A-583-856
Anti-Circumvention Inquiry: Vietnamese-Completed CORE
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December 13, 2019

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for Anti-Circumvention Inquiry on the Antidumping Duty Order on Certain Corrosion-Resistant Steel Products from Taiwan

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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 certain corrosion-resistant steel products (CORE) from Taiwan. As a result of our analysis, we continue to find, consistent with the *Preliminary Determination*,[1] that CORE, completed in Vietnam from hot-rolled steel (HRS) and/or cold-rolled steel (CRS) flat products sourced from Taiwan, are circumventing the AD order on CORE from Taiwan.[2] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of issues for which we received comments and rebuttal comments from interested parties:

Comment 1: Whether Companies That Did Not Receive Commerce's Quantity and Value (Q&V) Questionnaire Should Be Permitted to Participate in the Certification Process
Comment 2: Whether Commerce Abused Its Discretion in Rejecting the Q&V Questionnaire Responses of Certain Companies
Comment 3: Whether Commerce Lacks Statutory Authority to Apply AFA Where Respondents Did Not Deprive Commerce of Information Regarding Its Ability to Trace Inputs

[1] *See Certain Corrosion-Resistant Steel Products from Taiwan: Affirmative Preliminary Determination of Anti-Circumvention Inquiry on the Antidumping Duty Order*, 84 FR 32864 (July 10, 2019) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum.
[2] *See Certain Corrosion-Resistant Steel Flat Products from India, Italy, the People's Republic of China, the Republic of Korea, and Taiwan: Amended Final Affirmative Antidumping Duty Determination for India and Taiwan, and Antidumping Duty Orders*, 81 FR 48390 (July 25, 2016) (*Taiwan CORE Order*).

Comment 4: Whether Commerce's Use of AFA Impermissibly Departs Without Explanation from Its Decision in the China Anti-Circumvention Inquiry
Comment 5: Whether Precluding Certain Importers and Exporters from Participating in the Certification Process is Inappropriate and Unfairly Punishes Importers
Comment 6: Whether Commerce Should Allow Additional Time for Completing Certifications for Pre-Preliminary Determination Entries
Comment 7: Whether a Country-Wide Determination is Justified
Comment 8: Whether Commerce's Interpretation of Section 781(b) of the Act Applies to the CORE Production Process in Vietnam and Expands the Scope of the *Taiwan CORE Order*
Comment 9: Whether Commerce Should Amend the Exporter Certification Language to Prevent Funneling
Comment 10: Whether to Apply AFA to Certain Vietnamese Producers that are Affiliated with Those that are Deemed Non-Responsive
Comment 11: Whether Commerce Should Preclude Companies that Failed to Cooperate in Both the CORE from China and CORE from Taiwan Inquiries from Participating in the Certification Regime
Comment 12: Whether to Apply the Highest of the Petition Rate or Investigation Calculated Rate as the Cash Deposit Rate for Non-Responsive Companies
Comment 13: Whether CSVC's Manufacturing Operations in Vietnam Constitute Circumvention Under the Statutory Criteria Established in Section 781(b)(2) of the Act
Comment 14: Whether Nam Kim Should Be Eligible for Certification

II. BACKGROUND

On July 10, 2019, Commerce published the *Preliminary Determination* of circumvention of the *Taiwan CORE Order*. Pursuant to section 781(e) of the Tariff Act of 1930, as amended (the Act), on September 17, 2019, we notified the U.S. International Trade Commission (ITC) of our affirmative preliminary determination of circumvention and informed the ITC of its ability to request consultation with Commerce regarding the possible inclusion of the products in question within the *Taiwan CORE Order* pursuant to section 781(e)(2) of the Act. Between July 22, 2019 through August 2, 2019, we conducted verifications in Vietnam.[3]

In accordance with 19 CFR 351.309, we invited parties to comment on the *Preliminary Determination* and our verification findings.[4] On September 11 and 16, 2019, China Steel Sumikin Vietnam Joint Stock Company (CSVC), the domestic parties,[5] Formosa Ha Tinh Steel

[3] *See* Memoranda, "Verification of the Questionnaire Responses of China Steel Sumikin Vietnam Joint Stock Company in the Anti-Circumvention Inquiry of the Antidumping Duty Order on Corrosion-Resistant Steel Products from Taiwan," dated September 4, 2019 (CSVC Verification Report); and "Verification of the Questionnaire Responses of Nam Kim Steel Co.," dated September 4, 2019 (Nam Kim Verification Report).
[4] *See* Memorandum, "Anti-Circumvention Inquiry on Certain Corrosion-Resistant Steel Products from Taiwan: Briefing Schedule for the Final Determination," dated September 4, 2019.
[5] The domestic parties in this inquiry are: ArcelorMittal USA LLC; Nucor Corporation; United States Steel Corporation; Steel Dynamics, Inc.; and California Steel Industries.

(Formosa), Hoa Phat Group, Hoa Sen Group (Hoa Sen), U.S. Importers Group,[6] Marubeni-Itochu Steel America, Inc. (MISA), Mitsui & Co (U.S.A) Inc. (Mitsui), Ton Dong A Corporation (Ton Dong A), and Vina One Steel Manufacturing (Vina One) filed case briefs.[7] On September 11, 2019, Duferco Steel Inc. (Duferco), JFE Shoji Trade America, Inc. (JFE Shoji), and Optima Steel International, LLC (Optima Steel) filed letters in lieu of case briefs.[8] On September 18 and 19, 2019, CSVC, the domestic parties, Hoa Sen, U.S. Importers Group, JFE Shoji, MISA, Mitsui, Nam Kim Steel Co. (Nam Kim), Optima Steel, and Ton Dong A filed rebuttal briefs.[9] On October 24, 2019, Commerce held a public hearing for this inquiry.

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[6] U.S. Importers Group consists of Ferrostaal Metals GmbH, Kurt Orban Partners LLC, Macsteel International USA Corp., Stemcor USA Inc, Tata International Metals (Americas) Limited, and Cumic Steel USA, Inc.

[7] *See* CSVC's Letter, "Anti-Circumvention Inquiry on Corrosion-Resistant Steel Products from Taiwan – Case Brief," dated September 11, 2019 (CSVC's Case Brief); *see also* Domestic Parties' Letter, "Certain Corrosion-Resistant Steel Products from Taiwan: Petitioners' Case Brief," dated September 11, 2019 (Petitioners' Case Brief); Formosa's Letter, "Case Brief of Formosa Ha Tinh Steel Corporation," dated September 11, 2019 (Formosa's Case Brief); Hoa Phat Group's Letter, "Anti-Circumvention Inquiry Involving Corrosion-Resistant Steel – Case Brief of Hoa Phat Group and Its Subsidiaries," dated September 11, 2019 (Hoa Phat Group's Case Brief); U.S. Importers Group's Letter, "Certain Corrosion-Resistant Steel Products from Taiwan – Case Brief," dated September 11, 2019 (U.S. Importers Group's Case Brief); MISA's Letter, "Anti-Circumvention Inquiries of the Antidumping and Countervailing Duty Orders on Certain Corrosion-Resistant Steel Products from the Republic of Taiwan {sic}: Case Brief of Marubeni Itochu Steel America, Inc.," dated September 11, 2019 (MISA's Case Brief); Mitsui's Letter, "Corrosion-Resistant Steel Products from Taiwan: Case Brief," dated September 11, 2019 (Mitsui's Case Brief); Vina One's Letter, "Antidumping Duty Order on Certain Corrosion-Resistant Steel from Taiwan (Anti-Circumvention Inquiry, Vietnam Imports) – Case Brief," dated September 11, 2019 (Vina One's Case Brief); Hoa Sen's Letter, "Certain Corrosion-Resistant Steel Products from Republic of Taiwan {sic}; Anti-Circumvention Inquiry; Case No. A-583-856: Hoa Sen's Case Brief," dated September 16, 2019 (Hoa Sen's Case Brief); and Ton Dong A's Letter, "Certain Corrosion-Resistant Steel Products from Republic of Taiwan; Anti-Circumvention Inquiry; Case Nos. A-583-856: Ton Dong A Corporation Case Brief, " dated September 16, 2019 (Ton Dong A's Case Brief).

[8] *See* Duferco's Letter, "Certain Corrosion-Resistant Steel Products from Taiwan: Duferco Steel Inc.'s Letter in Lieu of Case Brief," dated September 11, 2019 (Duferco's Letter); *see also* JFE Shoji's Letter, "Certain Corrosion-Resistant Steel Products from Taiwan; Anti-Circumvention Inquiry; Case No. A-583-856: Letter in Lieu of Case Brief," dated September 11, 2019 (JFE Shoji's Letter); and Optima's Letter, "Certain Corrosion-Resistant Steel Products from Taiwan; Anti-Circumvention Inquiry; Case No. A-583-856: Letter in Lieu of Case Brief," dated September 11, 2019 (Optima Steel's Letter).

