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**Korean Producers' Proprietary Information Contained on pp. 8-9**

**Document May Be Released Under APO**

May 1, 2023

**VIA ELECTRONIC FILING**

The Honorable Gina Raimondo  
Secretary of Commerce  
U.S. Department of Commerce  
Attn: Enforcement and Compliance  
APO/Dockets Unit, Room 18022  
14<sup>th</sup> Street and Constitution Avenue, NW  
Washington, D.C. 20230

Re: Aluminum Foil from the People's Republic of China: Anti-Circumvention Inquiry  
With Respect to the Republic of Thailand and Korea – Case Brief

Dear Secretary Raimondo:

On behalf of the Flexible Packaging Association's Coalition for Aluminum Foil Security and its individual members, including Amcor Flexibles North America, Berry Global, Catty Corporation, Fres-co System USA, Inc., Novolex, ProAmpac, ProAmpac Holdings, Inc., Ampac

The Honorable Gina M. Raimondo

May 1, 2023

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Holdings, LLC, Specialty Packaging Inc., Tri-Seal Opco, LLC, Bagcraft Papercon LLC, International Converter LLC, Deluxe Produits de Papier Inc., General Packaging Products Inc, Paxxus, Inc., Sonoco Products Company, Tekni-Plex, Inc., Glenroy Inc, Hazen Paper Company, Printpack Inc., and Transcontinental Multifilm Inc. (collectively, “FPA Coalition”), a coalition of United States importers of subject merchandise, we hereby submit this case brief for consideration by the Department of Commerce (“Commerce”) before the final determination.

In accordance with 19 C.F.R. § 351.309(c)(2) (2022), this brief encompasses all affirmative arguments relevant to the above-captioned scope and anti-circumvention inquiries. The FPA Coalition reserves the right to respond to additional arguments in a rebuttal brief. This case brief is timely filed in accordance with deadlines established by Commerce. See Mem. from Mark Flessner to All Interested Parties re: Second Extension of Briefing Schedule (Apr. 26, 2023) (Public Document).

All business proprietary information cited herein related to the information previously submitted on the record for which no now request for proprietary treatment is needed. We ask that Commerce continue to accord BPI treatment for all such information.

The Honorable Gina M. Raimondo  
May 1, 2023  
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Copies of this document have been served in accordance with the attached certificate of service. Please contact the undersigned if you have any further questions regarding this matter.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. Mowry', written over the printed name.

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**Public Service List:**  
**Aluminum Foil from the People's Republic of China: Anti-Circumvention**  
**Inquiry With Respect to Korea**  
**A-570-053**

I, Kristin H, Mowry, certify that a copy of the attached submission was served on this 2nd day of May 2023 by electronic mail, on the following parties:

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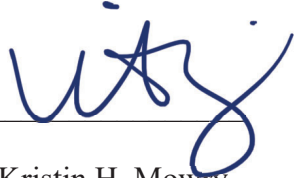


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**Public Service List:**  
**Aluminum Foil from the People's Republic of China: Anti-Circumvention**  
**Inquiry With Respect to Thailand**  
**A-570-053**

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Kristin H. Mowry

**BEFORE THE  
UNITED STATES DEPARTMENT OF COMMERCE**

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**IN THE MATTER OF:**

**ANTI-CIRCUMVENTION INQUIRY OF  
CERTAIN ALUMINUM FOIL FROM THE  
PEOPLE’S REPUBLIC OF CHINA**

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) **Case No. A-570-053**  
)

) **PUBLIC VERSION**  
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**CASE BRIEF OF THE FPA COALITION**

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**May 1, 2023**



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## INTRODUCTION

Commerce wrongly determined in the preliminary determination that Korean and Thai aluminum foil producers are circumventing the antidumping and countervailing duty orders on Aluminum Foil from the People's Republic of China. See Certain Aluminum Foil from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 83 Fed. Reg. 17,362 (April 19, 2018); see also Certain Aluminum Foil from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 Fed. Reg. 17,360 (April 19, 2018) (collectively, "Orders"). The expansion of antidumping ("AD") and countervailing duties ("CVD") on aluminum foil produced in Korea and Thailand is not appropriate under the statute because it is destructive to U.S. downstream manufacturing and Commerce should exercise its discretion to decline to impose measures on the respective foil products, or, as discussed herein, a subset of products not produced by the domestic industry. The statutory factors do not warrant the imposition of circumvention duties especially with respect to the industry in Korea, which even Commerce recognized preexisted the Chinese AD/CVD cases in some instances by decades, and had ample investment, research and development ("R&D") and intensive production processes as measured by capital investment, processing methods, and the value-add of those processes. Should Commerce wrongly reach an affirmative final determination, it should exclude ultra-thin foil from its affirmative finding, or, in the alternate, it should, consistent with its past practice, provide an end-use certificate to allow U.S. industry that relies on foil from the two countries to convert to packaging material to continue importing the product without crushing duties that will harm tens of thousands of American jobs for no benefit to the domestic aluminum foil industry.

