A-570-028
CIRC – Indian Blends
Public Document
E&C/OII: JAG/BAL

September 25, 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: Indian Blends

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 blends (HFCs) from the People's Republic of China (China).[1] We have, as described below, changed certain positions 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 anti-circumvention inquiry for which we received comments and rebuttal comments from interested parties:

General Issues

Comment 1: Whether Commerce's Initiation and *Preliminary Determination* Were Lawful with Respect to the ITC's Negative Injury Determination
Comment 2: Whether to Use Surrogate Values to Value Chinese-Origin Material Inputs
Comment 3: Whether the Production Process in India is Minor or Insignificant and Whether the Value of Further Processing in India Represents a Small Portion of the Value of U.S. Merchandise
Comment 4: Validity of the 12 Month Look-Back Provision of the Certification Requirements
Comment 5: Whether the Final Determination Should Be Retroactive to the Date of Initiation

[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: Preliminary Scope Ruling on Gujarat Fluorochemicals Ltd.'s R-410A Blend; Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order for Indian Blends Containing Chinese Components*, 85 FR 20244 (April 10, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

II. BACKGROUND

On April 10, 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 May 8, 2020, Gujarat Fluorochemicals Ltd.(GFL), SRF Limited (SRF), and Kivlan[3] filed case briefs.[4] On May 19, 2020, the American HFC Coalition and its individual members, who include Arkema Inc., the Chemours Company FC LLC, Honeywell International Inc., and Mexichem Fluor Inc., (collectively, the petitioners) filed a rebuttal brief.[5] On July 6, 2020, the U.S. International Trade Commission (ITC) notified Commerce that the ITC did not take a position on whether an affirmative circumvention finding by Commerce in this proceeding would raise a serious injury issue.[6] On July 13, 2020, GFL submitted comments on the ITC's Letter.[7] On July 29 and 30, 2020, we held phone conferences in lieu of a hearing with GFL and SRF in regard to the issues raised in their case briefs and with the petitioners in regard to the issues raised in their rebuttal brief.[8]

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

The scope inquiry covers imports of R-410A, comprised of Chinese manufactured HFC components and Indian manufactured HFC components, blended in India to produce R-410A, prior to importation into the United States. The anti-circumvention inquiry covers HFC blends R-404A, R-407A, R-407C, R-410A, and R-507A/R-507 produced in India using one or more HFC components of Chinese origin.[9]

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[3] Kivlan and Company, Inc., and its affiliated company FluoroFusion Specialty Chemicals Inc. (collectively, Kivlan).

[4] *See* GFL's Case Brief, "Hydrofluorocarbon Blends from the People's Republic of China: Case Brief," dated May 8, 2020 (GFL's Case Brief); SRF's Case Brief, "SRF's Case Brief: Hydrofluorocarbon Blends from the People's Republic of China, Indian Blends Anti-Circumvention Inquiry," dated May 8, 2020 (SRF's Case Brief); and Kivlan's Case Brief, "Hydrofluorocarbon Blends from the People's Republic of China: Case Brief," dated May 8, 2020 (Kivlan's Case Brief). We note that Kivlan's Case Brief did not present any legal issues.

[5] *See* Petitioners' Rebuttal Brief, "Hydrofluorocarbon Blends from the People's Republic of China: Rebuttal Brief," dated May 19, 2020 (Petitioners' Rebuttal Brief).

[6] *See* ITC's Letter, "Anticircumvention Inquiry of the Antidumping Duty Order on Hydrofluorocarbon Blends from the People's Republic of China, A-570-028; Third-Country Assembly in India," dated July 6, 2020 (ITC's Letter).

[7] *See* GFL's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Comments on ITC Letter," dated July 13, 2020.

[8] *See* Memorandum, "Ex Parte Meeting in Lieu of Hearing with SRF Limited Regarding the Indian Blends Anticircumvention Inquiry in Hydrofluorocarbon Blends from the People's Republic of China," dated July 30, 2020; Memorandum, "Ex Parte Meeting in Lieu of Hearing with Gujarat Fluorochemical, Ltd. Regarding the Indian Blends Anticircumvention Inquiry in Hydrofluorocarbon Blends from the People's Republic of China," dated July 30, 2020; and Memorandum, "Ex Parte Meeting in Lieu of Hearing with the American HFC Coalition Regarding the Indian Blends Anticircumvention Inquiry in Hydrofluorocarbon Blends from the People's Republic of China," dated July 30, 2020.

[9] Based upon questionnaire responses provided by the Indian producer/exporters in this inquiry, we have preliminarily determined to cover all of the HFC blends listed under the scope or the *Order*, as we stated we may cover in the *Hydrofluorocarbon Blends from the People's Republic of China: Initiation of Anti-Circumvention Inquiry of Antidumping Duty Order; Third-Country Blends Containing Chinese Components*, 84 FR 28269, 28270 (June 18, 2019) (*Initiation Notice*).

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.[10]

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.[11]

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[10] 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.

[11] *See Order*.

V. DISCUSSION OF THE ISSUES

Comment 1: Whether Commerce's Initiation and *Preliminary Determination* Were Lawful with Respect to the ITC's Negative Injury Determination

GFL's Arguments

- Commerce's initiation and conduct of an anti-circumvention inquiry under the facts of this case is unlawful. The ITC purposefully and with due consideration reached a negative determination with respect to the fact that imports of components were not injuring the domestic industry.[12] Further, Commerce has found that HFC blends manufactured in India are not subject to the *Order*.

- An affirmative determination in this anti-circumvention inquiry will lead to an improper and *ultra vires* expansion of the scope of the *Order* to cover Chinese origin components despite the fact that the ITC reached a negative determination with respect to HFC components.[13] Commerce does not have the statutory authority to expand the scope of the *Order* in a manner that nullifies the ITC's negative determination and its preliminary decision is, therefore, unlawful.[14]

- The ITC concluded through a unanimous 6-to-0 vote that, under its semi-finished product analysis, HFC blends and HFC components constitute separate domestic products.[15] The ITC concluded that the domestic HFC blends industry had been materially injured by reason of subject imports of HFC blends from China,[16] but, critically for this proceeding, the ITC determined that the domestic HFC components industry was neither materially injured nor threatened with material injury by reason of subject imports of HFC components from China.[17]

- In the *Order*, Commerce confirmed that the ITC had found that HFC blends and HFC components are separate domestic like products and that the ITC had reached a negative injury determination for HFC components.[18] The U.S. Court of International Trade (the Court) has also confirmed the ITC's negative injury determinations with respect to HFC Components.[19] Therefore, HFC components have been found to be explicitly excluded from the scope of the *Order*.[20]

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[12] *See* GFL's Case Brief at 1 (citing *Hydrofluorocarbon Blends and Components from China*, Inv. No. 731-TA-1279 (Final), USITC Pub. No. 4629 (August 2016) (ITC HFC Final)).
[13] *Id*.
[14] *Id*.
[15] *Id.* at 2 (citing ITC HFC Final at 13).
[16] *Id.* at 3 (citing ITC HFC Final at 20-28).
[17] *Id.* (citing ITC HFC Final at 31-44).
[18] *Id.* at 3-4 (citing *Order*, 81 FR at 55437.)
[19] *Id.* at 4 (citing *Arkema Inc. et al. v. United States*, Court No. 16-00179, Slip Op. 18-12 (CIT 2018); *Arkema Inc., et al. v. United States*, Court No. 16-00179, Slip Op. 18-153 (CIT 2018); and *Arkema Inc., The Chemours Company FC, LLC, Honeywell International Inv. v. United States*, Slip Op 19-81 (CIT 2019)).
[20] *Id*.

