, 34215 (June 25, 1997) (*Bismuth Carbon Steel*); and *Granular Polytetrafluoroethylene Resin from Italy: Final Affirmative Determination of Circumvention of Antidumping Duty Order*, 58 FR 26100, 26102 (April 30, 1993) (*Granular PTFE from Italy*).

[33] *Id.* at 4 (citing *Ausimont*, 26 CIT at 1362-63; and *Peer Bearing Co. – Changshan v. United States*, 128 F. Supp. 1304, 1312 (CIT 2015)).

[34] *Id.* at 4.

[35] *Id.* (citing *Ausimont*, 26 CIT at 1362-63)

[36] *Id.* at 4-5 (citing *Preliminary Determination* PDM at 13-16).

[37] *Id.* (citing ITC Final Determination at I-16 and III-7)

[38] *See* A-Gas' Comments on ITC Letter at 5.

[39] *Id.* at 6 (citing *Certain Uncoated Paper from Australia, Brazil, the People's Republic of China, Indonesia, and Portugal: Affirmative Final Determination of Circumvention of the Antidumping and Countervailing Duty Orders*, 82 FR 41610 (September 1, 2017), and accompanying Issues and Decision Memorandum at 5).

is able to conclude that certain products are within the scope of an order, even when those products do no fall within the literal scope of the order to prevent circumvention.[40] The CAFC has also ruled that "Congress has provided that Commerce's consideration of certain types of articles within the scope of an {antidumping duty} order will be a proper clarification or interpretation of the order instead of improper expansion or change even where these products do not fall within the order's literal scope.[41]

- The U.S. Court of International Trade (CIT) has described the legal framework under which Commerce conducts its circumvention inquiries to be separate from that of its scope inquiries, while maintaining that this interpretation would not allow Commerce to arbitrarily rewrite the scope of an order.[42]

- The Act requires only that Commerce confer with the ITC regarding circumvention as to whether the inclusion of the merchandise subject to an anti-circumvention inquiry would be inconsistent with the affirmative injury determination of the ITC.[43] Commerce did so, and nothing in the ITC Letter should prevent Commerce from moving forward with an affirmative finding that HFC components are circumventing the scope of the *Order*, which is fully consistent with the ITC's injury analysis in the original investigation.

- The statute only requires Commerce to "take into account" any written advice provided by the ITC under section 781(e)(3) of the Act. Thus, the statute does not give the ITC a decisional role in an anti-circumvention inquiry. Moreover, the legislative history states that the purpose of Commerce seeking the ITC's advice is so that any anti-circumvention action taken is consistent with U.S. international obligations.[44] The ITC Letter in no way explains how Commerce's *Preliminary Determination* does not meet the United States' international obligations.

- By making an affirmative *Preliminary Determination*, Commerce concluded that the imported HFC components, while "nominally component chemicals," are considered to be HFC Blends.[45] This view is consistent with Congress', as the legislative history states that circumvention findings address imported parts and components that "can be constructively assembled so as to constitute a like product for purposes of the original order."[46] There is an affirmative finding of injury with respect to HFC blends; thus, the United States' international obligations have been met.

- If the scope had not originally included HFC components, there would have been no injury determination by the ITC on HFC components. The ITC does not explain why there should be less protection from circumvention where the parts or components were

[40] *Id.* (citing *Deacero S.A. de C.V. v. United States*, 817 F. 3d 1332, 1337 (CAFC 2016)).
[41] *Id.* (quoting *Target Corp. v. United States*, 609 F. 3d 1352, 1355 (CAFC 2010)).
[42] *Id.* at 6-7 (quoting *Tai-Ao Aluminum (Taishan) Co., Ltd. v. United States*, 391F. Supp. 3d 1301, 1310-11 (CIT 2019)).
[43] *Id.* at 7-8 (citing section 781(e) of the Act).
[44] *Id.* at 8-9 (quoting Conference Report 100-576 at 602-03).
[45] *Id.* at 9 (citing *Bismuth Carbon Steel*, 62 FR at 34215; *Granular PTFE from Italy*, 58 FR at 26102; and *Pasta from Italy*, 63 FR 54672).
[46] *Id.* (citing Conference Report 100-576 at 603).