[9] *See* Domestic Parties' Letter, "Certain Corrosion-Resistant Steel Products from Taiwan: Petitioners' Rebuttal Brief," dated September 18, 2019 (Petitioners' Rebuttal Brief); *see also* Hoa Sen's Letter, "Certain Corrosion-Resistant Steel Products from the Republic of Taiwan; Anti-Circumvention Inquiry; Case No. A-583-856: Hoa Sen Group's Rebuttal Brief," dated September 18, 2019 (Hoa Sen's Rebuttal Brief); U.S. Importers Group's Letter, "Certain Corrosion-Resistant Steel Products from Taiwan – Rebuttal Brief," dated September 18, 2019 (U.S. Importer Group's Rebuttal Brief); JFE Shoji's Letter, "Certain Corrosion-Resistant Steel Products from Republic of Taiwan; Anti-Circumvention Inquiry; Case No. A-583-856: JFE Shoji's Rebuttal Brief," dated September 18, 2019 (JFE Shoji's Rebuttal Brief); MISA's Letter, "Anti-Circumvention Inquiries of the Antidumping Duty Order on Certain Corrosion-Resistant Steel Products from Taiwan: Rebuttal Brief of Marubeni Itochu Steel America, Inc.," dated September 18, 2019 (MISA's Rebuttal Brief); Mitsui's Letter, "Corrosion-Resistant Steel Products from Taiwan: Mitsui's Rebuttal Brief," dated September 18, 2019 (Mitsui's Rebuttal Brief); Nam Kim's Letter, "Certain Corrosion-Resistant Steel Products from Taiwan: Respondent Nam Kim Steel Co.'s Rebuttal Brief," dated September 18, 2019 (Nam Kim's Rebuttal Brief); Optima's Letter, "Certain Corrosion-Resistant Steel Products from Republic of Taiwan; Anti-Circumvention Inquiry; Case Nos. A-583-856: Optima Steel's Rebuttal Brief," dated September 18, 2019 (Optima's Rebuttal Brief); Ton Dong A's Letter, "Certain Corrosion-Resistant Steel Products from Republic of Taiwan; Anti-Circumvention Inquiry; Case Nos. A-583-856: Ton Dong A Corporation Rebuttal Brief," dated September 18, 2019 (Ton Dong A's Rebuttal Brief); and CSVC's Letter, "Anti-Circumvention Inquiry on Corrosion-Resistant Steel Products from Taiwan – Rebuttal Brief," dated September 19, 2019 (CSVC's Rebuttal Brief).

III. SCOPE OF THE ORDER

The products covered by this order are certain flat-rolled steel products, either clad, plated, or coated with corrosion-resistant metals such as zinc, aluminum, or zinc-, aluminum-, nickel- or iron-based alloys, whether or not corrugated or painted, varnished, laminated, or coated with plastics or other non-metallic substances in addition to the metallic coating. The products covered include coils that have a width of 12.7 mm or greater, regardless of form of coil (*e.g.*, in successively superimposed layers, spirally oscillating, *etc.*). The products covered also include products not in coils (*e.g.*, in straight lengths) of a thickness less than 4.75 mm and a width that is 12.7 mm or greater and that measures at least 10 times the thickness. The products covered also include products not in coils (*e.g.*, in straight lengths) of a thickness of 4.75 mm or more and a width exceeding 150 mm and measuring at least twice the thickness. The products described above may be rectangular, square, circular, or other shape and include products of either rectangular or non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been "worked after rolling" (*e.g.*, products which have been beveled or rounded at the edges). For purposes of the width and thickness requirements referenced above:

(1) Where the nominal and actual measurements vary, a product is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above, and

(2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) Iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

2.50 percent of manganese, or
3.30 percent of silicon, or
1.50 percent of copper, or
1.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
2.00 percent of nickel, or
0.30 percent of tungsten (also called wolfram), or
0.80 percent of molybdenum, or
0.10 percent of niobium (also called columbium), or
0.30 percent of vanadium, or
0.30 percent of zirconium

Unless specifically excluded, products are included in this scope regardless of levels of boron and titanium.

For example, specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels and high strength low alloy (HSLA) steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum.

Furthermore, this scope also includes Advanced High Strength Steels (AHSS) and Ultra High Strength Steels (UHSS), both of which are considered high tensile strength and high elongation steels.

Subject merchandise also includes corrosion-resistant steel that has been further processed in a third country, including but not limited to annealing, tempering, painting, varnishing, trimming, cutting, punching and/or slitting or any other processing that would not otherwise remove the merchandise from the scope of the orders if performed in the country of manufacture of the in-scope corrosion resistant steel.

All products that meet the written physical description, and in which the chemistry quantities do not exceed any one of the noted element levels listed above, are within the scope of these orders unless specifically excluded. The following products are outside of and/or specifically excluded from the scope of this order:

Flat-rolled steel products either plated or coated with tin, lead, chromium, chromium oxides, both tin and lead (terne plate), or both chromium and chromium oxides (tin free steel), whether or not painted, varnished or coated with plastics or other non-metallic substances in addition to the metallic coating;

Clad products in straight lengths of 4.7625 mm or more in composite thickness and of a width which exceeds 150 mm and measures at least twice the thickness; and

Certain clad stainless flat-rolled products, which are three-layered corrosion-resistant flat-rolled steel products less than 4.75 mm in composite thickness that consist of a flat-rolled steel product clad on both sides with stainless steel in a 20%-60%-20% ratio.

The products subject to the order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7210.30.0030, 7210.30.0060, 7210.41.0000, 7210.49.0030, 7210.49.0091, 7210.49.0095, 7210.61.0000, 7210.69.0000, 7210.70.6030, 7210.70.6060, 7210.70.6090, 7210.90.6000, 7210.90.9000, 7212.20.0000, 7212.30.1030, 7212.30.1090, 7212.30.3000, 7212.30.5000, 7212.40.1000, 7212.40.5000, 7212.50.0000, and 7212.60.0000. The products subject to the orders may also enter under the following HTSUS item numbers: 7210.90.1000, 7215.90.1000, 7215.90.3000, 7215.90.5000, 7217.20.1500, 7217.30.1530, 7217.30.1560, 7217.90.1000, 7217.90.5030, 7217.90.5060, 7217.90.5090, 7225.91.0000, 7225.92.0000, 7225.99.0090, 7226.99.0110, 7226.99.0130, 7226.99.0180,

7228.60.6000, 7228.60.8000, and 7229.90.1000.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the order is dispositive.

IV. SCOPE OF THE ANTI-CIRCUMVENTION INQUIRY

This anti-circumvention inquiry covers CORE produced in Vietnam from HRS or CRS substrate input manufactured in Taiwan, and subsequently exported from Vietnam to the United States (merchandise under consideration). This ruling applies to all shipments of merchandise under consideration on or after the date of the initiation of this inquiry. Importers and exporters of CORE from Vietnam manufactured from HRS and/or CRS substrate manufactured outside Taiwan must certify that the HRS and/or CRS substrate further processed into CORE in Vietnam did not originate in Taiwan, as provided for in the certifications attached to the accompanying *Federal Register* notice. Otherwise, their merchandise may be subject to AD duties.

V. CHANGES SINCE THE PRELIMINARY DETERMINATION

With the exceptions explained below, Commerce made no changes to its *Preliminary Determination* with regard to its analysis under the anti-circumvention factors of section 781(b) of the Act. For a complete description of our analysis, *see* the *Preliminary Determination*. Based on our review and analysis of the comments reviewed from parties, minor corrections presented at verifications and various errors identified, we made the following changes:

A. CSVC:
   1. We have only included the quantity of CORE CSVC directly exported to the United States in our pattern of trade analysis and excluded the volume of CORE CSVC sold to its affiliate which then re-sold the CORE to customers in the United States.[10]
   2. We have used CSVC's Taiwanese suppliers' actual cost of production (COP) when valuing CSVC's HRS purchases from Taiwan.[11] *See* analysis in Comment 13 below.