- Commerce's intentional removal of language covering Chinese HFC components from the *Order* establishes without a doubt that Chinese-origin components are not covered by the scope of the *Order*.[21] An affirmative determination in this anti-circumvention inquiry will lead to the improper expansion of the scope to cover Chinese origin components. Commerce cannot expand the scope in this way without nullifying the ITC's negative determination with respect to components which would be unlawful.[22] Further, this would effectively nullify the ITC material injury determination in regard to HFC components.[23]

- U.S. Court of Appeals for the Federal Circuit (Federal Circuit) precedent provides that Commerce's statutory power does not allow it to change an order or to interpret an order that is contrary to the order's fundamental terms.[24] Under the anti-circumvention statute, "Commerce may determine that certain types of articles are within the scope of a duty order, even when the articles do not fall within the order's literal scope."[25]

Petitioners' Rebuttal Arguments

- This inquiry is authorized by section 781(b) of the Tariff Act of 1930, as amended (the Act) and is consistent with the ITC's negative injury determination regarding HFC components in the original investigation.[26]

- Application of section 781(b) of the Act will enforce the *Order* and will not "nullify" the ITC's negative injury determination regarding HFC components in the original investigation.[27] Section 781(b) of the Act is designed to protect and ensure the efficacy of an existing AD order.[28] Section 781(b) of the Act applies only "to circumstances where an order with a defined scope is already in effect" and permits "extending an existing order to cover new merchandise so as to address circumvention of an order's pre-existing scope."[29] In this inquiry, Commerce is concerned with imports of HFC blends and not HFC components. Section 781(b) of the Act does not require Commerce to consider a prior negative injury determination in its circumvention analysis.[30]

- The anti-circumvention statute allows Commerce to expand the scope of the *Order* to cover products not within the literal scope of the order.[31] Commerce's *Preliminary Determination* that imports of HFC blends are covered by the *Order* is not interpreting

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[21] *Id.* at 5
[22] *Id.* (citing *Wheatland Tube Co. v. United States*, 973 F. Supp. 149, 158 (CIT 1997), dismissed, 152 F.3d 938 (Fed. Cir. 1998), and affirmed, 161 F.3d 1365 (Fed. Cir. 1998)).
[23] *Id.* at 5-6.
[24] *Id.* at 6 (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998) (*Wheatland Tube*)).
[25] *Id.* (citing *Deacero S.A. de C.V. v. United States*, 817 F.3d 1332, 1337 (Fed. Cir. 2016) (*Deacero*); *accord Tai-Ao Aluminum (Taishan) Co. v. United States*, 391 F. Supp. 3d 1301, 1306 (CIT 2019) (*Taishan*)).
[26] *See* Petitioners' Rebuttal Brief at 4-5.
[27] *Id.* at 5.
[28] *Id.* (citing *Bell Supply Co., LLC v. United States*, 83 F.Supp.3d 1311, 1323 (CIT 2015)).
[29] *Id.* (citing *SunEdison, Inc. v. United States*, 179 F.Supp.3d 1309, 1320 (CIT 2016)).
[30] *Id.* at 6.
[31] *Id.* at 7-8.

the *Order* contrary to its terms nor does it incorporate previously excluded products.[32] Rather, the *Order* expressly includes imports of HFC blends that are composed of HFC components, such as R-32 and R-125.[33] Neither are individual HFC components excluded by the literal scope language.[34] Section 781(b) of the Act expressly applies to imported merchandise that is completed or assembled in a third country from parts or components that are not subject to the relevant AD or countervailing duty order.[35] Thus, an affirmative finding of circumvention under section 781(b) may enlarge the scope of an existing AD order to cover merchandise not specifically identified in that order; that is, in effect, a primary purpose of the anti-circumvention statute.[36]

- Commerce has a long history of expanding the scope of AD orders through circumvention inquiries to capture products previously excluded from the order.[37] In *Steel Wire Rope from Mexico*, the scope of the AD order expressly excluded steel wire strand and the ITC had found that wire rope was a different "like product" from stranded wire in the ITC's investigation.[38] Commerce concluded, in an anti-circumvention inquiry that "steel wire strand, when manufactured in Mexico by Camesa and imported into the United States for use in the production of streel wire rope, falls within the scope of the {AD} order on steel wire rope from Mexico."[39] See also, to the same effect under section 781(a) of the Act, with respect to expressly excluded products.[40]

- Courts have affirmed Commerce's broad authority to expand the scope of an order to prevent evasion, so long as the statutory anti-circumvention criteria are satisfied.[41] The Court has explained that, "{i}n a circumvention inquiry, Commerce analyzes whether a product outside an order's literal scope should nevertheless be included within the scope to prevent circumvention of antidumping" duties.[42] The Federal Circuit has elaborated that, "{i}n order to prevent circumvention," section 781 of the Act "authorize{s} Commerce to expand the scope of exiting antidumping and countervailing duty orders to reach products that are not covered by the existing scope. . . ."[43] Thus, the anti-circumvention statute "empowers Commerce, in certain circumstances, to enlarge the

[32] *Id.* at 7.
[33] *Id*.
[34] *Id.* at 8.
[35] *Id*.
[36] *Id*.
[37] *Id.* at 8.
[38] *Id.* at 9 (citing *Steel Wire Rope from Korea and Mexico*, Inv. Nos. 731-TA-546 and 547 (Final), USITC Pub. 2613 at 6 (March 1993)).
[39] *Id.* (citing *Steel Wire Rope from Mexico; Affirmative Final Determination of Circumvention of Antidumping Duty Order*, 60 FR 10831, 10832 (February 28, 1995)).
[40] *Id.* at 9-10 (citing *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), where Commerce stated that a "theory that parts expressly excluded from the scope of an antidumping or countervailing order cannot be subject to an anticircumvention inquiry is contrary to, and would undermine, the core principles of the anticircumvention statute.").
[41] *Id.* at 10.
[42] *Id.* (citing *U.K. Carbon and Graphite Co. v. United States*, 931 F. Supp. 2d 1322, 1328 (CIT 2013) (*U.K. Carbon and Graphite*)).
[43] *Id.* (citing *AMS Associates, Inc. v. United States*, 737 F.3d 1338, 1343 (Fed. Cir. 2013); and *Deacero*, 817 F.3d at 1337).

scope of an order to reach products not covered by the existing scope, as an exception to the general rule that Commerce may interpret the scope language of an existing order but may not modify it."[44]

- GFL's reliance on *Wheatland Tube* and *Columbia Forest Products* is unavailing because neither case was an anti-circumvention inquiry under section 781(b) of the Act. *Wheatland Tube* was a conventional scope inquiry and the Federal Circuit has since cautioned that the *Wheatland Tube* analysis is not applicable to an anti-circumvention inquiry.[45] *Columbia Forest Products* was a section 781(c) inquiry, but required Commerce to apply different statutory standards than section 781(b) of the Act.[46]

- In *Wheatland Tube*, the Federal Circuit affirmed Commerce's decision to conduct a scope inquiry rather than initiate a minor alterations anti-circumvention inquiry because "minor alteration inquiries are inappropriate where the antidumping order expressly excludes the allegedly altered product."[47] In the underlying case in *Wheatland Tube*, the scope language contained an express exclusion.[48] The Federal Circuit in *Wheatland Tube* found that Commerce could not interpret section 781(c) of the Act in a way that "renders the orders internally inconsistent because it both excludes and includes the same product—line and dual-certified pipes. A minor alterations inquiry is, therefore, unnecessary because it can lead only to an absurd result."[49] The *Order* in this case does not exclude individual components;[50] neither does the *Order* expressly exclude HFC components or third-country HFC blends produced using Chinese-origin components.[51] Thus, an affirmative circumvention determination under section 781(b) of the Act in this case does not prevent an internally inconsistent scope, as in *Wheatland Tube*.[52]

- *Columbia Forest Products* concerned Commerce's refusal to initiate a minor alterations inquiry under section 781(c) of the Act.[53] However, section 781(c) inquiries consider factors than sections 781(a) and 781(b) inquiries.[54] Further, Commerce is not required to notify the ITC before making a final determination in section 781(c) inquiries.[55] The express exclusion of certain imports in *Columbia Forest Products* presented a different issue than the issue presented in this case.[56]

- The fact that language covering HFC components was removed from the scope of the *Order* following the ITC's separate like product determination does not render

[44] *Id.* (citing *Peer Bearing Co.–Changshan v. United States*, 128 F. Supp. 3d 1304, 1312 (CIT 2015)).
[45] *Id.* at 11 (citing *Target Corp. v. United States*, 609 F.3d 1352, 1362 (Fed. Cir. 2010) (*Target*)).
[46] *Id*.
[47] *Id.* (citing *Wheatland Tube*, 161 F.3d at 1370).
[48] *Id.* (citing *Wheatland Tube*, 161 F.3d at 1368).
[49] *Id.* at 11-12 (citing *Wheatland Tube*, 161 F.3d at 1371).
[50] *Id.* at 12 (citing *Order*, 81 FR at 55436-37).
[51] *Id*.
[52] *Id.* (citing *Deacero*, 817 F.3d at 1332).
[53] *Id*.
[54] *Id.* at 13.
[55] *Id*.
[56] *Id.* (citing *Target*, 609 F.3d at 1362).