originally within the scope of the investigation, but then considered outside the scope. The fact that the ITC considers HFC blends and HFC components to be separate domestic like products bears no weight in the context of section 781(e) of the Act, which only discusses ITC advice on the basis of an affirmative injury determination, which, in the instant case, is only on HFC blends, not components.[47]

- In the original investigation, the ITC examined the entire market for HFC components, regardless of use or channels of sale. Here, Commerce's *Preliminary Determination* was confined to components used to blend HFC blends, not the components used in out-of-scope blends or other applications, which was the basis for the ITC's negative injury determination with respect to HFC components. There is no AD order which applies to the subject components for uses other than the blending of HFC blends. In addition, the ITC determination was based on the facts that existed at the time of the original investigation, which did not include a surge in imports of HFC components. Thus, there is no inconsistency with the ITC's injury determination for the ITC to object to as the anti-circumvention inquiry is "fundamentally different" than the ITC's negative injury determination with respect to components. Specifically, this anti-circumvention inquiry is conducted at a different time, considers a narrower set of merchandise, and is based on different facts. In addition, Commerce did "understand and consider how the classes of merchandise was defined and analyzed in the original investigation.[48]

- Because the ITC Letter states that the ITC believes the *Preliminary Determination* is inconsistent with its negative injury determination on HFC components, Commerce does not need to consider the ITC's advice as the statute references the affirmative injury determination.[49] The ITC's affirmative injury determination found that imports of HFC blends from China injured the domestic industry. Commerce has conducted this anti-circumvention inquiry to remedy that injury determination as imports of HFC components are circumventing the *Order*. The Act only requires consultations between Commerce and the ITC with respect to the ITC's affirmative injury determination, and Commerce's *Preliminary Determination* is wholly consistent with the ITC's affirmative injury determination.[50]

- Congress' intent in enacting this portion of the statute was not to require consultations so that the ITC could weigh in on Commerce's analysis of the circumvention factors, but to advise whether the definitions of like products were consistent between the injury investigation and the anti-circumvention inquiry.[51] Congress also did not intend to prevent anti-circumvention inquiries in instances where the parts or components were not included in the ITC's affirmative injury determination. The statute's anti-circumvention sections would be invalidated by such an interpretation.[52] This point is emphasized by

[47] *Id.* at 10.
[48] *Id.* at 10-11.
[49] *Id.* at 11.
[50] *Id.* at 12.
[51] *Id.* at 13-14 (quoting Conference Report 100-576 at 603).
[52] *Id.* at 14.

Conference Report 100-576's list of situations in which the ITC would need to provide advice.[53]

- Commerce has shown that it is aware that HFC components were determined by the ITC and were, therefore, not encompassed by the prior HFC blends injury determination, but a separate injury analysis. However, section 781(e) of the Act focuses on whether the subject merchandise is constructively imported by minor processing in the United States, not whether HFC blends and components are the same product. Moreover, the conferees do not state whether the situations described in Conference Report 100-576 where the ITC would provide advice weigh for or against a finding of circumvention. This is why the conferees stated that the application of the anti-circumvention provisions in the statute would not require new injury determinations for each part or component.[54]

- The nature of circumvention requires Commerce to look at the factors in real time, not in the context of the original investigation. The ITC considered different facts in the original investigation, in which the use of Chinese components for blending was not as widespread, nor was there a surge of imports of Chinese components. Thus, a contrary reading of the statute would nullify the statute's requirement that Commerce consider patterns of trade.[55]

- Even if the section 781(e) of the Act allowed the ITC to comment on the merits of Commerce's circumvention analysis, the ITC would have to analyze the components industry at the time of the circumvention inquiry, which would include changes from the original investigation.[56]

- It is clear from the legislative history that Commerce's proposed affirmative determination of circumvention does not nullify the ITC's negative injury determination with respect to HFC components. To find such would mean there rarely could be anti-circumvention inquiries, since components of subject merchandise often have other uses. In addition, such an interpretation would mean that there was no need for advice from the ITC as envisioned by section 781(e) of the Act.