B. Nam Kim:
   1. As discussed in Nam Kim's Preliminary Analysis Memorandum,[12] our practice is to value materials which are not physically incorporated into subject merchandise as overhead.[13] At verification, we reviewed whether certain reported materials were

[10] *See* Memorandum, "Anti-Circumvention Inquiry of the Antidumping Duty Order of Certain Corrosion-Resistant Steel Products from Taiwan: China Steel Sumikin Vietnam Joint Stock Company – Final Analysis Memorandum," dated concurrently with this memorandum and Attachment (CSVC's Final Analysis Memorandum).
[11] *Id.* at Attachment.
[12] *See* Memorandum, "Anti-Circumvention Inquiry of the Antidumping Duty Order of Certain Corrosion-Resistant Steel Products from Taiwan: Nam Kim Steel Co. – Preliminary Analysis Memorandum (Nam Kim's Preliminary Analysis Memorandum) at 5.
[13] *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China*, 75 FR 57449 (September 21, 2010) and accompanying Issues and Decision Memorandum (IDM) at Comment 22.

physically incorporated into the subject merchandise[14] and, determine that anti-finger print coating, chromate liquid, Okemcoat F2, anti-corrosion coating, corrosion resistance coating, and atymol are incorporated into the subject merchandise. We have revised the further processing calculation to include these materials.[15]

VI STATUTORY FRAMEWORK

Section 781 of the Act addresses circumvention of AD and/or CVD orders. With respect to merchandise assembled or completed in a third country, section 781(b)(1) of the Act provides that, if (A) the merchandise imported in the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of an AD/CVD order, (B) before importation into the United States, such imported merchandise is completed or assembled in a third country from merchandise which is subject to such an order or is produced in the foreign country with respect to which such order applies, (C) the process of assembly or completion in a third country is minor or insignificant, (D) the value of the merchandise produced in the foreign country to which the AD/CVD order applies is a significant portion of the total value of the merchandise exported to the United States, and (E) Commerce determines that action is appropriate to prevent evasion of an order, then Commerce, after taking into account any advice provided by the ITC under section 781(e) of the Act, Commerce may include such imported merchandise within the scope of such order at any time the order is in effect.

In determining whether or not the process of assembly or completion in a third country is minor or insignificant under section 781(b)(1)(C) of the Act, section 781(b)(2) of the Act directs Commerce to consider: (A) the level of investment in the third country; (B) the level of research and development in the third country; (C) the nature of the production process in the third country; (D) the extent of production facilities in the third country; and (E) whether or not the value of processing performed in the third country represents a small proportion of the value of the merchandise imported into the United States. However, no single factor, by itself, controls Commerce's determination of whether the process of assembly or completion in a third country is minor or insignificant.[16] Accordingly, it is Commerce's practice to evaluate each of these five factors as they exist in the third country, considering the totality of the circumstances of the particular anti-circumvention inquiry.[17]

Furthermore, section 781(b)(3) of the Act sets forth the factors to consider in determining whether to include merchandise assembled or completed in a third country in an AD/CVD order. Specifically, Commerce shall take into account: (A) the pattern of trade, including sourcing

[14] *See* Memorandum, "Verification of the Questionnaire Responses of Nam Kim Steel Co.," dated September 3, 2019 (Nam Kim's Verification Report) at 14.
[15] *See* Memorandum, "Anti-Circumvention Inquiry of the Antidumping Duty Order of Certain Corrosion-Resistant Steel Products from Taiwan: Nam Kim Steel Co. – Final Analysis Memorandum," dated concurrently with this Memorandum and Attachment (Nam Kim's Final Analysis Memorandum).
[16] *See* Statement of Administrative Action, Accompanying the Uruguay Round Agreements Act (URAA), H. Doc. No. 103-316, vol 1 (1994) (SAA), at 893.
[17] *See Certain Tissue Paper Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 73 FR 57591, 57592 (October 3, 2008) (*Tissue Paper Final Circumvention Determination*).

patterns; (B) whether the manufacturer or exporter of the merchandise is affiliated with the person who, in the third country, uses the merchandise to complete or assemble the merchandise which is subsequently imported into the United States; and (C) whether or not imports of the merchandise into the third country have increased after the initiation of the AD and/or CVD investigation that resulted in the issuance of an order.

VII. STATUTORY ANALYSIS

Section 781(b) of the Act directs Commerce to consider the criteria described above to determine whether merchandise completed or assembled in a third country circumvents an order. As explained below, based on an analysis of these criteria, we find that CORE produced in Vietnam, using HRS and CRS manufactured in Taiwan, and exported to the United States, is circumventing the *Taiwan CORE Order*.

Whether the Merchandise Imported into the United States is of the Same Class or Kind as Merchandise that is Subject to the Taiwan CORE Order

Our analysis of this factor is unchanged from the *Preliminary Determination*. We continue to find that the finished CORE products produced in Vietnam using Taiwanese HRS or CRS substrate and exported to the United States are of the same class or kind as other merchandise that is subject to the *Taiwan CORE Order*. *See* discussion in the Preliminary Decision Memorandum at 13.

Whether, Before Importation into the United States, Such Merchandise is Completed or Assembled in a Third Country from Merchandise that is Subject to the Taiwan CORE Order or Produced in the Foreign Country that is Subject to the Taiwan CORE Order

Our analysis of this factor is unchanged from the *Preliminary Determination*. Thus, we continue to find that the merchandise under inquiry was completed or assembled in Vietnam using Taiwanese-origin HRS and/or CRS. *See* Preliminary Decision Memorandum at 13.

Whether the Process of Assembly or Completion in the Third Country is Minor or Insignificant

(A) Level of Investment in Vietnam

We continue to find that the information provided by CSVC and Nam Kim, which was verified by Commerce, does not support the respondent's assertion that the level of investment in Vietnam to complete the production of Taiwanese-origin input into CORE is significant. *See* analysis in Comment 5 below. We find that the level of investment undertaken by CORE producers in Vietnam is minor compared to the level of investment required by the integrated steel mills in Taiwan.

(B) Level of Research and Development (R&D) in Vietnam

We continue to find that the levels of R&D and related expenditures are not significant. As further explained in Comment 5 below, we compared the level of R&D to that of a Taiwanese

producer of HRS. We find that R&D expenses incurred by the respondents are not a significant factor in CORE production.

(C) Nature of Production Process in Vietnam and (D) Extent of Production Facilities in Vietnam

We continue to find that the CORE manufacturing process occurring in Vietnam represents a relatively minor portion of the overall production of finished CORE, in terms of the production stages and activities involved. With regard to the extent of the respondents' production facilities, we continue to find that the extent of CSVC and Nam Kim's facilities is minor relative to the facilities of integrated steel producers.

(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

Our calculation of the value of processing in Vietnam and its percentage of the value of the merchandise imported into the United States has changed since the *Preliminary Determination*, due to our findings at verification and other corrections. *See* "Changes Since the *Preliminary Determination*" section above, as well as Comment 7.

From a qualitative perspective of the nature of the production process, we note that HRS and/or CRS are the primary direct material inputs used by CSVC and Nam Kim to produce CORE.[18] CSVC and Nam Kim did not incur significant costs in addition to the HRS and/or CRS in the production of CORE.[19] This supports our finding that the value of the processing performed in Vietnam represents a small proportion of the value of the CORE CSVC and Nam Kim exported to the United States.

Other Factors to Consider

(A) Pattern of Trade and Sourcing

We have enhanced our analysis with regard to the total exports of CORE CSVC sold to the United States.[20] However, our findings regarding this factor are unchanged from the *Preliminary Determination*. We continue to find that a comparison of the pattern of trade during the 16-month period prior to the initiation of the anti-circumvention inquiries on the AD and countervailing duty (CVD) orders on CORE from the People's Republic of China (China), *i.e.*, from July 2015 through October 2016, with the pattern of trade during the 16-month base period

[18] *See* CSVC's Letter, "Anti-Circumvention Inquiry on Corrosion-Resistant Steel Products from Taiwan – Response to the Department's March 29 Questionnaire," dated April 26, 2019 (CSVC's IQR) at Appendix 38; *see also* CSVC's Letter, "Anti-Circumvention Inquiry on Corrosion-Resistant Steel Products from Taiwan – Response to the Department's May 24 and 30 Questionnaire," dated June 10, 2019 (CSVC's SQR) at Appendices 1S-9-A and 1S-9-D; and Nam Kim's Preliminary Analysis Memorandum at 6.

[19] *See* CSVC's Final Analysis Memorandum and Nam Kim's Final Analysis Memorandum where we calculated the per-kilogram/metric ton cost of production in Vietnam for CORE produced by CSVC and Nam Kim.