As Commerce makes its final determination, it absolutely must acknowledge and address three fundamental commercial realities: 1) the cost of aluminum metal is a pass through cost that distorts the total production cost if measured incorrectly, 2) Korean producers' investment over decades reflects the fact that Korean aluminum foil industry is a direct competitor of the Chinese aluminum industry as opposed to a pawn of the Chinese industry as Petitions would like Commerce to believe and 3) "aluminum sheet" has already been defined in prior AD/CVD cases and its definition must remain consistent in these cases.

### **ARGUMENT**

#### **I. THE FACTORS UNDER 19 U.S.C. § 1677j(b)(2) DO NOT WARRANT AN AFFIRMATIVE CIRCUMVENTION FINDING BECAUSE THE PROCESSING THAT OCCURS IN KOREA AND THAILAND IS MORE THAN MINOR OR INSIGNIFICANT**

In the preliminary determination, Commerce wrongly determined that Thai and Korean producers are circumventing the Orders on China. Commerce's affirmative preliminary determination stands on a fatally flawed analysis of the production process and the value add of the manufacturing that occurs in Korea and Thailand. Commerce's refusal to acknowledge that a large proportion of the cost of finished aluminum foil is merely pass-through commodity metal costs that are set on global exchanges skews its analysis such that its calculations are inaccurate and inconsistent with commercial reality. Commerce has no factual basis to make an affirmative determination with respect to the production process or the value add of that process for either Korea or Thailand. It is incongruous for Commerce to find that the nature of some of the production process is not minor or insignificant, i.e. producing ultra-thin foil is "substantial," and yet reach a conclusion that the process of assembly or completion in Korea and Thailand is nonetheless minor or insignificant. Antidumping and Countervailing Duty Orders on Certain Aluminum Foil from the People's Republic of China: Preliminary Affirmative Determinations of

Circumvention With Respect to the Republic of Korea and the Kingdom of Thailand, 88 Fed. Reg. 17,177 (Mar. 22, 2023), and accompanying Prelim. Dec. Mem. at 13-14 (Korea) (“Korea Prelim. Dec. Mem.”); see also accompanying Prelim. Dec. Mem. (Thailand) (“Thailand Prelim. Dec. Mem.”). Accordingly, in the final determination, Commerce should reach a negative country-wide determination of circumvention with regard to Korea and Thailand.

Relying on the significant nature of the production process is consistent with past practice, the statute and legislative history. Commerce itself confirmed that this factor is important to rendering a circumvention determination. Commerce reasoned in its determination that:

{T}the factors involving level of investment, the level of R&D, and the extent of the production facilities in {the third country} weigh less heavily in our determination than the factors involving the nature of the production process and the value added in {the third country} because the former relate more broadly to the companies and their facilities, whereas the latter relate more to the production of the inquiry merchandise itself.

Korea Prelim. Dec. Mem. at 15. “Process” is a foundational term in the statute. Pursuant to section 781(b)(1)(C) of the Tariff Act of 1930 (the “Act”), Commerce cannot include in the scope of an existing order products manufactured in a third country unless “the process of assembly or completion in the foreign country . . . is minor or insignificant.” 19 U.S.C. § 1677j(b)(1)(C). Section 781(b)(2)(C) of the Act lists “the nature of the production process in the foreign country” as a mandatory factor to consider. 19 U.S.C. § 1677j(b)(2)(C). Thus, the statute is grounded in an analysis of the production process in the third country and pass-through metal costs set on global exchanges should not cloud Commerce’s analysis.

Furthermore, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act repeatedly refers to circumventing activity as the establishment of a “screwdriver operation” in the United States or third country, and also notes that it would be “relatively easy” for a foreign exporter to circumvent orders by establishing such screwdriver operations. See

Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, at 893-94. It is clear from this legislative history that the type of activities intended to be covered by circumvention findings were those that are akin to “screwdriver assembly operations” that would be easy to establish. The immensely sophisticated production process occurring in Korea—that transforms aluminum ingot into ultra-thin aluminum foil—is certainly not “relatively easy” to establish and goes far beyond a simple “screwdriver operation.”