*BMP's and Kivlan's Comments on ITC Letter*

- The ITC letter informed Commerce that the inclusion of HFC components within the *Order* would raise a serious injury issue; thus, Commerce must reach a negative final determination. The ITC Letter confirms that Commerce cannot expand the scope of the *Order* here without invalidating the ITC's negative injury determination with respect to HFC components. An affirmative final determination of circumvention would be

[53] *Id.* at 14-15 (quoting Conference Report 100-576 at 603).
[54] *Id.* at 15.
[55] *Id.* at 16.
[56] *Id.*

contrary to law and precedent which require that an antidumping duty order be supported by an affirmative injury determination.[57]

- While the Courts have affirmed that the anti-circumvention provisions of the statute allow Commerce to expand the scope of an antidumping or countervailing duty order to products not covered by the existing scope, that authority is extremely limited and does extend to products which the ITC have explicitly determined where not materially injuring, or threatening material injury to, the domestic industry.[58] The Courts have explained that an antidumping order must be supported by an affirmative finding of injury by the ITC. Further, any expansion of the scope of that order "beyond the limits of the ITC injury determination" would violate both U.S. and international law.[59]

- The Courts have specifically held that Commerce may not interpret an order to include a product for which the ITC reached a negative injury determination, also calling the fact that U.S. and international law necessitate an affirmative injury determination by the ITC a "fundamental requirement."[60] As such, it would be contrary to the purpose of the antidumping laws were Commerce able to assess antidumping duties on products for which the ITC had reached a negative injury determination.[61] Thus, Commerce must reach a negative determination in light of the ITC Letter and in accordance with established law.

*Hudson's Comments on ITC Letter*

- The ITC Letter is correct in stating that the inclusion of HFC components in the *Order* would be inconsistent with its injury determination, and, thus, Commerce should issue a negative final determination in this inquiry.[62] The legislative history of the anti-circumvention provision states that it would be "relatively unusual" that the ITC would find that inclusion of merchandise subject to an anti-circumvention inquiry would be inconsistent with its prior injury determination and that written advice would often be unnecessary.[63]

- In cases where the ITC determines that a significant injury issue is present, Conference Report 100-576 instructs the ITC to provide Commerce with "formal written advice."[64]

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[57] *See* BMP's Comments on ITC Letter at 1-2; and Kivlan's Comments on ITC Letter (both citing section 731 of the Act and Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994).
[58] *See* BMP's Comments on ITC Letter at 2; and Kivlan's Comments' on ITC Letter at 2 (both citing *AMS Assocs. v. United States*, 737 F. 3d 1338, 1343 (CAFC 2013)).
[59] *See* BMP's Comments on ITC Letter at 2-3; and Kivlan's Comments on ITC Letter at 2-3 (both citing *Wheatland Tube Co. v. United States*, 973 F. Supp. 149, 158 (CIT 1997), *dismissed*, 152 F. 3d. 938 (CAFC 1998), and *aff'd Wheatland*, 161 F. 3d 1365 (CAFC 1998) (*Wheatland*)).
[60] *See* BMP's Comments on ITC Letter at 3; and Kivlan's Comments on ITC Letter at 3 (both citing *Maquilacero S.A. de C.V. v. United States*, 256 F. Supp. 3d 1294, 1311 (CIT 2017) and *Columbia Forest Prod. v. United States*, 399 F. Supp. 3d 1283, 1294 (CIT 2019) (*Columbia Forest*)).
[61] *See* BMP's Comments on ITC Letter at 3; and Kivlan's Comments on ITC Letter at 3 (both citing *Wheatland*, 161 F. 3d at 1371).
[62] *See* Hudson's Comments on ITC Letter at 2.
[63] *Id.* at 2-3 (citing Conference Report 100-576 at 602-03).
[64] *Id.* at 3 (citing Conference Report 100-576 at 604).

This role the ITC performs ensures that affirmative circumvention findings are in accordance with U.S. law and U.S. international obligations, which require an affirmative injury finding as a condition of the imposition of duties. This role provided to the ITC also shows that Commerce's authority to include products within the scope of an order using the anti-circumvention provisions is limited. Thus, Congress' intent in providing this role to the ITC was to help ensure that Commerce's anti-circumvention determinations stayed within these limits.[65]

- The ITC Letter confirms that Commerce is precluded from including HFC components within the scope of the *Order* because of the ITC's original negative injury determination with respect to HFC components. Commerce may not expand an order using an anti-circumvention inquiry to include products explicitly excluded from the order.[66]

- The ITC determined in the original investigation that the domestic HFC components industry was not injured, or threatened with injury, by imports of HFC components from China, and, thus, Commerce explicitly excluded them from the *Order*.[67] In light of this, Commerce does not have the authority to determine that HFC components are now covered by the *Order*, and doing so would be contrary to law. The ITC was provided the opportunity to provide advice from Congress, expressly to avoid unlawful application of section 781(a) of the Act. Since the ITC has stated its views, Commerce has "no legitimate basis for an affirmative determination."[68] Thus, Commerce should continue to exclude HFC components from the scope of the *Order* and issue a negative final determination in this inquiry.