[20] *See* "Changes Since the *Preliminary Determination*" section and CSVC's Final Analysis Memorandum at Attachment.

of November 2016 through February 2018 supports a finding that circumvention has occurred. *See* discussion in Preliminary Decision Memorandum at 19-20.

(B) Affiliation

Our analysis of this factor is unchanged from the *Preliminary Determination*. We continue to find that CSVC is affiliated with a Taiwanese producer and Nam Kim is not affiliated with any Taiwan producer and/or exporter of HRS or CRS.

(C) Increased Imports

Our analysis of this factor is unchanged from the *Preliminary Determination*. We continue to find that the available data indicate that Taiwanese exports of HRS and CRS inputs to Vietnam have increased since the initiation of the anti-circumvention inquiries on the AD and CVD orders on CORE from China, as discussed more fully in the Preliminary Decision Memorandum at 20-21.

Conclusion Regarding Statutory Factors

Pursuant to section 781(b)(1)(A) and (B) of the Act, we continue to find that CORE sold in the United States that was produced using HRS or CRS produced in Taiwan is of the same class or kind (*i.e.*, meets the physical description) as merchandise that is subject to the *Taiwan CORE Order*, and was completed in Vietnam from merchandise which is produced in Taiwan, the country to which the *Taiwan CORE Order* applies. Moreover, pursuant to 781(b)(1)(C) of the Act, after reviewing each factor under section 781(b)(2) of the Act, we find the process of completion in Vietnam to be minor and insignificant based on the totality of the evidence. Further, in accordance with section 781(b)(1)(D) of the Act, we find that the value of the merchandise produced in Taiwan, *i.e.*, HRS and/or CRS, is a significant portion of the total value of the completed merchandise, CORE, exported to the United States. Upon taking into consideration the factors described in section 781(b)(3) of the Act, the patterns of trade, affiliation, and increased imports of HRS and CRS from Taiwan to Vietnam following the initiation of the AD and CVD orders on CORE from China, we determine that action is appropriate to prevent evasion of the *Taiwan CORE Order* pursuant to section 781(b)(1)(e) of the Act. Consequently, our statutory analysis leads us to find that, in accordance with sections 781(b) of the Act, there was circumvention of the *Taiwan CORE Order* as a result of Taiwanese-origin HRS and/or CRS being completed into CORE in Vietnam and exported to the United States.

VIII. DISCUSSION OF THE ISSUES

Comment 1: Whether Companies That Did Not Receive Commerce's Quantity and Value (Q&V) Questionnaire Should Be Permitted to Participate in the Certification Process

Formosa, Hoa Phat Group, Hoa Sen, Ton Dong A, and Vina One's Case Briefs and Optima Steel's Letter

- The FedEx delivery confirmation shows that Hoa Sen, Ton Dong A, Formosa, Vina One, Dai Thien Loc Corporation (Dai Thien), and Hoa Phat Group never received the Q&V questionnaire.[21] Therefore, Commerce should not determine that these companies failed to provide necessary information, withheld information requested by Commerce, failed to provide information in a timely manner, and significantly impeded this proceeding.[22] Commerce should not apply facts available to these companies for failing to respond to a questionnaire that they never received.[23]

U.S. Importer Group's Case Brief

- The exclusion of certain Vietnamese producers and exporters from the certification process will inevitably result in the imposition of AD duties on non-subject merchandise. Commerce's certification scheme will prevent U.S. importers from demonstrating that CORE exported from Vietnam using non-Taiwanese substrate is not subject to additional duties.[24] This, in turn, leads to certain Vietnamese CORE being subject to the Taiwan CORE Order that is otherwise outside the scope of the same order.[25]
- U.S. importers are permitted to demonstrate the source of the substrate for the CORE they export in connection with the China CORE certification scheme.[26] Under the Taiwanese certification process, however, the same entries from certain Vietnamese suppliers would, nevertheless, be subject to remedial duties, despite the fact that the CORE exports do not contain substrate from any Taiwanese producers.[27]

Petitioners' Rebuttal Brief

- Whether or not these companies received a Q&V questionnaire, Commerce's *Initiation Notice* provided actual notice of the existence of the anti-circumvention inquiry and the need to provide Commerce with information regarding the origin of their substrate.[28] Without this information, Commerce cannot ascertain whether these companies have the ability to trace their substrate, which is crucial to Commerce's ability to conduct a

[21] *See* Formosa's Case Brief at 5-6; *see also* Hoa Phat Group's Case Brief at 2; Hoa Sen's Case Brief at 2; Ton Dong A's Case Brief at 2; and Vina One's Case Brief at 2 and 4.
[22] *See* Formosa's Case Brief at 6; *see also* Hoa Sen's Case Brief at 3-4; Ton Dong A's Case Brief at 3-4; and Vina One's Case Brief at 2-3.
[23] *See* Formosa's Case Brief at 6-7; *see also* Hoa Sen's Case Brief at 3; Ton Dong A's Case Brief at 3; and Vina One's Case Brief at 5.
[24] *See* U.S. Importers Group's Case Brief at 13.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *See* Petitioners' Rebuttal Brief at 46.

circumvention inquiry.[29] Furthermore, these companies were not substantially prejudiced by their preclusion from the certification process, because they can become eligible for it through a further administrative review or changed circumstances review.[30]

Commerce's Position: We agree with the petitioners that publication of our *Initiation Notice* constituted adequate notice to all interested parties that Commerce had initiated an anti-circumvention inquiry. However, notice of initiation is different from requesting specific information from a party, and having that party withhold information, pursuant to section 776(a) of the Act.

As Commerce explained in the *Initiation Notice*, "…Commerce intends to issue questionnaires to solicit information from the Vietnamese producers and exporters concerning their shipments of CRS to the United States and the origin of the imported HRS being processed into CRS."[31] The FedEx delivery confirmations confirm that these companies did not receive the questionnaire. Therefore, because these companies never received the questionnaire that we issued, we cannot conclude that they withheld requested information, pursuant to section 776(a) of the Act, or even more that it is appropriate to apply adverse facts available on these companies under section 776(b) of the Act. Thus, in our instructions to U.S. Customs and Border Protection (CBP) following publication of this final determination, the following companies will not be listed as ineligible to participate in the certification process: Hoa Sen, Ton Dong A, Dai Thien, Formosa, and Vina One. With respect to Hoa Phat Group, see Comment 9, below.

Comment 2: Whether Commerce Abused Its Discretion in Rejecting the Q&V Questionnaire Responses of Certain Companies

Hoa Sen and Ton Dong A's Case Briefs

- On September 4, 2019, Hoa Sen and Ton Dong A attempted to submit responses to the Q&V questionnaire, which Commerce rejected as untimely.[32] However, Commerce has the authority to extend any deadline for good cause under 19 CFR 351.302(b), as long as it is not precluded by statute.[33] Here, good cause exists for extending the deadline because Hoa Sen and Ton Dong A were never given an opportunity to participate, but were, nonetheless, subjected to an AFA finding for allegedly not being responsive to Commerce. That practically defines the concept of "good cause."[34]
- While Commerce has discretion to set and enforce deadlines, it commits an abuse of discretion when it rejects a submission where the interests of accuracy and fairness outweigh the burden on Commerce and the interest in fairness outweighs the burden placed on Commerce and the interest in finality."[35] For example, in *Grobest*, the Court of

[29] *Id.* at 47.
[30] *Id.* at 5.
[31] *See Certain Corrosion-Resistant Steel Products from the Republic of Korea and Taiwan: Initiation of Anti-Circumvention Inquiries on the Antidumping and Countervailing Duty Orders*, 83 FR 37785, 37790 (August 2, 2018) (*Initiation Notice*).
[32] *See* Hoa Sen's Case Brief at 11; *see also* Ton Dong A's Case Brief at 11.
[33] *Id.*
[34] *Id.*
[35] *See* Hoa Sen's Case Brief at 12; *see also* Ton Dong A's Case Brief at 12.