Commerce's preliminary determination unlawful. It is a fundamental principle of the AD law that "the language of an {AD} order dictates its scope."[57] The Federal Circuit elaborates that "Commerce's order must be enforced based on what the order actually says."[58] Given that the *Order* does not contain an express exclusion of HFC components or third-country blends, Commerce's *Preliminary Determination* should be affirmed in the final determination.[59]

Commerce's Position:

Under the anti-circumvention statute, "Commerce may determine that certain types of articles are within the scope of a duty order, even when the articles do not fall within the order's literal scope."[60] Section 781(b) of the Act provides, in relevant part, that merchandise imported into the United States that is of the same class or kind as any merchandise produced in a foreign country that is the subject of an AD order, if such merchandise is completed or assembled in another foreign country from merchandise which is produced in the subject country, may be circumventing the order. Accordingly, Commerce, after taking into account any advice from the ITC under section 781(e) of the Act, may include such circumventing merchandise within the scope of the order. As discussed in this final determination, the HFC blends at issue here, which are produced in India and include Chinese components, clearly meet these statutory criteria. These blends are precisely those products that section 781(b) of the Act is designed to examine in an anti-circumvention inquiry: products assembled or completed in a third country that are the same class or kind as merchandise subject to an AD order using parts or components from the foreign country that is the subject of an AD order.

The arguments presented by GFL fail to demonstrate that Commerce is unable to conduct this anti-circumvention inquiry pursuant to section 781(b) of the Act. As an initial matter, the statute is silent regarding the requirements that must be met for Commerce to conduct an anti-circumvention inquiry. Here, Commerce determined in the *Initiation Notice* that the petitioners provided sufficient evidence reasonably available to them under each of the relevant statutory factors to initiate an inquiry.[61] Further, as discussed herein, Commerce determined that the record, as developed in this inquiry, satisfied the statutory criteria, and therefore, that the circumventing merchandise should be included within the scope of the *Order*.

Nothing in the statute precludes Commerce from conducting an anti-circumvention inquiry in this instance. GFL is correct that the ITC reached a negative determination with respect to imports of Chinese components into the United States.[62] However, the ITC did not reach any determination with respect to imports of Indian blends with Chinese-origin components.[63] Instead, the ITC found that a domestic industry in the United States producing HFC blends is

[57] *Id.* (citing *Midwest Fastener Corp. v. United States*, Slip. Op. 2020-28 at 8 (CIT 2020); and *Bell Supply Co., LLC v. United States*, 179 F. Supp. 3d 1082, 1092 (CIT 2016)).
[58] *Id.* (citing *ALZ Belgium v. United States*, 551 F.3d 1339, 1348 (Fed. Cir. 2009)).
[59] *Id*.
[60] *Id.* (citing *Deacero*, 817 F.3d at 1337; *accord Taishan*, 391 F. Supp. 3d at 1306).
[61] *See Initiation Notice*, 84 FR at 28272.
[62] *See* ITC HFC Final at 1 and 31-44.
[63] We note that the ITC declined to take a position in regard to whether an affirmative determination of circumvention in this matter presented a significant injury issue. *See* ITC's Letter.

materially injured by reason of subject imports from China found to be sold in the United States at less than fair value.[64] To accept GFL's argument would impermissibly nullify section 781(b) of the Act, limiting Commerce's authority to examine circumvention under this provision and undermining the protections offered by section 781(b) of the Act to the domestic HFC blends industry. In addition, we disagree with GFL that the removal of certain language prior to the publication of the *Order* precludes Commerce from conducting this inquiry. The record is devoid of any discussion of why the third country blends provision was removed from the scope of the *Order*. Although GFL states that this language was removed "in accordance with the ITC's negative injury determination," there is nothing on the record in this proceeding to support GFL's argument.

Further, although Commerce has determined that HFC blends manufactured in India do not fall within the literal terms of the scope the *Order*, this does not preclude Commerce from examining these same products in the context of a section 781(b) of the Act anti-circumvention inquiry. As noted above, under the anti-circumvention statute, "Commerce may determine that certain types of articles are within the scope of a duty order, even when the articles do not fall within the order's literal scope."[65] Indeed, we agree with the petitioners that this is precisely the purpose of section 781(b) of the Act. Further, we agree with the petitioners that none of the cases cited by GFL pertain to anti-circumvention inquiries conducted under section 781(b) of the Act. Furthermore, given that the product imported into the United States meets the statutory requirements of section 781(b) of the Act, GFL's arguments are without merit.

Comment 2: Whether to Use Surrogate Values to Value Chinese-Origin Material Inputs

GFL's Arguments

- Commerce must determine circumvention using the actual values for the Chinese-origin components.[66] There is no legal basis for using surrogate values because Commerce initiated the anti-circumvention inquiry pursuant to section 781 of the Act and surrogate values are covered by section 773 of the Act relating to non-market economy (NME) proceedings.[67] Further, Commerce's regulations require that components are valued at the actual value at the time of importation, except if the components were purchased from an affiliated person, which is not the case here.[68]

Petitioners' Rebuttal Arguments

- Commerce's use of surrogate values in this inquiry is in accordance with law and supported by longstanding Commerce practice.[69] The Court has affirmed Commerce's

[64] *See* ITC HFC Final at 44.
[65] *See Deacero*, 817 F.3d at 1337; *accord Taishan*, 391 F. Supp. 3d at 1306.
[66] *See* GFL's Case Brief at 11.
[67] *Id.* at 9-11.
[68] *Id.* at 11.
[69] *See* Petitioners' Rebuttal Brief at 29-32 (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 23, 2018) (*CORE from China*), and accompanying Issues and Decision

use of its NME methodology in anti-circumvention cases where the input was sourced from an NME, such as China.[70] Furthermore, 19 CFR 351.225(g) allows Commerce to resort to section 773(f)(3) of the Act when the components at issue are sourced from an affiliate; it does not compel Commerce to use actual values in an NME anti-circumvention inquiry.[71]

Commerce's Position:

In the *Preliminary Determination*, we analyzed the five factors under section 781(b) of the Act to determine whether the process of assembly in the India is minor or insignificant. Consistent with our practice in prior circumvention cases involving NMEs,[72] we used a surrogate value methodology for determining the value of an input from an NME country to determine whether the value of the merchandise produced in the foreign country to which the order applies is a significant portion of the total value of the merchandise, pursuant to section 781(b)(1)(D) of the Act. Accordingly, we used a surrogate country, Mexico, to value the Chinese-origin HFC components in question.

While GFL 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 must consider the particular facts of each proceeding. In this case, we are analyzing the value of the inputs coming from China. HFC components were produced in China, an NME country, and are further processed into subject HFC blends in India prior to importation into the United States. While real prices paid for inputs are typically used in the cost buildup for market economy (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 based on actual prices paid invalid under Commerce's normal methodologies. Thus, the application of Commerce's NME methodology is appropriate to analyze the HFC component 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, and the Court has upheld this practice in our circumvention determinations.[73]

While GFL asserts that Commerce should use its ME purchases to evaluate the value of Chinese inputs, GFL confuses the purpose of our analysis. We are not valuing GFL's cost of its components; rather we are valuing components produced in China, in accordance with section 781(b)(1)(D) of the Act. The ME purchases from a Chinese company do not represent the value of the merchandise produced in China, which is the crux of our analysis.

Memorandum (IDM); and *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination*, 77 FR 33405, 33407 (June 6, 2012); *Steel Wire Garment Hangers from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 76 FR 66895 (October 28, 2011); and *Certain Tissue Paper Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 73 FR 57591 (October 3, 2008)).

[70] *Id.* at 31 (citing *U.K. Carbon and Graphite*, 931 F. Supp. 2d at 1336).

[71] *Id*.

[72] *See, e.g.*, *CORE from China* IDM at Comment 6.

[73] *Id.*

Further, we disagree with GFL'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. As noted above, Commerce's practice is to use a surrogate value methodology for determining the value of an input from an NME country in anti-circumvention cases, which has been upheld by the Court.[74] Moreover, although GFL 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. Therefore, we find no reason to change our valuation methodology for the final determination.