*Juxin's Comments on ITC Letter*

- The ITC Letter stated that the ITC believed there was a significant injury issue present and that the inclusion of HFC components within the scope of the *Order* would be inconsistent with the ITC's injury determination with respect to components.[69] Juxin and its affiliate Zhejiang Quzhou Lianzhou Refrigerants Co., Ltd. (Lianzhou) have advocated this same position before Commerce, yet Commerce still initiated the anti-circumvention inquiry and proceeded to issue an affirmative *Preliminary Determination*.[70]

- In the *Preliminary Determination*, Commerce completely ignored the legal arguments made by the respondents. The ITC has now provided advice which supports the same position Juxin, Lianzhou, and others have made since before initiation. Commerce has an obligation to no longer ignore the law and the overwhelming precedent of the ITC Letter;

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[65] *Id.* (citing Conference Report 100-576 at 602-04).
[66] *Id.* at 4 (citing *Columbia Forest*, 399 F. Supp. 3d at 1293).
[67] *Id.* (citing ITC Final Determination at 31-44; and *Order*, 81 FR a 55436).
[68] *Id.* at 4.
[69] *See* Juxin's Comments on ITC Letter at 2 (quoting ITC Letter).
[70] *Id.* at 2-3 (quoting Lianzhou's Letter, "Zhejiang Quzhou Lianzhou Refrigerants Co., Ltd.'s Response to American HFC Coalition's Request for a §781(a) Anti-Circumvention Inquiry and Request for Meeting, Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China," dated May 14, 2019 at 14-15; also quoting Juxin's January 24, 2020 Initial Questionnaire Response at 1-2; and Juxin's Case Brief at 3-4).

the anti-circumvention inquiry must now be rescinded because it was improvidently initiated.[71]

*National's Comments on ITC Letter*

- The ITC provided Commerce with written advice confirming that Commerce's *Preliminary Determination* presents a "serious injury issue" that is inconsistent with the ITC's final injury determination with respect to HFC blends and HFC components.[72] The ITC Letter highlights the fundamental legal requirement that duties may only be imposed on merchandise for which there has been an affirmative injury determination to an industry in the United States.[73] Although section 781(a) of the Act provides Commerce the authority to include parts or components circumventing an AD order issued under section 731 of the Act, it does not free Commerce from the legal prerequisite that an affirmative injury finding must be made on imported merchandise to be subject to antidumping duties.[74]

- In no prior anti-circumvention inquiry has the ITC provided Commerce written notice that the inclusion of merchandise under an AD order would be inconsistent with its prior injury determination. While the ITC has the authority to provide written advice, the ITC has never had cause to do so. That the ITC has done so here demonstrates the "exceptional nature of this case" and that the imposition of duties on imports of HFC Components, especially National's, would be unlawful.[75]

- The Act states that Commerce must take into account any advice provided by the ITC to make a determination under section 781(a) of the Act.[76] In enacting the anti-circumvention provisions of the statute, the legislative history shows Congress specifically intended for the ITC to provide Commerce with formal written advice with respect to any serious injury issues.[77] The legislative history also demonstrates Congress' belief that if the ITC provided Commerce advice that there was a significant injury issue, it would likely focus on three issues: (1) whether the assembler or finisher would fall under the definition of the domestic industry in the prior industry definition; (2) whether the parts or components were treated as a distinct like product by the ITC in the prior injury determination and excluded from the order; and (3) whether the parts or components constitute a distinct like product, with distinct characteristics and uses, and were not encompassed by the prior injury determination.[78]

- These factors listed in the conference report clearly demonstrate that National's imports of HFC components cannot be circumventing the *Order*. The ITC affirmatively determined that the members of the domestic HFC blends industry included domestic

[71] *Id.* at 4.
[72] *See* National's Comments on ITC Letter at 2 (quoting ITC Letter).
[73] *Id.* at 3 (citing section 731 of the Act).
[74] *Id.* at 3 (citing 140 Congressional Record E2385-88 (December 20, 1994) (statement of Rep. Crane)).
[75] *Id.* at 4.
[76] *Id.* (citing section 781(a)(1) of the Act).
[77] *Id.* at 4-5 (quoting Conference Report 100-576 at 602).
[78] *Id.* at 5 (quoting Conference Report 100-576 at 602).