International Trade (CIT) found Commerce to have abused its discretion when it rejected a respondent's separate rate certification, even though the certification was submitted 95 days after the deadline.[36]

- Here, the interests in accuracy and fairness clearly outweigh the burden placed on Commerce and the interest in finality.[37] To subject all of Hoa Sen's and Ton Dong A's exports to the *Taiwan CORE Order*, regardless of where the substrate used to produce that CORE is actually produced, is a highly inaccurate and punitive result. In contrast, the burden on Commerce to examine Hoa Sen's and Ton Dong A's Q&V questionnaire is small, as the Q&V questionnaire asks only six questions.[38]

Petitioners' Rebuttal Brief

- Hoa Sen and Ton Dong A misread applicable regulations.[39] The "good cause" standard is applicable to requests for additional time before a deadline passes.[40] Here, because the deadline for submission of their Q&V responses had passed eight weeks earlier, they are required to demonstrate the existence of "extraordinary circumstances." Commerce's alleged improper service does not constitute an extraordinary circumstance.[41]
- The CIT has ruled that "Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits."[42] It has also stated that Commerce's "strict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation of its decision."[43]
- Hoa Sen and Ton Dong A had constructive notice of the existence of this inquiry and the obligation to participate.[44] Consequently, Commerce's enforcement of its deadlines and application of AFA for failure to respond to the Q&V questionnaire is not punitive or arbitrary, but consistent with Commerce's court-affirmed practice.[45]

Commerce's Position: We continue to find that Commerce appropriately rejected the untimely filed Q&V responses of Hoa Sen and Ton Dong A.

On July 27, August 2, 5, and 12, 2019, certain interested parties submitted letters that contained untimely new factual information. (Hoa Sen and Ton Dong A were not among the interested parties who submitted the new factual information.) On August 30, 2019, Commerce issued a memorandum clarifying what information it would accept from parties. That memorandum says in part, "{S}ome of the letters referenced above …contain {new factual information} regarding

[36] *See* Hoa Sen's Case Brief at 12; *see also* Ton Dong A's Case Brief at 12, both citing *Grobest & I-Mei Indus. (Vietnam) Co., Ltd. v. United States*, 815 F. Supp. 2d 1342, 1365 (CIT 2012) (finding Commerce to have established its discretion when it rejected a company's separate rate certification submitted after the deadline).
[37] *See* Hoa Sen's Case Brief at 12; *see also* Ton Dong A's Case Brief at 12.
[38] *See* Hoa Sen's Case Brief at 12; *see also* Ton Dong A's Case Brief at 12.
[39] *See* Petitioners' Rebuttal Brief at 48.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 49, citing *Yantai Timken Co. v. United States*, 521 F. Supp. 2d 1356, 1370-71 (CIT 2007).
[43] *Id.*, citing *Maverick Tube Corp. United States*, 107 F. Supp. 3d 1318, 1331 (CIT 2015).
[44] *Id.* at 50.
[45] *Id.*

certain Vietnamese producers/exporters' CORE production and sales and whether they sourced their substrates from Taiwan. This information we will not accept onto the record."[46] Although Hoa Sen and Ton Dong A were not among those parties who had submitted the new factual information, this memorandum should have alerted Hoa Sen and Ton Dong A that we would not accept any additional Q&V information from any parties. Nevertheless, Hoa Sen and Ton Dong A submitted Q&V information anyway on September 4, 2019.

Commerce's regulations state:

> (1) Unless the Secretary extends a time limit under paragraph (b) of this section, the Secretary will not consider or retain in the official record of the proceeding:
>
> (i) Untimely filed factual information, written argument, or other material that the Secretary rejects, except as provided under § 351.104(a)(2); or
>
> (ii) Unsolicited questionnaire responses, except as provided under § 351.204(d)(2).
>
> (2) The Secretary will reject such information, argument, or other material, or unsolicited questionnaire response with, to the extent practicable, written notice stating the reasons for rejection.[47]

Therefore, because Hoa Sen's and Ton Dong A's Q&V submissions constituted new, unsolicited information, we conclude that we acted properly and within our regulations in rejecting them from the record. With respect to Hoa Sen and Ton Dong A's argument that application of AFA is not appropriate because they did not receive Commerce's questionnaire, we agree, as explained above in response to Comment 1.

Comment 3: Whether Commerce Lacks Statutory Authority to Apply AFA Where Respondents Did Not Deprive Commerce of Information Regarding Its Ability to Trace Inputs

Hoa Sen and Ton Dong A's Case Briefs

- In previous anti-circumvention inquiries where Commerce has precluded respondents from participating in a certification program, Commerce has done so because it has found that the respondent does not have the ability to trace the raw material inputs that went into its production of the merchandise it has exported to the United States.[48] Here, however, Commerce never requested information from respondents about their ability to trace their inputs. Under section 776(a) and(b) of the Act, before Commerce can apply facts available, let alone AFA, Commerce must, under section 782(d) of the Act, actually request the information that it considers necessary or which it has deemed a respondent to have

[46] *See* Memorandum, "Anti-Circumvention Inquiry on Certain Corrosion-Resistant Steel Products from Taiwan: Clarification Regarding New Factual Information Regarding Responses to Commerce's FedEx Questionnaire Delivery Confirmation Memorandum," dated August 29, 2019.
[47] *See* 19 CFR 351.302(d).
[48] *See* Hoa Sen's Case Brief at 14; *see also* Ton Dong A's Case Brief at 14, citing *Steel Wire 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 accompanying IDM at 8.

withheld or otherwise failed to provide. Commerce cannot apply FA or AFA to respondents who did not provide information that Commerce did not request.[49]

- There is no evidence on the record that Hoa Sen and Ton Dong A do not have the ability to trace their exports of CORE to the United States to the HRS and CRS substrate used to produce that CORE.[50] Thus, Commerce must either re-open the record to request the necessary information, or else allow Hoa Sen and Ton Dong A to participate in the certification process.[51]

Petitioners' Rebuttal Brief

- Commerce's practice is to permit importers and exporters to participate in a certification process only when they can demonstrate traceability.[52] Consistent with this practice, in the *Preliminary Determination*, Commerce precluded all known Vietnamese producers or exporters from the certification process if they failed to demonstrate their ability to trace the origin of the steel substrate.[53]
- Commerce's determination in this regard was in full accord with its authority and discretion when conducting anti-circumvention inquiries, and a reasonable method of ensuring the effectiveness of the certification process.[54]

Commerce's Position: We find these issues to be moot with respect to Hoa Sen and Ton Dong A. As explained above in Comment 1, in this final determination, we have determined to allow Hoa Sen and Ton Dong A to participate in the certification program, because record evidence shows that these companies did not receive Commerce's Q&V questionnaire and, thus, did not fail to cooperate in this proceeding.

Comment 4: Whether Commerce's Use of AFA Impermissibly Departs Without Explanation from Its Decision in the China Anti-Circumvention Inquiry

Duferco's Letter

- Commerce's *Preliminary Determination* is in stark contrast to its previous country-wide anti-circumvention determination in *China CORE Anti-Circumvention Determination* where Commerce did not preclude certain companies from participating in a certification

[49] *See* Hoa Sen's Case Brief at 14; *see also* Ton Dong A's Case Brief at 14, citing *Koyo Seiko Co. v. United States*, 92 F. 3d. 1162, 1165 (Fed. Cir. 1996); *Olympic Adhesives, Inc v. United States*, 899 F.2d 1565, 1572-75 (Fed. Circ. 1990); and *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, No. 97-08-11344, 1999 WL 1991194 at 12-13 (CIT 1990).
[50] *See* Hoa Sen's Case Brief at 17; *see also* Ton Dong A's Case Brief at 17.
[51] *Id.*
[52] *See* Petitioners' Rebuttal Brief at 34, citing *Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China: Preliminary Affirmative Determination of Circumvention of the Antidumping Duty Order*, 83 FR 35205 (July 25, 2018) (*Butt-Weld Pipe Fittings China Circumvention Preliminary Determination*) and *Certain Tissue Paper Products from the People's Republic of China: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 78 FR 4010 (July 3, 2013) (*Tissue Paper from China Circumvention Determination*).
[53] *Id.* at 35.
[54] *Id.*

program.[55] Exporters and importers have relied on the rules established in *China CORE Anti-Circumvention Determination*.[56] It is both capricious and arbitrary to preclude importers and exporters from filing certifications when they have maintained records demonstrating they were produced from substrate from Taiwan.[57]