As explained below, Commerce has no statutory basis to find that processing is minor or insignificant, and additionally, no matter Commerce’s minor or insignificant finding, these circumvention inquiries are not appropriate under 19 U.S.C. § 1677j(b)(1)(E) because these inquiries are self-initiated and they jeopardize the large U.S. ultra-thin foil consuming industry.

#### **A. The Processing Is Neither Minor nor Insignificant**

While none of the statutory factors lend themselves to a finding of minor or insignificant processing for either country, the FPA Coalition stresses that the value of processing is not a small proportion of total value and the nature of the production process is substantial—especially with regard to Korea.

##### **1. Value of the Processing Is Not a Small Proportion of the Value When Setting Aside the Pass-Through Metal Cost**

Commerce should not include the metal content in its price valuation analysis because U.S. aluminum foil producers, like Korean and Thai producers, do not smelt primary aluminum. See Letter on Behalf of FPA Coalition to Dep’t of Commerce re: The Flexible Packaging Association’s Coalition for Aluminum Foil Security’s Comments on Initiation and Rebuttal Factual Information at 10-11 (Public Version) (“FPA Initial Comments”). As the FPA Coalition explained in its prior

comments, domestic aluminum foil producers only begin with casting. See id. The reality of domestic producers' processes is unrebutted.

Once Commerce analyzes the cost of aluminum foil production beginning with casting and/or rolling, the extensive nature of processing in Korean and Thailand becomes apparent. The cost of aluminum metal content is merely a pass-through cost that distorts the total production cost if measured incorrectly. The FPA Coalition refers Commerce to detailed production methods and diagrams that it supplied which explain how smelting is disconnected from later casting and rolling that is performed. See id. at 12-15 (Public Version).

Commerce's valuation analysis under 19 U.S.C. § 1677j(b)(1)(D) continues to wrongly include the cost of raw aluminum when determining that "the value of aluminum foil inputs produced in China constitutes a significant portion of the total value of the aluminum foil exported to the United States from Korea and Thailand." See Mem. from Ryan Majerus to Lisa Wang re: Initiation of Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders DOC Initiation Mem. at 9 ("Public Document") ("DOC Initiation Mem."). Separating the cost of raw aluminum from the cost of producing aluminum foil is consistent with both the production of aluminum foil, i.e., that the domestic industry is not smelting raw aluminum, and the industry standard that the metal cost is considered a pass-through cost to the customer. Aluminum prices globally are directly linked to the LME and other similar commodity metal trading indices, thus, Commerce should use a casting-forward value comparison. See FPA Initial Comments at Ex. 2, Manakin Decl. ¶ 16-17 (Public Version) ("Manufacturers pass through the cost of the base metal to the customer, whether based on the LME only or the LME plus a relative market premium (Rotterdam, Midwest, Japanese...)." "The fabrication selling price that represents the mill's actual operating earnings (separated from the metal cost.")). Id. Incorporating the cost of aluminum in



the value does not make sense for a product that is so significantly tied to the price of a globally traded commodity and where the differentiation from smelting through to the end product is based entirely on the production processes since the metal content is static. In other words, the aluminum value chain is set up exactly according to the analytical framework that the FPA Coalition urges Commerce to apply, which put simply is to measure the significance of processing based on processing without diluting the analysis with pass-through metal costs.

Not only was Commerce's valuation analysis flawed by including the cost of raw aluminum in calculating the total value of foil, but a valuation of the merchandise in terms of a monetary figure was flawed in the first instance. When it comes to aluminum foil, the value correlates to the processing because the inherent worth of the product is the technologically complex processing of aluminum foil into ultra-thin foil, i.e., the fabrication cost, and not the LME-pegged raw material cost. See id., at 24-25. Fabrication costs "are largely dependent upon the machine time and other conversion costs." See id., at Ex. 2, Manakin Decl. ¶ 17 (Public Version). Commerce's current valuation analysis, therefore, vastly over-inflates the total value of the merchandise produced in China by focusing on the raw material (metal) costs. Rather than focusing on monetary analysis based on the raw material costs, Commerce must instead examine the value of the merchandise in terms of the equipment hours required per weight of output. See id. at ¶ 19 (Public Version). The number of equipment hours that go into the processing of the foil correlates to the fabrication cost. See id. The fabrication cost is then used to negotiate the price of the foil between the buyer and seller. Here, when value of foil is properly analyzed in terms of processing, as opposed to a simple monetary figure, the only conclusion is that the value of the product produced in China is not a significant portion of the total value of the merchandise.