Comment 3: Whether the Production Process in India is Minor or Insignificant and Whether the Value of Further Processing in India Represents a Small Portion of the Value of U.S. Merchandise

In the *Preliminary Determination*, we conducted our analysis of whether the process of assembly or completion in India is minor or insignificant using the interpretative framework outlined in sections 781(b)(1)(C) and 781(b)(2) of the Act. Based on this evaluation, we determined that: (1) SRF and GFL's levels of investment were comparable to the level of investment required to build and maintain a components factory;[75] (2) GFL and SRF's responses confirmed that their research and development (R&D) expenses are negligible;[76] (3) the nature of GFL and SRF's production processes in India are not as extensive as the production of HFC blends without Chinese components;[77] (4) the extent of GFL and SRF's production facilities in India were comparable to that of HFC components producers in China;[78] and (5) the value of the processing performed in India represents a small proportion of the value of the merchandise imported into the United States.[79] Analyzing these criteria in the specific circumstances of this case, we found that, under section 781(b)(1)(C) of the Act, the process of assembly or completion in India is overall minor or insignificant.[80]

GFL's Arguments

- Commerce failed to account for the fact that only R-32 was sourced from China and other components were either produced by GFL in India or imported from countries other than China in its analysis of the nature and value of the blending process in India.[81]

- In regard to the production process, Commerce only considered the steps used in blending and noted that blending does not involve a chemical reaction. However, Commerce failed to account for the fact that GFL produces R-125 for use in the blending process and the production of R-125 does involve a chemical reaction.[82]

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[74] *See U.K. Carbon and Graphite*, 931 F. Supp. 2d at 1336.
[75] *See Preliminary Determination* PDM at 18.
[76] *Id*.
[77] *Id.* at 19.
[78] *Id*.
[79] *Id.* at 20.
[80] *Id*.
[81] *See* GFL's Case Brief at 12.
[82] *Id.*

- In regards to the value of further processing in India, Commerce only considered the cost of further processing (the sum of costs of direct labor, factory overhead, selling, general, and administrative expenses, and net interest expenses) as a percent of the value of the merchandise sold in the United States. Commerce did not consider the value of the R-125 produced by GFL or the cost of components sourced from countries other than China.[83] The value of processing in India must include the value of R-125 produced by GFL, as well as the cost of obtaining non-Chinese origin components.[84] Given that the value added of the additional processing incurred to transform a component to a finished blend indicates that it has been transformed such as to be unrecognizable from the original input, there is no basis to find that the processing incurred in India is minor or insignificant.[85]

Petitioners' Rebuttal Arguments

- Commerce's *Preliminary Determination* is supported by substantial evidence. The production of R-125 in India does not prevent the application of section 781(b) of the Act or establish that the blending process was significant. Moreover, record evidence shows that the "value of the processing performed" in India was a small proportion of the total value of the finished blend.

- GFL argues that Commerce "failed to account for the fact that GFL first produces R-125 for use in the blending process," which "should have been considered part of the overall production process occurring in India when assessing whether the production process in India is complex or significant."[86] However, section 781(b)(2) of the Act states that "{i}n determining whether the process of assembly or completion is minor," Commerce should take into account the "nature of the production process in the foreign country."[87] The origin of the blended HFC components or the manufacturing operations needed to produce components is immaterial in this context.[88]

- Commerce's standard practice is to evaluate the factors identified in section 781(b)(2)(C) of the Act in the context of finishing parts or components into subject merchandise and does not include evaluating the production steps for producing other potential inputs.[89] In *Uncovered Innerspring Units from China*, Commerce considered whether a respondent that imported Chinese-origin components and finished them into subject merchandise in Malaysia before

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[83] *Id.* at 12-13.
[84] *Id.* at 13 (citing *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27329, 27329 (May 19, 1997) (*Preamble*)).
[85] *Id.* at 13.
[86] *See* Petitioners' Rebuttal Brief at 14 (citing GFL's Case Brief at 12-13).
[87] *Id*.
[88] *Id*.
[89] *Id.* (citing *Uncovered Innerspring Units from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 78 FR 41784 (July 11, 2013) (*Uncovered Innerspring Units from China Prelim*), and accompanying PDM, unchanged in *Uncovered Innerspring Units from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 79 FR 3345 (January 21, 2014)).

export to the United states was circumventing the AD order.[90] In that case, some of the components were sourced from other companies in Malaysia and others were produced by the respondent in Malaysia.[91] In analyzing the nature of the production process in Malaysia, pursuant to section 781(b)(2)(C) of the Act, Commerce only analyzed the process of assembly of the components into subject merchandise.[92] Commerce did not include in its analysis the production of other components by the respondent because the statute only instructs Commerce to evaluate whether the "process of assembly or completion" is minor or insignificant.[93] GFL has provided no basis for departing from Commerce's standard practice in anti-circumvention inquiries.[94]

- GFL wrongly contends that Commerce should also "consider the value of the R-125 produced by GFL or the cost of components sourced from countries other than China."[95] Commerce applied the literal language of section 781(b)(2)(E) of the Act and found that the weighted-average value of processing in India was only 11.47 percent of the total value of the finished HFC blends imported into the United States.[96] This value was based on processing costs plus selling, general and administrative expenses taken directly from the questionnaire response filed by GFL.[97]

- GFL's contention that Commerce should also "consider the value for the R-125 produced by GFL or the cost of components sourced from countries other than China" is contrary to Commerce practice.[98] The commentary cited by GFL is directed to section 781(b)(1)(D) of the Act, not section 781(b)(2)(E) of the Act.[99] By considering whether the Chinese HFC components account for a large percentage of the total value of the finished HFC blend, Commerce is considering the value of the India-made components that are contained in that blend.[100]

- The weighted average of all HFC blends exported by GFL is the best measure of the Chinese content because the foreign producer has the ability to shift the Chinese components to any of the blends that it produces.[101] Given that the value of Chinese HFC components accounts for over 40 percent of the average price of the finished HFC, it follows that the value of the India-made HFC components included in those blends was not sufficient to overcome the finding of circumvention.[102]

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[90] *Id.* at 15.
[91] *Id.* (citing *Uncovered Innerspring Units from China Prelim* PDM at 5 and 14).
[92] *Id*.
[93] *Id.* (citing *Uncovered Innerspring Units from China Prelim* PDM at 7).
[94] *Id*.
[95] *Id.* at 16
[96] *Id.* at 16-17 (citing Memorandum, "Preliminary Analysis Memorandum for Gujarat Fluorochemicals Limited," dated April 3, 2020 at 6 and Attachment (GFL's Preliminary Analysis Memo)).
[97] *Id.* at 17 (citing GFL's January 31, 2020 Initial Questionnaire Response (GFL's January 31, 2020 IQR) at Exhibit 39).
[98] *Id.* (citing GFL's Case Brief at 12-13).
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] *Id.* (citing GFL Preliminary Analysis Memo at 6-7).

Commerce's Position:

For our final determination, we continue to find that the process of assembly or completion is minor or insignificant within the meaning of section 781(b)(1)(C) of the Act, as informed by the factors in section 781(b)(2) of the Act.

Section 781(b)(1)(C) and 781(b)(2) of the Act

Section 781(b)(1)(C) of the Act states, if "the process of assembly or completion in the foreign country referred to in subparagraph (B) is minor or insignificant," in combination with the other factors of circumvention under section 781(b)(1) of the Act, "the administering authority. . . may include such imported merchandise within the scope of such order or finding at any time such order or finding is in effect." Section 781(b)(2) of the Act states:

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

In addition, the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA) lists the five statutory criteria in section 781(b)(2) of the Act and states that "{n}o single factor will be controlling."[103] The importance of any one of the factors listed under section 781(b)(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(b)(2) of the Act, based on both qualitive and quantitative factors. We focus here on GFL's arguments for the final determination pertaining to sections 781(b)(2)(C) and 781(b)(2)(E) of the Act.