Hoa Sen and Ton Dong A's Case Briefs

- In *China CORE Circumvention Determination*, Commerce permitted non-responsive companies to participate in the certification program. In contrast, Commerce precluded non-responsive companies from the certification process in the *Preliminary Determination*.[58]
- While Commerce may depart from its prior decisions, it must provide adequate explanation for why it is departing. The law is clear that agen{cies} must either conform {themselves} to {their} prior decisions or explain the reasons for {their} departure. As the Court of International Trade (CIT) has explained, "{t}his rule against creating conflicting precedents is designed not to restrict an Agency's considerations of the facts from one case to the next, but rather to insure consistency in an agency's administration of a statute."[59]
- In the anti-circumvention inquiry on AD and CVD orders of CORE from China, Commerce did not exclude companies that did not respond to the Q&V questionnaire from the certification process or apply any other AFA findings. Commerce explained "{t}he questionnaire issued to numerous Vietnamese companies at the outset of these inquiries regarding their use of Chinese substrate were not designed to determine which companies were circumventing, but to determine which companies might have the most relevant information needed to apply the criteria of section 781(b) of the Act."[60]
- In *China CORE Circumvention Determination*, Commerce concluded that a "transaction-specific exemption through a certification process" was the best way "to ensure that circumvention does not happen now or will not happen in the future."[61]
- In the same proceeding, Commerce described the certification procedure as "adequate and appropriate" to address interested parties' concerns about evasion, while also recognizing that the certification process addresses interested parties' concerns that the AD and CVD orders on China CORE would be applied to CORE produced from non-Chinese substrate.[62]
- In the *Preliminary Determination*, however, Commerce took an entirely different position, though the factual and legal circumstances were identical. Commerce did not, because it

[55] *See* Duferco's Letter at 2, 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) (*China CORE Circumvention Determination*) and accompanying IDM at Comment 4.
[56] *Id.* at 3.
[57] *Id.*
[58] *See* Hoa Sen's Case Brief at 17; *see also* Ton Dong A's Case Brief at 17-18.
[59] *See* Hoa Sen's Case Brief at 17-18; *see also* Ton Dong A's Case Brief at 18, citing *Allegheny Ludlum Corp. v. United States*, 112F. Supp. 2d 1141, 1147 (CIT 2000) (*Allegheny Ludlum Corp v. United States*) and *Hussey Copper, Ltd. vs. United States*, 843 F. Supp. 413, 418-19 (CIT 1993) (*Hussey Copper, Ltd. v. United States*).
[60] *See* Hoa Sen's Case Brief at 18; *see also* Ton Dong A's Case Brief at 18, citing *China CORE Circumvention Determination* IDM at 24.
[61] *See* Hoa Sen's Case Brief at 18; *see also* Ton Dong A's Case Brief at 18, citing *China CORE Circumvention* IDM at 25.
[62] *See* Hoa Sen's Case Brief at 18; *see also* Ton Dong A's Case Brief at 18-19, citing *China CORE Circumvention* IDM at 28-29.

cannot, provide any reason why these concerns are attendant in the instant inquiries, but not in the anti-circumvention inquiry on CORE from China, where the same circumstances were present. If the certification procedure were "adequate and appropriate" in the *China CORE Circumvention Determination*, it is not clear why they are not "adequate and appropriate" here, given the *Preliminary Determination* explicitly links the certification regime under the AD and CVD orders on CORE from China and Korea.[63]

MISA's Case Brief

- It is settled law that, while Commerce has discretion to establish a reasonable practice, it nevertheless must explain the reasons for deviating from that practice.[64]
- Commerce deviated from its practice in *China CORE Circumvention Determination* where Commerce did not impose a "blacklist" or any restrictions on the producers or exporters that could participate in the certification process.[65]
- In the *Preliminary Determination*, Commerce made no findings or explanations as to why it departed from its past practice and prohibited the "non-responsive companies" from participating in the certification process.[66]
- Commerce's change is arbitrary and unjust, because at the time of the initiation of the instant anti-circumvention inquiry, exporters, producers, and importers had no notice that failure of Vietnamese exporters to respond fully to all questionnaires during the anti-circumvention inquiry would not only result in a risk of an affirmative circumvention finding based on AFA, but also that Commerce would apply the adverse inference to the post-inquiry certification process.[67]

U.S. Importers Group's Case Brief

- In the anti-circumvention inquiry of CORE from China, Commerce established a certification process whereby all Vietnamese exporters and U.S. importers are able to demonstrate that CORE imported from Vietnam is not produced using Chinese substrate and, therefore, is not subject to Commerce's circumvention finding.[68]
- It is apparent from the record of the anti-circumvention inquiry of CORE from China that not all of the companies required to provide quantity and value questionnaire responses submitted adequate responses, because Commerce rejected certain responses as improperly filed and because certain other responses are missing from the record. Nevertheless, all Vietnamese exporters—even those that did not respond properly—were permitted to participate in the China certification process.[69]
- In the *Preliminary Determination*, Commerce made a fundamental change in the certification regime—with no prior notice to outside parties, including importers—by

[63] *See* Hoa Sen's Case Brief at 19; *see also* Ton Dong A's Case Brief at 19.
[64] *See* MISA's Case Brief at 7.
[65] *Id.* at 7-8, citing *China CORE Circumvention Determination* IDM at 27-29.
[66] *Id.* at 8.
[67] *Id.*
[68] *See* U.S. Importers Group's Case Brief at 10, citing *Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Preliminary Determination of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 82 FR 58170 (December 11, 2017) (*China CORE Circumvention Preliminary Determination*) at Appendix II.
[69] *Id.*

excluding from the certification process those companies which Commerce determined had chosen not to respond to the quantity and value questionnaire.[70]

- There is a patent absurdity in permitting a company to submit a certification and supporting documentation in the China case—which will necessarily show the source of the substrate used to make the CORE product—but instructing U.S. Customs and Border Protection (CBP) and Commerce to ignore the same information if it also demonstrates that the source of the substrate is not Korea or Taiwan. Not only does this process force the importer to make an incorrect declaration (*i.e.*, that the entry in question is a Type 03 entry when the objective facts demonstrate that it is a Type 01 entry), but it also distorts the official import statistics by erroneously reporting the importation of a product from Vietnam as a product of Taiwan.[71]
- As the Court of Appeals for the Federal Circuit found, if "Commerce acted differently in this case than it has consistently acted in similar circumstances without reasonable explanation, then Commerce's actions will have been arbitrary" and "an agency action is arbitrary when the agency offer(s) insufficient reasons for treating similar situations differently." In the *Preliminary Determination*, Commerce acted arbitrarily by abandoning an established and universally accepted certification regime in favor of a radically different and circumscribed process without either notice or adequate justification.[72]

Petitioners' Rebuttal Brief

- The respondents' reliance on the anti-circumvention inquiry of CORE from China is fundamentally flawed because Commerce's failure to apply AFA to non-cooperative respondents in the anti-circumvention inquiry of CORE from China appears to be anomalous. Rather it is Commerce' established practice to apply AFA to non-cooperative respondents and to preclude them from participating in a certification process. This is because uncooperative respondents' failure to provide information prevents Commerce from confirming their ability to trace their inputs and renders an effective certification process impossible.[73]
- A decision made in a single administrative proceeding does not constitute fixed agency practice. Rather, an action only "becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the {particular action} or procedure."[74]
- Congressional guidance set forth in the SAA is to apply AFA to parties that fail to respond to Commerce's requests for information.[75]

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[70] *Id.*

[71] *Id.* at 12 and n.39.

[72] *Id.* at 12-13, citing *Consolidated Bearings Co. v. United States*, 348 F. 3d 997, 1007 (Fed. Cir. 2003) (*Consolidated Bearings Co. v. United States*); *RHP Bearings v. United States*, 288 F.3d 1334, 1347 (Fed. Cir. 2002) (*RHP Bearings v. United States*); and *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (*SKF USA Inc. v. United States*)).

[73] *See* Petitioners' Rebuttal Brief at 41.

[74] *Id.* at 41-42, citing *Seah Steel Vina Corp v. United States*, 182 F. Supp 3d 1316, 1327 (CIT 2016); and *Union Steel v. United States*, 755 F. Supp. 2d 1304, 1311 (CIT 2011).

[75] *Id.* at 42, citing *SKF USA Inc. v. United States*, 391 F. Supp. 2d at 1335 and SAA at 870.