HFC blends producers who consume imported HFC components,[79] which the legislative history makes clear that the production activity resulting in a company being regarded as a member of the domestic industry could not be circumventing an order designed to protect that industry.

- The ITC also affirmatively determined that HFC blends and components make up to separate like products, and, thus, there were two domestic industries producing two distinct products.[80] Thus, the ITC conducted two separate injury analyses with separate injury determinations, resulting in the negative injury determination for HFC components.[81] Unlike any other product Commerce has considered under section 781(a) of the Act, the ITC specifically considered the fact pattern present here and determined the importation of HFC components from China to be non-injurious. Thus, in line with issue (2) of the legislative history, the proposed inclusion of HFC components in the scope of the *Order* is obviously inconsistent with the ITC's determination that HFC components are excluded from the definition of the domestic like product upon which the ITC's affirmative injury determination, and the *Order*, is made.[82]

- Congress never intended for Commerce to use the anti-circumvention provisions to contradict the ITC's prior findings in a proceeding, and that the ITC would intervene in Commerce's anti-circumvention inquiries only when a significant injury issue was present. In the instant case, the ITC has advised Commerce that Commerce's proposed expansion of the scope to encompass HFC components is inconsistent with its prior injury findings. Commerce must take the ITC's advice into account and there is no ambiguity with respect to the ITC's original injury determination, the statute, or legislative history. Thus, Commerce must find that imports of HFC components are not circumventing the *Order*.

- Finding no circumvention would not mean that duties could never be imposed on HFC components. Arkema filed an AD petition on R-32 on January 23, 2020, and the ITC issued an affirmative preliminary injury determination.[83] If Commerce finds that R-32 has been unfairly traded and the ITC reaches an affirmative final injury determination, duties may be imposed on that HFC component.[84] Material injury cannot be found with respect to R-143a because it is not produced in the United States, but Honeywell could petition for the imposition of AD duties on imports of R-125 since it is a domestic producer.

**D. Commerce's Position**

As discussed above, section 781(a)(1) of the Act states that Commerce:

[79] *Id.* at 6 (citing ITC Final Determination at 10-13).
[80] *Id.* (citing ITC Final Determination at 7 n.25).
[81] *Id.* at 6-7 (citing ITC Final Determination at 31-44).
[82] *Id.* at 7.
[83] *Id.* at 8 (citing *Difluoromethane (R-32) from China*, 85 FR 14703 (March 13, 2020)).
[84] *Id.* (citing section 731 of the Act)

> after taking into account any advice provided by the {ITC}. . . **may** include within the scope of such order or finding the imported parts or components. . . that are used in the completion or assembly of the merchandise in the United States at any time such order or finding is in effect. (emphasis added).

As required by section 781(a)(1) of the Act, we have considered the written advice provided by the ITC. As explained above, on July 6, 2020, the ITC provided formal written advice under section 781(e) of the Act that inclusion of the three HFC components at issue within the AD order on HFC blends from China would raise a significant injury issue because it would be inconsistent with the ITC's underlying injury determination. To our knowledge, this is the first instance in over 30 years since the enactment of the anti-circumvention provisions of the statute that the ITC has requested consultations or provided Commerce with such written advice. That said, although this is an issue of first impression, it is specifically contemplated under the statute and relevant legislative history, discussed above.[85]

Based on the ITC's advice, we determine that the merchandise subject to this anti-circumvention inquiry should not be included within the scope of the *Order*. Thus, for the final determination, we have determined not to include HFC components R-32 (difluoromethane), R-125 (pentafluoroethane), and R-143a (1,1,1-trifluoroethane) from China that are further processed in the United States to produce subject HFC blends to be within the scope of the *Order*.