Commerce's final determination must also consider the value of machine time at each step per volume of output, which demonstrates that processing occurring in Korea and Thailand is not minor or insignificant. Foil mills use machine time as a variable cost measure to allocate fixed and other costs because machine time is an objective and accurate way to distribute costs for different products. More machine time means the product must absorb more cost. This is particularly important, where, as here, raw material cost is only a pass-through and does not contribute to the mill's bottom line. While mills' country cost structure, depreciation, financing and other general operating environments may differ from country to country, or even within a country, one thing is constant for all aluminum foil mills – time. See id. at Ex. 2, Manakin Decl. ¶ 19 (Public Version) (equipment hours required per weight of output “is a standard measure of operators and will clearly reflect a mill's fabrication costs”). Commerce presumes that casting of the hot band is more significant than the subsequent rolling and finishing steps. See Korea Prelim. Dec. Mem. at 13. But this is far from true. In fact, casting of hot band and cold rolling all the way to aluminum foil stock of approximately 0.279 mm contributes only 20.9% of mill processing time. See id. at Ex. 2, Manakin Decl. ¶ 21 (Public Version). As some of the domestic foil producers also purchase hot band from other producers, even this is overstated as it includes more than 200 hours/million pounds for the continuous casting of the hot band itself that domestic aluminum foil producers may themselves purchase from outside. Id. If that is removed, the cold rolling contributes only 4.6% of equipment time compared with 95.6% of equipment time dedicated to the rolling of foil stock to ultra-thin aluminum foil. Id. The total equipment hours for rolling of 0.279 mm foil stock to ultra-thin foil is 999.4 per million pounds of output, whereas the casting of the hot band is only 218 hours and the cold rolling of hot band to foil stock is only 46.1 hours. See id.

## 2. Nature of the Production Process is Substantial

Far from a “screwdriver operation,” Commerce itself acknowledges that the aluminum foil production process contains multiple steps and that includes complex machinery to ensure highly precise, customer-specified aluminum foil characteristics that meet specific mechanical properties. See Korea Prelim. Dec. Mem. at 13-14; Thailand Prelim. Dec. Mem. at 19 (explaining the multi-step aluminum foil rolling process). There is no question that Commerce’s final determination should reflect that the nature of the production process in Korea and Thailand is substantial. The Korean producers explained in significant detail the steps that Lotte and Dong-Il go through to produce exacting aluminum foil product specifications, especially for ultra-thin foil. See Letter on Behalf of Dong-IL Aluminium Co., Ltd., Dongwon Systems Corp., ILJIN Altec Co., Ltd., Korea Aluminium Co., Ltd., Lotte Aluminium Co., Ltd., and Sam-A Aluminium Co., Ltd. (collectively, “Korean Producers”) to Dep’t of Commerce re: Korean Producers’ Comment Regarding Preliminary Determination at 26-27 (Feb. 13, 2023) (Public Version) (“Korean Producers Pre-Prelim. Comments”). The Korean Producers also explained that the Korean aluminum foil industry developed separately from the aluminum strip industry in Korea because aluminum foil production is such a specialized manufacturing process. See id. at 24.

Commerce’s final determination must consider the processing costs and complexity of creating aluminum foil, which Dong-Il summarized on the record. See Korean Producers Pre-Prelim. Comments at 26 (Business Proprietary Version). The Korean Producers provided that:

Dong-IL’s rolling process begins with the cold-rolling mill machine, where the thickness and the flatness are managed under the AGC/AFC system, to ensure the production of high-quality products with diverse dimensions. The rolling process involves several passes, that take anywhere from [REDACTED] minutes, as well as the doubling process necessary to manufacture ultra-thin gauge aluminum foil products. Next, the separator machine cuts the aluminum foil to customer specifications, which takes [REDACTED] minutes to slit and separate two layers of one aluminum strip roll. The aluminum foil is then annealed at temperatures between [REDACTED] and takes [REDACTED] minutes to process a set of [REDACTED] aluminum

strip rolls. Aluminum foil rolls are next inspected by using the light gauge machine to rewind the aluminum foil rolls, taking [ ] minutes per roll. For thicker aluminum foil, there may be a coating process before they are cut in the slitting process, taking [ ] minutes. Thick aluminum foil undergoes the slitting process in the heavy gauge machine, taking [ ] minutes for each roll. Dong-IL utilizes [ ] different types of major and complex machinery for these processes with equipment costing as much as [ ] KRW for its [ ] foil mills, which is significantly higher when accounting for inflation. Finally, Dong-IL's employees require several external trainings, including advanced [ ]].