- In *Tianjin Magnesium Int'l Co. v. United States*, the CIT was "troubled" that not adopting adverse inferences where respondents failed to cooperate would create "an incentive to submit false information {or no information}… without fear of negative consequences.[76]
- Commerce has recognized that it "has a duty to both ensure that uncooperative parties do not benefit from their lack of cooperation and to encourage their future compliance."[77]
- Rather than establishing a fixed and inalterable practice, the decision in the anti-circumvention inquiry of CORE from China to give non-responsive parties a pass on their lack of cooperation is a departure from long-standing agency practice.[78]
- Commerce "is not required by the statute or regulations to implement" a certification process in every anti-circumvention inquiry, but has "the authority to determine if a certification program will adequately address circumvention or if other measures, such as suspension of all merchandise from a particular producer, are warranted."[79]
- Consistent with its "duty to both ensure that uncooperative parties do not benefit from their lack of cooperation and to encourage their future compliance, "Commerce's longstanding practice in conducting anti-circumvention inquiries pursuant to section 781(b) of the Act has been to apply AFA to noncooperative respondents and preclude such entities from participation in certification processes.[80]
- Commerce denied an uncooperative respondent, MFVN, the opportunity to participate in a certification process after first allowing a cooperative respondent in a separate anti-circumvention inquiry under the same order, Quinjaing, to participate in a certification program and then later barring yet another uncooperative respondent a third anti-circumvention inquiry under the same order, Sunlake, from participating in a circumvention process. MFVN appealed that decision to the CIT in *Max Fortune Indus. Co. v. United States*, arguing that Commerce had departed from its past practice without explanation. However, the CIT affirmed Commerce's practice of precluding uncooperative AFA entities in anti-circumvention inquiries from participating in a certification process, finding that Commerce reasonably determined that "there is no basis to conclude that in this instance a certification procedure would be a reliable means of addressing

[76] *Id.* at 42, citing *Tianjin Magnesium Int'l Co. v. United States*, 844 F. Supp. 2d. 1342, 1348 (CIT 2012).
[77] *Id.*, citing *Certain Circular Welded Non-Alloy Steel Pipe from Mexico: Final Results of Antidumping Duty Administrative Review*, 76 FR 36086 (June 21, 2011) (*Pipe from Mexico Final Results*) and accompanying IDM at Comment 4.
[78] *Id.* at 43.
[79] *Id.*, citing *Certain Tissue Paper Products From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 76 FR 47551 (August 5, 2011) (*Tissue Paper from China: MFVN Anti-Circumvention Final*) and accompanying IDM at Comment 4; *see also 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) (*Tissue Paper from China: Quijang Anti-Circumvention Final*).
[80] *Id.*, citing *Pipe from Mexico Final Results* IDM at Comment 4; *see also Tissue Paper from China: MFVN Anti-Circumvention Final* IDM at Comment 4; and *Certain Tissue Paper Products From the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 74 FR 20915 (May 6, 2009) (*Tissue Paper from China: Sunlake Anti-Circumvention Preliminary Determination*) unchanged in *Certain Tissue Paper Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 74 FR 29172, 29174 (June 19, 2009) (*Tissue Paper from China: Sunlake Anti-Circumvention Final*).

circumvention" because MFVN failed to participate and Commerce lacked information with which to evaluate MFVN's ability to trace its inputs.[81]

- Commerce followed the same practice of denying uncooperative entities the opportunity to participate in certification regimes in the country-wide anti-circumvention finding in *Butt-Weld Pipe Fittings from China Circumvention Determination* which was completed after the anti-circumvention inquiry of CORE from China. Commerce explained that uncooperative companies were "not eligible to participate in the certification process…{because} these companies have not demonstrated to our satisfaction that their shipments of butt-weld pipe fittings {} were made from non-Chinese origin inputs."[82]
- All Vietnamese producers had notice that failure to participate would result in preclusion from the certification process because Commerce's preliminary decision to bar uncooperative companies in *Butt-Weld Pipe Fittings from China Circumvention Preliminary Determination*, pre-dated the initiation of the instant anti-circumvention inquiry.[83]
- It would be unreasonable to permit parties that decided not to cooperate with Commerce's inquiry to participate in the certification process. As the CIT affirmed in *Max Fortune Indus. Co. v. United States*, there is no indication from uncooperative unresponsive parties that their participation in the certification process "would be a reliable means of addressing circumvention" "because none of these parties established their ability to track the country of origin of their substrate inputs through the production process to each shipment of CORE to the United States.[84]
- An agency action is arbitrary only where it "consistently follows a contrary practice in similar circumstances and provide{s} no reasonable explanation for the change in practice."[85]

Commerce's Position: We agree with the petitioners. The arguments from Ton Dong A, Hoa Sen, MISA, and the Importer's Group that Commerce improperly departed from a consistent or established and uniform practice are unavailing, as are their arguments that Commerce must provide a reason for departing and failed to do so.[86]

Commerce is not bound by its earlier decision not to bar uncooperative respondents from participating in the certification regime in the CORE from China and CRS from China anti-circumvention determinations. Commerce's decision to bar, from the certification process, certain uncooperative companies that were unresponsive to our requests for Q&V and related information, and thus failed to participate in this proceeding, is not an unlawful change of practice. As the CIT has found, "Commerce acts arbitrarily and violates the law when it 'consistently followed a contrary practice in similar circumstances and provided no reasonable

[81] *Id.* at 43-45, citing *Max Fortune Indus. Co. v. United States*, Slip Op. 2013-52 (CIT 2013) (*Max Fortune Indus. Co. v. United States*).
[82] *Id.* at 45-46, 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 Circumvention Determination*) and accompanying IDM at Section VIII.D (p. 13).
[83] *Id.* at 46-47.
[84] *Id.* at 47, citing *Max Fortune Indus. Co. v. United States*.
[85] *Id.* at 47, citing *Shenzhen Xinboda Indus. Co. v. United States*, Slip. Op. 2017-160 (CIT 2017).
[86] *See* Ton Dong A Case Brief at 15-17; *see also* Hoa Sen Case Brief at 16-19.

explanation for the change in practice.'"[87] In contrast, as the CIT has found and as the petitioners point out, a decision made in a single instance in a single administrative proceeding does not establish a fixed agency practice.[88] As the CIT has also held and as the petitioners point out, an action only "becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the {particular action} or procedure."[89] Thus, while "an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently,"[90] Commerce's actions are not arbitrary unless Commerce "consistently follows a contrary practice in similar circumstances and provides no reasonable explanation for the change in practice," [91] or "acted differently {in a particular} case than it has *consistently* acted in similar circumstances without reasonable explanation."[92]

The methodology used in the CORE from China and CRS from China anti-circumvention determinations does not constitute an "established procedure."[93] Commerce's authority to apply AFA to uncooperative parties, including in country-wide anti-circumvention inquiries, and indeed to extend AFA to barring uncooperative parties from participating in a certification program is not only necessary to ensure compliance, it has a firm basis in Commerce's practice, and indeed, has been affirmed by the CIT. As the petitioners point out, Commerce has recognized that it has a "duty to both ensure that uncooperative parties do not benefit from their lack of cooperation and to encourage their future compliance."[94] Moreover, as the petitioners also point out, the application of AFA to uncooperative respondents is required by the Act and by Commerce's regulations, and is well established in Commerce's practice, and has also been found to be appropriate by the CIT and the Court of Appeals for the Federal Circuit (CAFC).[95] Commerce has also previously barred uncooperative companies from participating in certification regimes in previous anti-circumvention inquiries, notably the anti-circumvention inquiries regarding *Butt-Weld Pipe Fittings China Anti-Circumvention Final*[96] and *Aluminum*

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[87] *See SeAH; see also Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003).
[88] *See Union Steel v. United States*, 755 F. Supp. 2d 1304, 1310-11 (CIT 2011); *see also* Petitioners' Rebuttal Brief at 57.
[89] *See SeAH*; *Huvis Corp. v. United States*, 525 F. Supp 2d 1370, 1378 (CIT 2007); and *Ranchers-Cattlemen Action Legal Found. v. United States*, 74 F. Supp. 2d 1353, 1374 (CIT 1999). *See also* Petitioners' Rebuttal Brief at 57.
[90] *See SeAH*; *RHP Bearings v. United States*, 288 F.3d 1334, 1347 (Fed. Cir. 2002); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001); and *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996); and *Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003).
[91] *See* Shenzhen *Xinboda Indus. Co. v. United States*, No. 16-116, slip. op. 17-160, *11 (CIT Dec. 5, 2017); *see also* Petitioners' Rebuttal Brief at 47.
[92] *See Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) (emphasis added); *see also RHP Bearings v. United States*, 288 F.3d 1334, 1347 (Fed. Cir. 2002).
[93] *See SeAH*; *Huvis Corp. v. United States*, 525 F. Supp 2d 1370, 1378 (CIT 2007); *see also Ranchers-Cattlemen Action Legal Found. v. United States*, 74 F.Supp.2d 1353, 1374 (CIT 1999).
[94] *See Pipe from Mexico Final Results* IDM at Comment 4; *see also* Petitioners' Rebuttal Brief at 58.
[95] *See* Petitioners' Rebuttal Brief at 57-58. *See also* sections 776(a)(l), (a)(2)(A)-(C), and (b) of the Act; 19 CFR 351.308(a); *SKF USA Inc. v. United States*, 391 F. Supp. 2d 1327, 1335 (CIT 2005); SAA at 870; *Tianjin Magnesium Int'l Co. v. United States*, 844 F. Supp. 2d 1342, 1348 (CIT 2012); and *Pipe Mexico Final* IDM at Comment 4.
[96] *See Butt-Weld Pipe Fittings China Anti-Circumvention Final*.