Interested parties raised several comments regarding the ITC's Letter, summarized above. We find it appropriate to respond to arguments on the narrow issue of whether, and to what extent, Commerce should take into account the ITC's advice. With respect to the remaining arguments challenging the substance of the ITC's Letter (including, *inter alia*, the factual and legal basis for the ITC's letter), Commerce is not addressing those arguments. As indicated in the legislative history, where Commerce relies on the ITC's advice, as we have done so here, the ITC would be responsible for defending such advice in any relevant judicial proceeding.[86]

Section 781(a) of the Act provides that, after taking into account any advice by the ITC, Commerce may include within the scope of the order the parts or components at issue. Neither the Act nor the legislative history explains whether, and to what extent, Commerce should take into account ITC advice that the proposed inclusion raises a significant injury issue. However, we find that the statutory framework and legislative history together provide a basis to rely on the ITC's advice. In general terms, section 731 of the Act requires both an affirmative Commerce determination of sales at less than fair value and an affirmative determination by the ITC that the relevant domestic industry is materially injured, or threatened with material injury, as a result of the dumped imports before imposing duties under an AD or CVD order. Therefore, without an affirmative ITC injury determination, Commerce may not issue an order with respect to the class or kind of merchandise covered by the investigation pursuant to section 736 of the Act.

Although we agree with parties that the ITC is not granted a decisional role by the statute with respect to anti-circumvention inquiries, the statute explicitly directs Commerce to consider any

[85] Conference Report 100-576 at 602.
[86] *Id.* at 604.

advice provided to us by the ITC.[87] Congress intended that Commerce would take into account the ITC's advice when provided, or it would not have included a provision directing Commerce to do so for an event it believed would be "relatively unusual."[88] Thus, the legislative history and the Act, despite not granting a decisional role to the ITC, affords significant weight to the ITC's written advice in an anti-circumvention proceeding involving the type of issue at hand in this proceeding. Here, the ITC has advised that inclusion of the components at issue would raise a significant injury issue. We find no compelling reason to disregard this advice.

The petitioner argues that section 781(a) of the Act applies to HFC blends finished in the United States that are the same class or kind of merchandise subject to the *Order*.[89] Both parties cite multiple other anti-circumvention inquiries where Commerce has explained that the anti-circumvention provisions in the Act treat the imports of parts and components that are completed or assembled into subject merchandise in the United States as constructively assembled subject merchandise.[90] This interpretation, the petitioner asserts, is fully consistent with the statute under section 781(a)(1)(A) of the Act.[91]

We agree that under section 781(a) of the Act, Commerce's usual practice is to treat imported components or parts of subject merchandise that are completed or assembled in the United States as constructively assembled subject merchandise, *i.e.*, as the same class and kind of merchandise.[92] However, the cases cited by the petitioner and A-Gas do not follow the same unique fact pattern present in the instant inquiry.[93] In those cases, the ITC did not specifically determine that the merchandise subject to the anti-circumvention inquiries was a distinct domestic like product produced by a separate domestic industry from the injured industry, nor do those cases compel us to set aside the ITC's advice in this inquiry[94]