Section 781(b)(2)(C)

GFL argues that the focus of our analysis on the nature of the blending process is flawed because we failed to account for the fact that only R-32 was sourced from China and other components were either produced by GFL in India or imported from countries other than China.[104] We disagree with GFL's arguments, and, with respect to section 781(b)(2)(C) of the Act, we continue to find that the nature of GFL's production process in India is minor or insignificant. As an initial matter, we note that GFL does not challenge Commerce's characterization of the

[103] *See* SAA, H.R. Rep. No. 103-316, Vol. 1 at 893 (1994); *accord* 19 CFR 351.225(h) ("{T}he Secretary will not consider any single factor of section 781(b)(2) to be controlling."); and *Preliminary Determination* PDM at 11.
[104] *See* GFL's Case Brief at 12.

blending process as minor or insignificant;[105] GFL only argues that Commerce did not account for its production of R-125 when analyzing this factor. This assertion is incorrect.

Our analysis pursuant to 781(b)(2)(C) of the Act included the production or purchase of HFC components as part of the steps in the production of HFC blends.[106] Based on information provided by GFL and SRF, we found that the HFC blends production process consists of three steps.[107] Of these three steps, we found that the blending and subsequent filling steps are a minor part of the production process for HFC blends.[108] We further stated that when GFL sources one or more HFC components from China for use in the assembly or completion of HFC blends in India, this results in a process that more closely resembles assembly of components than the full production of an HFC blend from non-Chinese origin components.[109] We analyzed the significance of the assembly and completion process relative to the full production process for HFC blends, and determined that the third country process is far less extensive than the full production of HFC blends, thus supporting a finding that the process of assembly or completion is minor or insignificant.

GFL's arguments also fail to acknowledge that each separate HFC component production line requires a significant investment[110] and that each component requires a more significant production process compared to the mere blending of HFC blends.[111] Further, the fact that some components were purchased from countries other than China has no impact on this analysis pursuant to section 781(b)(2)(C) of the Act, which is concerned solely with the "nature of the production process in the foreign country." Further, not only did we account for the production of HFC components in India per our analysis under section 781(b)(2)(C) of the Act, we also examined this production under other aspects of our analysis under section 781(b)(2) of the Act. Specifically, in the *Preliminary Determination*, we considered GFL's production of R-125 in our analysis of the level of investment in India and the extent of the production facilities in India, under sections 781(b)(2)(A) and (D) of the Act, respectively.[112]

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[105] *See Preliminary Determination* PDM at 18 ("We find that the blending and subsequent filling production steps are a minor part of the production process for HFC blends.").
[106] *Id.*
[107] *Id*.
[108] *Id*.
[109] *Id.* at 19.
[110] *See* GFL Preliminary Analysis Memo at 3 ("GFL did not report its exact investments in the manufacture {sic} of components, but its financial statements for the 2018-19 fiscal year (*i.e.*, April 1, 2018 through March 31, 2019) show that GFL's carrying amount (*i.e.*, investment after depreciation) for 'plant and equipment' totaled 19,373,522,000 INR, or approximately $278 million U.S. dollars." and "The United States International Trade Commission (ITC) found that a production facility for HFC components requires an investment of 'hundreds of millions of dollars'.") (citing GFL's January 31, 2020 IQR at Exhibit 4-B at 137; and ITC HFC Final at 12).
[111] *See Preliminary Determination* PDM at 19 ("We acknowledge that the production of HFC components involves greater complexity than the production of HFC blends, as well as specialized inputs and production equipment.").
[112] *See* GFL's Preliminary Analysis Memorandum at 4 (noting that GFL produces R-125 and the components to produce R-125 and including GFL's investment in these activities in our analysis of the level of investment in India) and 6 ("{W}e find that while the blending operations are relatively limited. . . the extent of GFLs {*sic*} facilities, because GFL manufactures R-125, and the inputs of R-125, its facilities are comparable to that of an HFC component and blends producer in China.").

Section 781(b)(2)(E)

GFL additionally argues that when assessing whether the value of the further processing in India represents a small proportion of the value of the U.S. merchandise under section 781(b)(2)(E) of the Act, Commerce should include the value of the R-125 produced by GFL or the cost of the components sourced from countries other than China.[113] GFL contends that, under the statute, Commerce must determine whether the cost of further processing the Chinese-origin components into subject blends is a significant portion of the total value of the merchandise sold in the United States.[114] GFL claims this further processing must include the value of the self-produced R-125 and the cost of other non-Chinese-origin components.[115] GFL asserts that Commerce's *Preamble* explains this interpretation of the Act:

> One commenter argued that because the emphasis in anticircumvention inquiries concerning completion or assembly in the United States or a third country is now on whether that process is minor or insignificant, any parts or components sourced from third countries should not be included in making that judgement. We have not adopted this suggestion. The commenter is correct about the change in emphasis in anticircumvention inquiries. However, {Commerce} also must determine whether the value of the parts or components from the subject country is a significant portion of the total value of the merchandise. Any parts or components sourced from a third country necessarily form part of the total value of any such merchandise.[116]

GFL argues that the production process is not minor or insignificant when the cost of Indian-produced and third-country-sourced components are added to the value of the processing performed in India.[117]

We disagree with GFL with respect to our analysis of section 781(b)(2)(E) of the Act, and we continue to find that the value of the processing performed in India represents a small proportion of the value of the merchandise imported into the United States. GFL misinterprets the passage of the *Preamble* to which it cites to support its claim that its non-Chinese HFC components should be included in the quantitative analysis of whether the value of the processing in India represents a small proportion of the U.S. value.[118]

As an initial matter, relevant to this issue is the SAA, which states:

> {I}n a number of anticircumvention investigations, the outcome has been determined by the current statutory requirement that the difference between the value of the parts imported into the United States (or into a third country) from the country subject to the order and the value of the finished product be "small."

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[113] *See* GFL's Case Brief at 12.
[114] *Id.*
[115] *Id.* 12-13.
[116] *See Preamble*, 62 FR at 27329.
[117] *See* GFL's Case Brief at 13.
[118] *Id.* at 12-13.

> This mechanical, quantitative approach fails to address adequately circumvention scenarios in which only minor assembly is done in the United States (or in a third country), but for various reasons the difference in value is not "small."
>
> Another serious problem is that the existing statute does not deal adequately with the so-called third country parts problem. In the case of certain products, particularly electronic products that rely on many off the shelf components, it is relatively easy for a foreign exporter to circumvent an {AD} order by establishing a screwdriver operation in the United States that purchases as many parts as possible from a third country. Given the language of the existing statute, these third country parts cannot be included with the parts imported from the country subject to the order in determining whether the difference between the value of the parts imported from the country subject to the order and the value of the finished product is "small." This has proved to be an elusive standard substantially limiting the effectiveness of the law.
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> . . .
>
> With respect to the factor of small value added, the existing statute requires that the value of imported parts from the country under the order be compared to the value of the finished product and that the difference between the two values be "small," as a prerequisite for an affirmative determination. This has the effect of including third country parts in U.S. value, thereby making it easier for a foreign producer to circumvent an order. New sections 781(a)(2)(E) and 781(b)(2)(E) require Commerce to determine whether the value of the processing performed in the United States (or a third country) represents a small proportion of the value of the finished product. This is consistent with the overall thrust of section 230 of the bill which is to focus the anticircumvention inquiry on the question of whether minor or insignificant assembly or completion is taking place.[119]

Congress acknowledged in these passages of the SAA that, under the previous statutory criteria, the inclusion of the parts or components from a third country proved to be problematic. Therefore, Congress enacted the revisions to section 781(b) of the Act, which allowed for Commerce to focus on whether the process of assembly or completion is minor or insignificant pursuant to section 781(b)(2) of the Act.

However, the inclusion of third country parts is not entirely removed from the analysis. Indeed, the *Preamble* passage cited by GFL states that "{Commerce} also must determine whether the value of the parts or components from the subject country is a significant portion of the total value of the merchandise. Any parts or components sourced from a third country necessarily form part of the total value of any such merchandise."[120] This language specifically refers to section 781(b)(1)(D) of the Act. Under section 781(b)(1)(D) of the Act, Commerce must determine whether "the value of the merchandise produced in the foreign country to which the {AD} order applies is a significant portion of the total value of the merchandise exported to the United States." As discussed further below, Commerce performed this analysis as required by the statute.

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[119] *See* SAA at 893-94.
[120] *See Preamble*, 62 FR at 27329.