Korean Producers Pre-Prelim. Comments at 26-27 (Business Proprietary Version) {**Korean Producers' BPI**}. Likewise, in Thailand, Commerce explained that aluminum foil manufacturing is a multi-step process.

The first is “rough” rolling, where aluminum strip is tested and then rolled to foil thickness. The second is “intermediate” rolling, where the rough-rolled foil is rolled to the approximate target thickness, annealed, and inspected with water and tensile tests. The third is “finish” rolling, which rolls the annealed foil to the exact thickness specified by the customer. Subsequently, the merchandise is slit, cleaned, inspected for surface quality (smoothness, absence of pinholes, etc.), and then packed.

See Thailand Prelim. Dec. Mem. at 19. Aluminum foil manufacturing is not a simple screwdriver operation in either country.

Commerce should also appreciate the complexity of ultra-thin aluminum foil manufacturing specifically—in both Thailand and Korea. Domestic purchasers of foil consider ultra-thin foil to be separate from other types of foil. Manakin Industries set forth that “{u}ltra-thin foil is a specialty foil of 0.0003 inches in thickness or less that is used primarily in the packaging for end uses in the medical, pharmaceutical, hygiene, food and insulation industries.”

See Letter on Behalf of FPA Coalition to Dep't of Commerce re: The Flexible Packaging Association's Coalition for Aluminum Foil Security's Comments on Initiation and Rebuttal Factual Information at Ex. 2, Manakin Decl. ¶ 5 (Public Version) (“FPA Initial Comments”). Several other companies confirm that they rely on ultra-thin foil to produce their products. For

instance, Novolex, a major U.S. manufacturer of flexible packaging, set forth that “more than 95% of what {it} import{s} has a thickness of *less than 0.0003 {inches}*.” See id., Novolex Letter at p. 1 (Public Version). Similarly, Paxxus, the “leading supplier of engineered flexible materials for the global healthcare market,” explained that it uses aluminum foil less than “0.0009 inch{es} (23 microns) thick” and that this type of ultra-thin foil is “optimal for {its} equipment.” See id. at Ex. 2, Paxxus Decl. ¶ 9 (Public Version). The FPA Coalition submitted extensive, unrebutted factual information highlighting the importance of machine time in how foil is produced and establishing that nearly 80 percent of the machine time to process 6 mm aluminum hot band to ultra-thin foil occurs from the step of annealing 0.279 mm foil stock and then continuing to roll-reduce, double, separate/slit and finish annealing to reach the final ultra-thin foil. See id. at Ex. 2 (Public Version). The specialized nature of ultra-thin foil production is anything but minor or insignificant.

### **3. Imposing Circumvention Measures in this Case is Not Appropriate Under 19 USC § 1677j(b)(1)**

Beyond the three-factors set forth under 19 U.S.C. § 1677j(b)(3), Commerce must reach a negative circumvention determination because these inquiries are not appropriate. These circumvention inquiries are already causing irreparable damage to U.S. industry that relies on aluminum foil. U.S. workers and consumers are paying the literal and figurative price for these unnecessary and unrequested circumvention inquiries.

Not all aluminum foil is alike. The kind of aluminum foil exported from Korea and Thailand is predominantly of a gauge that is not widely available in the United States – namely, high purity, light gauge foils less than or equal to 0.025 mm used in lidding, household foil where the foil comes into contact with food, and especially ultra-thin foil applications. An affirmative circumvention finding against ultra-thin foil is not appropriate given that the domestic industry

either does not produce, or cannot meet, the demand for this type of product that is used in critical end-uses such as the medical and food-storage fields.

FPA Coalition members are packaging converters – they coat, laminate, and print aluminum foil and combinations of foil, paper and plastic to make flexible packaging that is used for a variety of products. Commerce’s self-initiated aluminum foil anticircumvention inquiries are not appropriate because they threaten a thriving U.S. industry that is reliant on ultra-thin foil that is not produced by the domestic industry. As the FPA Coalition has explained throughout these proceedings, products that FPA members create are critical to the U.S. economy and the ultra-thin foil it relies on is not widely available from U.S. producers. See FPA Initial Comments at 30-45 (Public Version).