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[87] *See* section 781(a)(1) of the Act.
[88] *See* Conference Report 100-576 at 602.
[89] *See* Petitioner's Comments on ITC Letter at 3.
[90] *Id.*; and A-Gas' Comments on ITC Letter at 9 (both citing *Anti-Circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 63 FR 54672, 54673 (October 13, 1998) (*Pasta from Italy*) (quoted with approval in *Ausimont SpA v. United States*, 26 CIT 1357, 1363 (CIT 2002) (*Ausimont*)); *Initiation of Anticircumvention Inquiry on Antidumping and Countervailing Duty Orders on Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom and Germany*, 62 FR 34213, 34215 (June 25, 1997) (*Bismuth Carbon Steel*); and *Granular Polytetrafluoroethylene Resin from Italy: Final Affirmative Determination of Circumvention of Antidumping Duty Order*, 58 FR 26100, 26102 (April 30, 1993) (*Granular PTFE from Italy*)).
[91] *See* Petitioner's Comments on ITC Letter at 4 (citing *Ausimont*, 26 CIT at 1362-63; and *Peer Bearing Co. – Changshan v. United States*, 128 F. Supp. 3d 1304, 1312 (CIT 2015)).
[92] *See, e.g.*, *Pasta from Italy*, 63 FR at 54674 ("Under section 781(a) of the Act, such components are treated as constructively the subject merchandise upon importation.").
[93] *See, e.g.*, *Pasta from Italy, Ausimont, Bismuth Carbon Steel,* and *Granular PTFE from Italy*.
[94] *See, e.g.*, *Pasta from Italy, Ausimont, Bismuth Carbon Steel, Granular PTFE from Italy*; compare *Steel Wire Rope from Mexico; Affirmative Final Determination of Circumvention of Antidumping Duty Order*, 60 FR 10831, 10832 (February 28, 1995); and *Initiation of Anticircumvention Inquiry on Antidumping and Countervailing Duty Orders on Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom and Germany*, 62 FR 34213, 34215-16 (June 25, 1997) with Steel Wire Rope from the Republic of Korea and Mexico, USITC Pub. 2613, Inv. Nos. 731-TA-546 and 547 (Final) (March 1993) at 6 ("{Commerce} defined the class or kind of merchandise subject to these investigation as steel wire rope. . . other than stranded wire") and 7-8; and *Certain Hot-Rolled Lead and Bismuth Carbon Products from Brazil, France, Germany, and the United Kingdom*, USTIC Pub. 2611 Invs. Nos. 701-TA-314-317 (Final) (March 1993) at 6 ("{Commerce} defined the class or kind of merchandise subject to investigation as follows. . . excluded are semi-finished steels") and 9-10.

Here, as Congress envisioned, the ITC used its authority under section 781(e)(3) of the Act to advise Commerce that it believes a significant injury issue would arise should Commerce determine to include HFC components within the scope of the *Order* because such an inclusion would be inconsistent with the ITC's prior injury determination. As required by section 781(a) of the Act, we have considered the advice provided by the ITC, and we find it would be inappropriate to determine that the merchandise subject to this anti-circumvention inquiry should be included within the scope of the *Order*. Thus, for the final determination, we have determined not to include HFC components R-32 (difluoromethane), R-125 (pentafluoroethane), and R-143a (1,1,1-trifluoroethane) from China that are further processed in the United States to produce subject HFC blends to be within the scope of the *Order*.[95]

Lastly, the interested parties raised a number of other issues for the final determination in their case and rebuttal briefs.[96] However, because we have determined not to include HFC components from China within the scope of the *Order*, these issues are moot, and we have not summarized or addressed them here.

## VI. RECOMMENDATION

Based upon the advice provided by the ITC in its letter regarding the significant injury issues that could arise from their inclusion, we recommend not including HFC components R-32, R-125,

[95] While we have determined not to include these HFC components within the scope of the *Order*, we note that the petitioner is not without other avenues of relief if it is being materially injured, or threatened with material injury, by reason of imports of HFC components sold at LTFV, or if such imports are materially retarding the establishment of a domestic industry. For example, the petitioner, or the individual companies comprising the petitioner, could file a new petition covering these components. Indeed, Commerce recently initiated an LTFV investigation on R-32 from China. *See Difluoromethane (R-32) from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 85 FR 10406 (February 24, 2020).

[96] These issues include: (1) whether to permit another opportunity to provide briefs or comments after receiving written advice from the ITC; (2) whether the LTFV investigation of R-32 from China conflicts with this anti-circumvention inquiry; (3) Commerce's notification to the ITC; (4) Commerce's analysis of the circumvention factors under section 781(a) of the Act; (5) whether to apply adverse facts available to companies that failed to cooperate in this proceeding; (6) whether an affirmative final determination should be made on a country-wide or company-specific basis; (7) Commerce's customs instructions for the *Preliminary Determination*; (8) whether suspension of liquidation and cash deposits should be applied retroactively to the date of initiation; (9) whether to impose a certification scheme; (10) the use of surrogate values; (11) surrogate country and the selection of surrogate values; (12) whether to include components that were not subject to the original HFC blends investigation; and (13) whether Commerce should create an import monitoring system for HFC components.

and R-143a from China within the scope of the *Order*. If accepted, we will publish the final determination of this anti-circumvention inquiry in the *Federal Register*.

| ☒ | ☐ |
|---|---|
| Agree | Disagree |

8/13/2020

X 

Signed by: JOSEPH LAROSKI

Joseph A. Laroski Jr.
Deputy Assistant Secretary
for Policy and Negotiations