In addition, as noted above, Commerce has also considered the value of parts and components sourced from countries not subject to the order or finding in other parts of its analysis. In the *Preliminary Determination*, we considered GFL's production of R-125 in our analysis of the level of investment in India and the extent of the production facilities in India, under sections 781(b)(2)(A) and (D) of the Act, respectively, and also considered the production step of the purchase or production of components under section 781(b)(2)(C) of the Act as discussed above.[121]

Thus, the *Preamble* passage cited by GFL is not justification for including the non-Chinese HFC components in our analysis of the value of the processing in India under section 781(b)(2)(E) of the Act; it merely concludes that the HFC components not of Chinese-origin necessarily form a part of the value of the finished HFC blends and should be accounted for pursuant to section 781(b)(1)(D) of the Act. This view is supported by the SAA, as discussed above.

Having considered whether the value of the Chinese-origin HFC components represent a large proportion of the U.S. value of the finished HFC blends pursuant to section 781(b)(1)(D) of the Act, we have also considered the value of Indian and third-country components that necessarily form part of the remaining value of the HFC blend along with profit and further processing. Accordingly, the methodology we used in the *Preliminary Determination* to determine the value of the processing in India is in accordance with the Act.

The total value of the merchandise is a function of the value of the Indian and third-country HFC components, the Chinese-origin HFC components, the processing (*i.e.*, the sum of direct labor, manufacturing overhead, SG&A expenses, and the net interest expense), and profit. The Act states that "{i}n determining whether the process of assembly or completion is minor or insignificant. . . {Commerce} shall take into account. . . the value of the processing performed in the foreign country" (*i.e.*, India).[122] Thus, when the Act is referring to the value of the processing, it is referring to the process of completion or assembly of the parts or components, not the process to manufacture the parts or components. This interpretation of the language in the Act is consistent with Congress' intent towards this portion of the statute. The SAA states:

> These new provisions do not establish rigid numerical standards for determining the significance of the assembly (or completion) activities in the United States or for determining the significance of the value of the imported parts or components.[123]

Congress recognized that the inclusion of third-country parts as part of U.S. value would make it easier to circumvent an order. In addition, the Act does not instruct Commerce to use a particular analysis when evaluating whether the value of processing performed in the foreign

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[121] *See* GFL's Preliminary Analysis Memorandum at 4 (noting that GFL produces R-125 and the components to produce R-125 and including GFL's investment in these activities in our analysis of the level of investment in India) and 6 ("{W}e find that while the blending operations are relatively limited. . . the extent of GFLs {*sic*} facilities, because GFL manufactures R-125, and the inputs of R-125, its facilities are comparable to that of an HFC component and blends producer in China.").
[122] *See* section 781(b)(2)(E) of the Act.
[123] *See* the SAA at 893-94.

country represents a small proportion of the value of the merchandise imported into the United states for purposes of section 781(b)(2)(E) of the Act.[124] Accordingly, for the *Preliminary Determination*, we valued only the respondents' direct labor, manufacturing overhead, SG&A expenses, and net interest expenses in valuing the production process as these are the only expenses incurred by GFL and SRF in performing the processing on the components to make HFC blends. We see no reason to divert from this methodology for the final determination based upon the arguments supplied by GFL. Consequently, we continue to find that the value of the processing performed in India as a proportion of the U.S. value of the HFC blends is minor or insignificant.

In prior anti-circumvention inquiries, Commerce has explained that Congress directed the agency to focus more on the nature of the production process and less on the difference between the value of the subject merchandise and the value of the parts and components imported into the processing country.[125] Additionally, Commerce has explained that following the URAA, Congress redirected Commerce's focus away from a rigid numerical calculation of value-added toward a more qualitative focus on the nature of the production process.[126] Thus, we have focused more on the nature of the production process in the foreign country (*i.e.*, India). As explained in the *Preliminary Determination*:

> When one or more HFC components are sourced from China, the process or completion in India consists of only the blending in specific ratios noted above. Although blending is a necessary step in the production of HFC blends, it is just one of the multiple steps in the production process of HFC blends, and the least labor and capital intensive. We find that the blending and subsequent filling production steps are a minor part of the production process for HFC blends.
>
> We acknowledge that the production of HFC components involves greater complexity than the production of HFC blends, as well as specialized inputs and equipment. However, when those processes are separated, *i.e.*, when GFL or SRF sources one or more HFC components from China for use in the assembly or completion of HFC blends in India, we find that this results in a process that more closely resembles assembly of components than the full production of an HFC blend from non-Chinese origin components.

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[124] *See Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Affirmative Preliminary Determination of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 84 FR 32875 (July 10, 2019), and accompanying PDM at "(E) Whether the Value of the Processing Performed in Vietnam Represents a Small Proportion of the Value of the Merchandise Imported into the United States."

[125] *See, e.g.*, *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination*, 77 FR 33405, 33411 n.64 (June 6, 2012); unchanged in *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 77 FR 47596 (August 9, 2012). Although the cited proceeding involved assembly or processing in the United States under section 781(a) of the Act, the language regarding the value of processing or assembly is essentially the same under both sections 781(a)(2)(E) and 781(b)(2)(E) of the Act. Accordingly, we find that our prior rationale applies to section 781(b)(2)(E) as well.

[126] *Id.*

> Therefore, for HFC blends assembled or completed in India using HFC components sourced from China, the nature of the production process in India is far less extensive than it would be to produce HFC blends without Chinese components.[127]

Our analysis for the *Preliminary Determination* with respect to the nature of the production process and the value of the processing in India has not changed for the respondents for the final determination. Based on the aforementioned, and consistent with the conclusions reached in our *Preliminary Determination*,[128] we continue to find that record evidence demonstrates that the nature of the production process in India is far less extensive than it would be to produce HFC blends without Chinese components. We also find that, pursuant to section 781(b)(2)(E) of the Act, the value of the processing performed in India as a proportion of the value of the merchandise imported into the United States is small. As noted above, no single factor is controlling and the importance of any one of the factors listed under section 781(b)(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(b)(1)(C) of the Act, as informed by the totality of our analysis of the factors in section 781(b)(2) of the Act. Therefore, in addition to our findings under sections 781(b)(1) and (3) of the Act, our findings under section 781(b)(2) of the Act continue to support a finding of circumvention for GFL.

In addition, we note that SRF did not challenge our finding in the *Preliminary Determination* that it was circumventing the *Order* on HFC blends from China. Accordingly, for the final determination, we continue to find that the factors under section 781(b) of the Act support a finding of circumvention for SRF.

Comment 4: Validity of the 12 Month Look-Back Provision of the Certification Requirements

GFL's Arguments

- GFL agrees that the certification regime should exclude HFC blends produced in India from non-Chinese origin components and agrees that a certification procedure is appropriate.[129] GFL does not agree with the requirement that an exporter certify that it has not purchased any of the subject Chinese components during the 12 month period prior to shipment of the HFC blends to the United States.[130] This requirement would impermissibly expand the scope to the inquire and the scope of the *Order* to include HFC blends from Indian that do not contain any subject Chinese components.[131]

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[127] *See Preliminary Determination* PDM at 18-19 (citations omitted); and GFL's Preliminary Analysis Memorandum at 4-6 for a more detailed analysis of the specifics of GFL's production process for HFC blends. Because this analysis contains business proprietary information, we have not summarized it here.
[128] *See Preliminary Determination* PDM at 18-20.
[129] *See* GFL's Case Brief at 14.
[130] *Id.* at 14-15.
[131] *Id.* at 15.

SRF's Arguments

- Commerce explained that its certification requirement for the 12 months prior to shipment to the United States was "due to the fungible nature of HFC components and HFC blends, their relatively long shelf-lives, and the manner in which HFC components and blends are handled and mixed."[132] However, GFL's questionnaire response provides no indication or description of the fungible nature of HFC components and HFC blends, nor does the response provide any explanation concerning the "long self-life."[133] Thus, Commerce's certification requirement relating to the 12 months prior to shipment require is not supported by substantial evidence.