When it comes to packaging for medical devices, food, and health care, sterility is critical – there is no ideal substitution for the barrier protection that aluminum foil provides. This is because this ultra-thin foil has to “adhere to food safety and other requirements promulgated by regulatory bodies including but not limited to REACH, RoHS, CONEG, Conflict Mineral Sourcing, FDA CFR 21 178.3910, California Proposition 65 and others.” See FPA Initial Comments at Ex. 2, Novolex Letter, p. 1-2; see also id., Manakin Decl. ¶ 5 (“These end uses have strict quality requirements.”); id., TekniPlex Decl. ¶ 7 (noting that the aluminum foil subject to these inquiries must meet “strict technical specifications”). In the case of medical devices, “pinholes in the aluminum foil and the impact on water vapor and oxygen barrier properties are a concern.” Id., Paxxus Decl. ¶ 15. “End users stipulate a maximum number of . . . pinhole defects per square inch of finished material.” Id., Manakin Decl. ¶ 5. To meet these requirements, “the qualification process . . . {is} very expensive and time-consuming.” Id., Paxxus Decl. ¶ 14; see also id., TekniPlex Decl. ¶ 9 (setting forth that due to its products being highly regulated by the

FDA, “changing sources of raw materials, even if available, cannot be implemented in a short time frame due to regulator requirements, customer required qualification and stability testing to demonstrate equivalency.”). This is further complicated by substantial lead times between seven and ten months. See id. at ¶ 10. Worse yet, the potential applicability of duties will likely lead to increases in already long-lead times. See id. at ¶ 11. The combination of stringent quality requirements and long-lead times severely hampers producers’ ability to substitute ultra-thin foil with wider gauges.

In conclusion, as discussed in the circumvention inquiry of Certain Welded Carbon Steel Standard Pipes and Tubes from India, where each of the factors under subsection (E) are not present, the statute states that Commerce may determine that action is not appropriate. See Certain Welded Carbon Steel Standard Pipes and Tubes From India: Final Negative Determinations of Circumvention of the Antidumping Duty Order, 88 Fed. Reg. 12,917 (Mar. 1, 2023), and accompanying Issues and Dec. Mem. at Cmt. 1. Given that production in Korea and Thailand is not minor or insignificant, and the circumvention inquiry is destructive to the U.S. ultra-thin foil consuming industry, the statutory factors are not all met here, and a “not appropriate” finding is required by statute.

## **II. EVEN IF COMMERCE REACHES AN AFFIRMATIVE DETERMINATION FOR THAILAND, IT SHOULD REACH A NEGATIVE DETERMINATION FOR KOREA**

Even if Commerce reaches an affirmative determination for Thailand, it must not for Korea. The long history of aluminum foil production in Korea, combined with substantial casting input production inside the country, leave Commerce no basis for an affirmative finding in the country. As Commerce itself acknowledges throughout its evaluation, the record evidence is clear and conclusive that throughout Korea, the nature of the production process is not minor or insignificant. Although an affirmative determination is not warranted for either Thailand or Korea,

there are distinguishing characteristics of industry in Korea that require a negative determination. Most importantly, the Korean industry's production process is more substantial than Thailand by nature of Korea's smelting and casting capabilities in-country. Moreover, Korea has a long history of aluminum foil production that far precedes the Orders on China. See Korea Prelim. Dec. Mem. at 13.

First, Commerce concluded that “{a}lthough the nature of {the} aluminum foil production facilities may be less extensive than that of a newer, integrated aluminum production facility, we preliminarily find that the extent of the . . . production facilities in Korea is not minor or insignificant.” Korea Prelim. Dec. Mem. at 14. As the Korean producers already explained, both Novelis Korea and Choil Aluminum have significant capacity “capacity for casting aluminum sheet/strip” in Korea. Korean Producers Pre-Prelim Comments at 33 (Public Version). In other words, Commerce must give significant weight to the fact that it has already recognized that the foil industry is a specialized industry that sprung up decades ago as a companion industry to the aluminum casting industry. The statute refers to “the process of assembly or completion in the foreign country,” not the process or completion by particular parties in in the foreign country. 19 U.S.C. § 1677j(b)(1)(C). In Commerce's initiation notice, it stated that it was concerned that aluminum foil completed in Korea (and Thailand) “using inputs (i.e., aluminum foil- and sheet-gauge products) manufactured in the People's Republic of China (China), are circumventing.” Certain Aluminum Foil From the People's Republic of China: Initiation of Circumvention Inquiries of the Antidumping Duty and Countervailing Duty Orders, 87 Fed Reg. 42,702 (July 18, 2022) (“Initiation Notice”). In Korea, unlike Thailand, producers rely on “a significant quantity of Korean-origin inputs” and thus there cannot be circumvention. See Korean Producers Pre-Prelim. Comments at 33 (Public Version).