- GFL's response demonstrates that HFC blends R-410A and R-407C are not fungible.[134] The process diagrams provide no information concerning the fungible nature of HFC components and HFC blends or the shelf-life of HFCs.[135] In fact, HFC blends and components are pressurized gases and must be maintained at consistent pressure, which limits their shelf-lives.[136]

- Commerce's *Preliminary Determination* unlawfully expands an importer's potential liability and requires the deposit of antidumping duties when an exporter/producer may not have exported any HFC blends made from Chinese components or purchase any Chinese components after the date of the initiation.[137]

- SRF provided substantial evidence that confirms how it tracks the batch number and origin of all HFC components used to produce HFC blends.[138] Based on this evidence provided to Commerce, SRF can unequivocally confirm that it has not exported HFC blends to the United States containing Chinese HFC components or Chinese blends on or after the date this anti-circumvention inquiry was initiated.[139]

- The primary reason why Commerce would require a certification with a 12 month look-back period is because of its doubt as to whether an Indian producer maintains sufficient, verifiable records to demonstrate that no Chinese HFC blends or HFC components were included in merchandise exported to the United States that entered after the date of initiation.[140] Given that SRF has demonstrated that it can link each production lot of HFC blends to the production or purchase lot of the HFC components in the HFC blends, there is no reason to require the 12 month look-back provision in this case.[141] There is no basis in

[132] *See* SRF's Case Brief at 2 (citing *Preliminary Determination* PDM at 24; and GFL's January 31, 2020 IQR at 6-8 and Exhibit 14).
[133] *Id.* at 2-3.
[134] *Id*.
[135] *Id.* at 3.
[136] *Id*.
[137] *Id*.
[138] *Id.* (citing SRF February 4, 2020 IQR at Exhibit 38(b)).
[139] *Id*.
[140] *Id.* at 4.
[141] *Id*.

this case "to preempt unfounded circumvention" by including the 12 month look-back certification requirement specified in the *Preliminary Determination*.[142]

- If Commerce does not remove the 12 month look-back provision, R-404A should be excluded from the certification requirements because it is impossible for R-404A to be blended with any other in-scope HFC blend.[143] Therefore, R-404A is not fungible with any in-scope HFC blend, and any R-404A purchased from Chinese sources could not have been used to create or be mixed with any other HFC blends exported to the United States.[144]

- Alternatively, if Commerce does not remove the 12 month look-back provision from the certification requirements, Commerce should modify the certification in one of the following ways: (1) add language which limits the 12 month look-back provision to blends from which the HFC blends covered by the *Order* could be derived;[145] (2) add language that limits the 12 month look-back provision to purchases of Chinese HFC blends for export to the United States and purchases of Chinese HFC components for purposes of producing HFC blends for shipment to the United States;[146] (3) add language which limits the 12 month look-back provision to Chinese HFC blends and HFC components purchased for the purpose of producing HFC blends;[147] (4) add language limiting the look-back provision to three months and add language that separates the HFC blends from HFC components;[148] or (5) add language that limits the 12 month look-back provision to where Chinese HFC blends or Chinese HFC components were shipped/maintained/or stored at the plant/facility from which the exports were produced and made.[149]

Petitioners' Rebuttal Arguments

- No party challenges Commerce's authority or determination to adopt a certification regime.[150] GFL and SRF's narrow objection relates to the look-back provision.[151] Given that the look-back provision is well within Commerce's considerable discretion to fashion certification regimes, Commerce should not modify the provisions in the final determination.[152]

- The look-back provision implements section 781(b) of the Act in a manner that prevents evasion of the *Order*.[153] Having made an affirmative preliminary circumvention finding and seeing that the circumvention activities were facilitated by HFC component and blend shelf-life and fungibility, Commerce properly took action to ensure that Chinese-origin

[142] *Id.* (citing *Appleton Papers Inc. v. United States*, 929 F.Supp.2d 1329, 1338 (CIT 2013)).
[143] *Id.*
[144] *Id*.
[145] *Id*.
[146] *Id.* at 6.
[147] *Id*.
[148] *Id.* at 7.
[149] *Id*.
[150] *See* Petitioners' Rebuttal Brief at 18.
[151] *Id*.
[152] *Id*.
[153] *Id*.

components and blends would not be present in entries exempted from duty liability through the certification regime.[154]

- When enacting section 781 of the Act, "Congress sought Commerce's 'aggressive implementation' of the statute."[155] Courts have found that Commerce has considerable discretion to fashion certification regimes based on its "obligation to administer the {anti-circumvention provision of the} law in a manner that prevents evasion of the order."[156] This mandate for aggressive enforcement has on occasion led Commerce to restrict eligibility for participation in certification regimes.[157] In *Butt-Weld Pipe Fittings from China*, Commerce found it necessary to restrict certification eligibility to prevent circumvention by known high-volume exporters.[158] Here, the same restrictions are warranted because HFC's shelf-life and fungibility facilitate circumvention.[159]

- The patterns of trade established on the record with respect to section 781(c)(3) of the Act also justify a restriction on importer eligibility for the certification regime to prevent additional circumventions by the producers/exporters that have already purchased Chinese-origin components in the year prior to shipment of HFC blends to the United States.[160]

- The look-back provision does not expand the scope of this inquiry or the *Order* to include HFC blends of Indian origin that do not contain any of the subject Chinese components;.[161] neither will Indian producers be subject to the AD order on HFC blends from China on its exports to the United States even if all its exports to the United States consisted of HFC blends that were produced entirely from non-Chinese origin components.[162] Rather, the look-back provision is not applied to imported blends produced entirely from non-Chinese components and provides respondents an avenue to demonstrate this.[163]

- The collection of cash deposits is not a conclusive determination that the entries are of in-scope merchandise as GFL argues.[164] The final determination that an uncertified entry is in or out of scope will be made in a subsequent review of those entries under sections 751(b) or (b) of the Act, when importers and exporter/producers may prove their entries contained no Chinese-origin components.[165] The parties rights are further protected by the importers' right

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[154] *Id.* at 19
[155] *Id.* (citing *Deacero S.A. de C.V. v. United States*, 942 F. Supp. 2d 1321, 1329 (CIT 2013) (citing S. Rep. No. 100-71 at 101)).
[156] *Id.* at 20 (citing *Max Fortune Indus. Co. v. United States*, Slip Op. 2013-52 at 28 (CIT 2013)).
[157] *Id*.
[158] *Id.* (citing *Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 84 FR 29164 (June 21, 2019) (*Butt-Weld Pipe Fittings from China*)).
[159] *Id*.
[160] *Id*.
[161] *Id.* at 21 (citing GFL's Case Brief at 15).
[162] *Id.* (citing GFL's Case Brief at 15).
[163] *Id*.
[164] *Id*.
[165] *Id.* (citing *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Affirmative Final Determinations of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 84 FR 70948 (December 26, 2019), and accompanying IDM at Comment 4).

to request section 751(a) administrative reviews of their entries, and any interested party may request a section 751(b) changed circumstances review.[166]

- SRF claims without support that the record does not address shelf-life and fungibility and that components and blends have short shelf-lives.[167] This assertion is incorrect because: (1) maintaining pressure is a feature of HFC gas storage, not of HFC shelf-life;[168] (2) HFC components and blends last as long as they are properly contained, meaning they have long shelf-lives;[169] (3) the citation to which SRF cites refers to the "manner in which HFC components and blends are handled and mixed."[170]

- The factual basis for adopting the look-back feature is substantially evident in the HFC blends proceedings.[171] HFC components and blends have "longevity," as amply demonstrated by the existence of the reclamation industry and the manner in which gases from multiple sources are combined, reclaimed, disaggregated, and combined demonstrate fungibility.

- Commerce should reject SRF's proposed modifications of the certification regime.[172] Commerce has considerable discretion in this regard,[173] and the 12 month look-back provision is a straightforward mechanism that is appropriate for the entry process administered by U.S. Customs and Border Protection.[174] Under the 12 month look-back provision, no entry subject to proper review and verification will be assessed antidumping duties if the entered goods contain no Chinese-origin components or blends. [175] SRF claims to have systems in place to establish the origin of HFC components used in its production.[176]

Commerce's Position:

While none of the interested parties question either Commerce's ability to fashion a certification regime or the appropriateness of a certification regime based on the facts of this case, GFL and SRF question the appropriateness of the 12 month look-back provision in the certification requirements. In the *Preliminary Determination*, we included the following requirements for the exporter/producer certification:

> The Indian exporter (and producer, if two different companies) have not purchased Chinese HFC blends (*i.e.*, R-404A, R-407A, R-407C, R-410A, and/or

[166] *Id.* (citing 19 CFR 351.213(b)(3)).
[167] *Id.* (citing SRF's Case Brief at 2).
[168] *Id.*
[169] *Id.* at 25-26 (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), and accompanying IDM at Comment 2).
[170] *Id.* at 26.
[171] *Id.* at 26-27.
[172] *Id.* at 27.
[173] *Id.* (citing *Tung Mung Development Co., Ltd. v. United States*, 354 F.3d 1371 (Fed. Cir. 2004); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984))
[174] *Id.*
[175] *Id.*
[176] *Id.* (citing SRF's Case Brief at 3-4).

R-507A/R-507) or Chinese HFC components (*i.e.*, R-32, R-125, R-134a, and/or R-143a) during the 12 months prior to shipment of the aforementioned HFC blend(s) to the United States.[177]

The importer certification contains similar language.[178]

While it is within Commerce's discretion to restrict certification eligibility to prevent circumvention, we do not find it necessary or appropriate to do so in this case by the inclusion of the 12 month look-back provision. Parties subject to the certification requirement claiming that the imports of HFC blends from India do not contain Chinese components must complete and maintain the certification and all supporting documentation. We find this is sufficient to ensure that our determination is appropriately enforced and will prevent potential evasion, subject to verification of the certification and supporting documentation.

We also note that while the record does contain information potentially related to the fungibility and shelf-life of HFC blends and components, the record does not contain information related to the appropriateness of a 12 month period in regard to the look-back provision. Thus, for the foregoing reasons, we are removing the 12 month look-back provision from the certification requirements for exporters/producers and for importers.

Comment 5: Whether the Final Determination Should Be Retroactive to the Date of Initiation

GFL's Arguments

- If Commerce reaches an affirmative final determination of circumvention, it should not suspend liquidation or require cash deposits prior to the date of the publication of the *Preliminary Determination*.[179] Although Commerce's regulations state that Commerce will suspend liquidation and require cash deposits for entries on or after the date of initiation of the circumvention inquiry,[180] the statute does not require retroactive treatment. Based upon the facts of this case, retroactive treatment is inappropriate because Indian exporter/producers and U.S. importers relied on the ITC negative injury determination in regard to HFC components.

- In *Taishan*, the Court held that suspension of liquidation in a circumvention proceeding is not permitted to be retroactive to the date of initiation where Commerce has not put parties on notice that their products could be subject to administrative action.[181] The certification requirement extends the scope of this inquiry to cover Indian origin blends that have not been produced with Chinese origin components simply because an Indian producer may have purchased Chinese origin components for purposes other than producing HFC blends to the

[177] *See Preliminary Determination*, 85 FR at 20247.
[178] *Id.*
[179] *See* GFL's Case Brief at 15.
[180] *Id.* at 16 (citing 19 CFR 351.225(l)(2)).
[181] *Id.* at 16-17 (citing *Taishan*, 391 F. Supp. 3d at 1314).

United States.[182] If Commerce does not change the certification requirement, cannot make the determination retroactive to the date of initiation of the inquiry.[183]

SRF's Arguments

- If Commerce concludes that it should not remove the 12 month look-back certification provision, then the 12 month look-back period should not begin until one year after the *Preliminary Determination*.[184] In addition, at a minimum, the 12 month look-back provision should not encompass any shipments that entered prior to the *Preliminary Determination*, which is when the parties were given notice of the certification requirements.[185]

Petitioners' Rebuttal Arguments

- The ITC's negative injury determination is not a shield for GFL to hide behind.[186] By statue, "publication {in the Federal Register}. . . is sufficient to give notice of the contents of the document to a person subject to or affected by it."[187] As explained by the Federal Circuit, "{w}hat the statutory and regulatory notification provisions require is that any reasonably informed party should be able to determine, from the published notice of initiation read in light of announced {Commerce} policy, whether particular entries in which it has an interest may be affected by the administrative review."[188] Given that the *Initiation Notice* fulfilled these requirements, GFL's argument is immaterial.[189]

- GFL filed a scope ruling request on June 12, 2017, asking Commerce to confirm that GFL's blend of R-410A, containing a 50-50 blend of a Chinese-origin HFC component and a Indian-produced HFC component and blended in India, is excluded from the *Order*.[190] Commerce published the *Initiation Notice* in this anti-circumvention inquiry in June 2019.[191] Thus, there cannot be any ambiguity that GFL's HFC blends were the subject of this inquiry.[192]

- The scope of this inquiry is not limited by time of the U.S. entry, the identity of the Indian or Chinese exporters/producers, or the identity of the U.S. importer.[193] The *Initiation Notice* also made clear that the suspension of liquidation and requiring of cash deposits would be

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[182] *Id.* at 17.
[183] *Id*.
[184] *See* SRF's Case Brief at 5 and 7.
[185] *Id*.
[186] *Id*.
[187] *Id.* (citing 44 U.S.C. section 1507; *see also Suntec Industries Co., Ltd. v. United States*, 857 F.3d 1363, 1370-71 (Fed. Cir. 2017)).
[188] *Id.* (citing *Transcom, Inc. v. United States*, 182 F.3d 876, 882-83 (Fed. Cir. 1999)).
[189] *Id.* at 28-29.
[190] *Id.* at 22 (citing Commerce's Letter, "Hydrofluorocarbon Blends from the People's Republic of China: Rejection of Scope Ruling Request," dated February 1, 2017, to show that the scope ruling request in this proceeding was actually the second scope ruling request by GFL).
[191] *Id.* at 22-23.
[192] *Id.* at 23.
[193] *Id*.

after the date of the initiation of this inquiry if Commerce were to issue a preliminary determination.[194]

- Commerce sought data on HFC blends from the respondents from January 2016.[195] Thus, parties were given notice well before the publication of the *Preliminary Determination* that Commerce was examining exports during at time period that would include the eventual look-back period.[196]

- GFL's reliance on *Taishan* is misplaced.[197] In *Taishan*, the Court rejected retroactive application of suspension and cash deposits because the notice of initiation was ambiguous as to which importers and exporters were covered by the inquiry, which is not the situation in this proceeding.[198]

- Beginning the suspension of liquidation on a date other than the publication of the *Initiation Notice*is prohibited by regulation.[199]

Commerce's Position:

We find no basis to alter our determination to suspend liquidation and require cash deposits as of the date of publication of the *Initiation Notice*. As an initial matter, 19 CFR 351.225(l)(2) and (3) provide that, upon an affirmative preliminary or final determination, Commerce will instruct Customs and Border Protection to suspend liquidation and require applicable cash deposits dating back to the date of initiation of the inquiry. Commerce notified parties of this provision in its *Initiation Notice*.[200]

We disagree with GFL that *Taishan* is applicable to this proceeding. In *Taishan*, the Court examined whether the notice in that case was sufficient for all exporters other than the named exporter in the initiation notice, and it held that the notice was insufficient in regard to the unnamed exporters.[201] In the *Initiation Notice* for this proceeding, however, we stated:

> This anti-circumvention inquiry covers HFC blend R–410A, comprised of Chinese manufactured HFC components and Indian manufactured HFC components, blended in India to produce R–410A, prior to importation into the United States. This inquiry will also examine HFC blends R–404A, R–407A, R–407C, and R–507A produced in India using one or more HFC components of Chinese origin, as appropriate.[202]

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[194] *Id.* (citing *Initiation Notice*, 84 FR at 28272).
[195] *Id.* at 23-24.
[196] *Id.* at 24.
[197] *Id.* (citing GFL's Case Brief at 16; and *Taishan*, appeal pending)).
[198] *Id.* (citing *Taishan*).
[199] *Id.* at 27.
[200] *See Initiation Notice*, 84 FR at 28272.
[201] *Id*.
[202] *Id.* at 28270.

Thus, in this case there was no ambiguity about which exporters/producers or products would be covered by this inquiry. We stated clearly that the HFC blends at issue that were produced in India using one or more HFC components of Chinese-origin were the focus of our inquiry.

Given that we have removed the 12 month look-back provision of the certification requirements (*see* Comment 4), SRF's argument is moot. For the same reasons as discussed under Comment 1, we also disagree that the ITC's negative injury determination should impact Commerce's application of 19 CFR 351.225(l) in suspending liquidation to the date of initiation of the inquiry and adopting a certification scheme as discussed in Comment 4.

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 anti-circumvention inquiry in the *Federal Register*.

☒ ☐

Agree Disagree

9/25/2020

X 

Signed by: JOSEPH LAROSKI

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