Second, the Korean producers' limited use of input production from China is not a coincidence. “{E}ach of the six Korean Producers has been manufacturing aluminum foil for more than 30 years and, in the case of Lotte, for 55 years.” Id. at 25 (Public Version). Korean producers' investment over decades reflects the fact that the “Korean aluminum foil industry is a direct competitor of the Chinese aluminum foil industry” as opposed to a pawn of Chinese industry as Petitioners would like Commerce to believe. Id. at 7 (Public Version). Aluminum foil production in Korea is anything but minor or insignificant.

### **III. ULTRA-THIN FOIL SHOULD BE EXCLUDED FROM ANY AFFIRMATIVE DETERMINATION**

No factual basis exists for an affirmative final determination with respect to either Korea or Thailand, but in the event Commerce reaches an affirmative determination, ultra-thin foil should be exempted because it is unique product that is not produced in the United States. Imposing restrictive trade measures pursuant to Commerce's self-initiated anticircumvention inquiries would not be appropriate under the statute because it would threaten the viability of the U.S. industry reliant on ultra-thin foil. As explained in FPA Initial Comments, the kind of aluminum foil exported from Korea and Thailand includes a gauge range that is not widely available in the United States to packaging converters – namely, high purity, light gauge foils less than or equal to 0.025 mm and more specifically product of 0.0003 inches or less used in ultra-thin foil applications. See FPA Initial Comments at 30 (Public Version). To name just a few examples, ultra-thin foil allows FPA Coalition members to create building materials, like insulation facer on construction materials that promote energy conservation, medical products found in doctors' offices and hospitals, such as medical blister packs and medical device packaging and consumer products like sandwich packaging and gift wrap. See id. at Ex. 16 (Public Version).

The FPA Coalition has already reported that to the best of its knowledge only two U.S. mills have the technical capability to produce ultra-thin foil, yet those companies have quality control problems and very limited volume. See id. at 40 (Public Version). This is confirmed by the fact that, for several years, not a single U.S. foil producer has objected to Section 232 exclusion requests on the basis that ultra-thin foil is available domestically. See id. at 42 (Public Version). Despite years of trade relief from the China Orders, the domestic industry is not able to support the U.S. ultra-thin foil consuming manufacturing industry. See id. at 37-41 (Public Version). In combination with the fact that that U.S. converter/packaging industry is entirely reliant on imported ultra-thin foil, imposing trade measures pursuant to these self-initiated anticircumvention inquires would be inappropriate because such measures would cause disproportionate harm to the U.S. economy by restricting imports of ultra-thin foil that the domestic industry has already proven it will not make, notwithstanding years of antidumping and countervailing duties, Section 301 duties, and Section 232 duties.

As the FPA Coalition provided in its Initial Comments and above in section I.A.1., ultra-thin foil requires a complex manufacturing process and FPA Coalition members are reliant Korean and Thai producers to supply them the ultra-thin foil that they use for critical food and health safety products that members manufacture in the United States. See infra section I.A.2. (referencing Manakin Industries' declaration).

#### **IV. ULTRA-THIN FOIL SHOULD BE ELIGIBLE FOR AN END-USE CERTIFICATION EXEMPTION IF COMMERCE REACHES AN AFFIRMATIVE DETERMINATION**

In the unlikely event that Commerce reaches an affirmative final determination, we further request that Commerce exempt converter foil that is used by packaging manufacturers and domestic manufacturers converting the foil for other uses. Such a certification regime would help limit damage to FPA Coalition members.

Precedent exists for a certification exemption regime that includes end-use factors. The 2021 revision of Commerce’s circumvention regulations envisioned a flexible approach in the use of certification mechanisms in connection with circumvention findings. See Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 Fed. Reg. 52,300, 52,353 (Sept. 20, 2021) (“Final Rule”). Commerce stated that “the most important factor is that Commerce has the flexibility to apply a remedy in accordance with a circumvention determination on a case-by-case basis which it finds to be appropriate given the facts on the record and its policies and practices.” Id. at 52,353. There are at least two examples of such certification regimes.

First, in its Final Rule, Commerce itself cited to the Steel Concrete Reinforcing Bar from Mexico case as an example. See id. at 52,363 n.190; see also Steel Concrete Reinforcing Bar from Mexico Final Affirmative Determination of Circumvention of the Antidumping Duty Order, 85 Fed. Reg. 34,705, 34,706 (Jun. 8, 2020). In that determination Commerce required certifications from importers to exclude a category of merchandise produced for an identified construction project and produced according to an engineer’s structural design consistent with an industry standard. This was implemented in paragraph 7 of Customs Instructions No. 0084401 (Mar. 24, 2020) (requiring the importer to certify that “{t}he imports of hooked rebar have been sold in connection with a specific, identified construction project and produced according to an engineer's structural design, consistent with industry standards”). Id. at 35,607; see also Letter on behalf of the FPA Coalition to Commerce re: Comments Prior to the Preliminary Circumvention Decisions at 10 (Feb. 24, 2023) (“FPA Comments Prior to the Prelim.”) (Public Document). Whether the imported article actually went to the identified construction project cannot be confirmed without

post-importation facts. Thus, this certification regime exempted product based on how that product was used after importation.

Second, in the Solar Cells from China anticircumvention inquiries preliminary determination, Commerce required certification of use of the solar cells after importation in order to determine if the goods are subject to duties. See, e.g., Letter from Eric B. Greynolds to the File re: Placement of Customs and Border Protection (CBP) Messages on Record of Proceedings (Feb. 17, 2023) (A-570-979) (requiring the importer to certify, at the time of importation, that the solar cells or modules “will be utilized in the United States by no later than 180 days after the earlier of 06/06/2024, or the date the emergency described in Presidential Proclamation 10414 is terminated”); see also FPA Comments Prior to the Prelim. at 10-11. There, whether imported articles are subject or not subject to antidumping or countervailing duties at the time of importation depends on the timing of the end use of the imported article long after importation, confirming that post-importation use of merchandise can be the subject of a certification and can be relied upon by Commerce and CBP to determine applicability of duties.

In sum, in the event Commerce reaches an affirmative final determination, it should exempt ultra-thin foil destined for use by domestic manufacturers converting the foil for packaging or similar uses. A certification could be utilized to ensure that the ultra-thin foil qualifies for the exemption based on how it is used after importation, consistent with Commerce’s precedent cited above.

## **V. COMMERCE HAS ALREADY DEFINED ALUMINUM SHEET**

As explained above in Section II, in Commerce’s initiation notice, it stated that it was concerned that aluminum foil completed in Korea (and Thailand) “using inputs (i.e., aluminum foil- and sheet-gauge products) manufactured in the People’s Republic of China (China), are

circumventing.” Initiation Notice, 87 Fed. Reg. at 42,702. In the preliminary certifications, Commerce required importers and exporters claiming exemption to certify that the imported foil was not produced with Chinese aluminum foil or “aluminum sheet.” In the event of a final affirmative determination, whether in whole or part, Commerce must confirm the existing definition of “aluminum sheet.”

Because this case was self-initiated, reference to the petitioner’s intention is not available. Commerce’s definition of “aluminum sheet” used in numerous other Commerce investigations must be what Commerce means in this case by “aluminum sheet.” See Common Alloy Aluminum Sheet From Bahrain, Brazil, Croatia, Egypt, Germany, India, Indonesia, Italy, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan and the Republic of Turkey: Antidumping Duty Orders, 86 Fed. Reg. 22,139 (Apr. 27, 2021). Commerce must confirm that its intention is to permit Thai and Korean foil producers to use Chinese aluminum greater than 6.3 mm without subjecting the respective third-country foil producers to Chinese AD/CVD duties. For example, in the common alloy aluminum sheet (“CAAS”) cases, Commerce defines aluminum sheet as “a flat-rolled aluminum product having a thickness of 6.3 mm or less, but greater than 0.2 mm, in coils or cut-to-length, regardless of width.” See id. Commerce, consistent with its past practice, should confirm for parties that these circumvention inquiries’ use of “aluminum sheet” refers to the scope definition of aluminum sheet as found in the CAAS cases at Commerce.

Defining “aluminum sheet” in this case in a manner that goes beyond the scope of the CAAS cases would create a conflict between Commerce’s analysis of pending circumvention claims involving the production of aluminum sheet from plate gauge aluminum products. See e.g., Common Alloy Aluminum Sheet from China – Domestic Industry Request for Circumvention Ruling Pursuant to Section 781(b) of the Tariff Act of 1930, as Amended (Mar. 15, 2023)

(ACCESS Barcode 4354039-01). Aluminum flat products thicker than the scope of CAAS cases cannot properly be construed to circumvent both the sheet case and the foil case. Such a finding would improperly nullify the significance of the aluminum sheet industry and impossibly blur or even eliminate any distinction between the foil and sheet cases. To avoid this, Commerce should make clear that aluminum foil produced in Korea and Thailand from aluminum plate greater than 6.3 mm can be certified as exempt from the circumvention measures on Chinese aluminum foil.

### CONCLUSION

The record in this case underscores that no legal or factual justifications exists to reach an affirmative finding of circumvention in either Korea or Thailand. For the reasons set forth above, Commerce must continue to find that no circumvention of the China Orders has occurred in the final determination.

Respectfully submitted,



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