Extrusions China Anti-Circumvention Final.[97] In *Max Fortune*, the CIT affirmed Commerce's practice of barring uncooperative respondents from a certification process.[98] In *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, Commerce also made a country-wide affirmative anti-circumvention determination, and established a similar certification regime as the ones established in *China CORE Anti-Circumvention Final*, *China CRS Anti-Circumvention Final*, *Korea CORE Anti-Circumvention Final*, and *Korea CRS Anti-Circumvention Final*.[99]

However, in *Butt-Weld Pipe Fittings China Anti-Circumvention Preliminary*, Commerce preliminarily barred one respondent, Pantech, and its importers from participating in the certification process because Commerce found that Pantech had failed to cooperate and had failed to establish that it was able to trace the country of origin of its inputs.[100] Commerce reversed itself with respect to Pantech in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, but not because Commerce determined that a stricter general stance toward such deficiencies and uncooperativeness was unwarranted. Rather, Commerce reversed its preliminary AFA finding with respect to Pantech because Pantech had demonstrated its cooperation and because Commerce had successfully verified Pantech's ability to trace its inputs.[101] In fact, Commerce continued to find several other unresponsive companies in the same inquiry to be uncooperative, and continued to bar these companies from the certification process.[102] Thus, rather than the rule, Commerce's decision to allow unresponsive respondents to participate in the certification process in *China CORE Anti-Circumvention Final* and *China CRS Anti-Circumvention Final* are the exceptions to Commerce's practice in several similar country-wide anti-circumvention inquiries, including *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, *Aluminum Extrusions China Anti-Circumvention Final*, *Tissue Paper China MFVN Anti-Circumvention Final*, *Tissue Paper China Quijiang Anti-Circumvention Final*, and *Tissue Paper China Sunlake Anti-Circumvention Final*.

Moreover, Commerce did, in fact, explain why it was choosing the adverse inference that uncooperative parties and their importers were ineligible to certify their exports. Commerce explained that "{i}t is Commerce's practice to consider, in employing adverse inferences, the

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[97] *See Aluminum Extrusions from the People's Republic of China: Final Affirmative Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders, and Partial Rescission*, 84 FR 39805 (August 12, 2019) (*Aluminum Extrusions China Anti-Circumvention Final*).

[98] *See Max Fortune*, No. 11-340, slip op. 13-52 (CIT Apr. 15, 2013)). *See also Tissue Paper from China: MFVN Anti-Circumvention Final* IDM; *Tissue Paper from China: Quijiang Anti-Circumvention Final; Tissue from China: Sunlake Anti-Circumvention Final*.

[99] *See Certain Corrosion-Resistant Steel Products from Korea: Affirmative Final Determinations of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, dated concurrently with this notice (*Korea CORE Anti-Circumvention Final*); *see also Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Affirmative Final Determinations of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, dated concurrently with this notice (*Korea CRS Anti-Circumvention Final*).

[100] *See Butt-Weld Pipe Fittings China Anti-Circumvention Final)* ("In the *Preliminary Determination*, Pantech Steel Industries Sdn. Bhd. (Pantech) and its importers were precluded from participating in the certification process. However, because Commerce has verified Pantech's ability to trace the country of origin for its shipments of butt-weld pipe fittings, we will allow Pantech and its importers to participate in the certification process for unliquidated entries of butt-weld pipe fittings from Malaysia that were entered, or withdrawn from warehouse, for consumption on or after August 21, 2017 (the initiation date of this anti-circumvention inquiry).").

[101] *See Butt-Weld Pipe Fittings China Anti-Circumvention Final.*

[102] *Id*.

extent to which a party may benefit from its own lack of cooperation."[103] Therefore, Commerce, upon considering the extent to which uncooperative unresponsive parties in this anti-circumvention inquiry may benefit from their own lack of cooperation, explicitly barred uncooperative parties from participating in the certification process: "As a result of our application of AFA, we preliminarily determine that the non-responsive companies are precluded from participating in the Taiwan certification process."[104] Moreover, the need to bar uncooperative respondents from the certification process is shown by the fact that Commerce's more lenient stance in declining to bar respondents from participating in the certification process in the *China CORE Anti-Circumvention Final* and the *CRS China Anti-Circumvention Final* proved not to sufficiently induce cooperation of producers and exporters in the instant anti-circumvention inquiry. This is apparent from the fact that a number of producers failed to cooperate in the instant anti-circumvention inquiry after Commerce previously employed a more lenient stance toward unresponsive companies in the earlier *China CORE Anti-Circumvention Final* and the *CRS China Anti-Circumvention Final*.[105] This demonstrates that the method applied in the China-wide anti-circumvention inquiries was not sufficient to induce companies to cooperate in the instant anti-circumvention inquiry.

We also agree with the petitioners that Commerce is not required by the Act or regulations to establish a certification regime in instances where such a regime will not address circumvention or if other measures are warranted.[106] In particular, Commerce is not obligated to permit a previously uncooperative party to participate in a certification process if that party has, by its unwillingness to cooperate, prevented Commerce the opportunity to use that party's information to conduct its analysis, or to assess and verify such party's ability to trace its inputs to particular U.S. sales.[107]

Ton Dong A and Hoa Sen point out that, in the *China CORE Anti-Circumvention Final*, Commerce described "transaction specific exemption through a certification process" as "adequate and appropriate" to address interested parties' concerns about evasion and the best way "to ensure that circumvention does not happen now or will not happen in the future," while also recognizing that the certification process addresses interested parties' concerns about extending the relevant order to all Vietnamese producers.[108] The parties also argue that barring

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[103] *See Preliminary Determination* and accompanying Preliminary Decision Memorandum at 12 (citing *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013) and accompanying Preliminary Decision Memorandum at 4 unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476 (March 14, 2014)).

[104] *See Preliminary Determination* and accompanying Preliminary Decision Memorandum at 12-13.

[105] *See Preliminary Determination* and accompanying Preliminary Decision Memorandum at 11-13; Customs AD/CVD message number 9225301 at paragraph 5a.(ii) (available at https://aceservices.cbp.dhs.gov/adcvdweb).

[106] *See* Petitioners' Rebuttal Brief at 58 citing *Tissue Paper China MFVN Anti-Circumvention Final* IDM at Comment 4; *see also Tissue Paper China Quijiang Anti-Circumvention Final*.

[107] *See, e.g., Butt-Weld Pipe Fittings China Anti-Circumvention Final*; *Tissue Paper from China: Sunlake Anti-Circumvention Preliminary*; and *Tissue Paper China MFVN Anti-Circumvention Final*; and *Max Fortune*, No. 11-340, slip op. 13-52 (CIT Apr. 15, 2013)).

[108] *See* Ton Dong A Case Brief at 18-19; *see also* Hoa Sen Case Brief at 18 citing *China CORE Anti-Circumvention Final* IDM at 24, 25, and 28.

uncooperative unresponsive companies is unnecessary and inappropriate.[109] Ton Dong A's and Hoa Sen's reliance on these statements is misplaced, and ignores the broader context of the issues Commerce was addressing. The issues raised by interested parties, to which Commerce's referenced statements were responding, were: (1) whether to make a country-wide circumvention finding; and (2) whether to impose certification requirements on any or all Vietnamese producers and their U.S. importers. Thus, Commerce was referring to whether it was appropriate to make a country-wide circumvention finding and establish a certification process (as opposed to instructing CBP to treat all Vietnamese CORE exported to the United States as circumventing the *CORE Orders*), and the need to impose certification requirements on all Vietnamese CORE producers and their U.S. importers (as opposed to imposing certification requirements on specific individually-examined producers found to be circumventing and their U.S. importers, pursuant to a company-specific finding of circumvention). Commerce's statements in the *China CORE Anti-Circumvention Final* are not relevant to the question of whether to bar uncooperative respondents from participating in such a certification process.[110]

MISA and the U.S. Importers Group claim that outside parties were provided no notice of the potential for Commerce to bar uncooperative companies from the certification process.[111] However, as the petitioners point out, in the *Initiation Notice* Commerce explained that it was initiating the anti-circumvention inquiry "on a country-wide basis (*i.e.*, not exclusive to the producers mentioned immediately above)" and would be reviewing "information from the Vietnamese producers and exporters concerning their shipments of CORE to the United States and the origin of any imported HRS and CRS being processed into CORE."[112] Moreover, Commerce recently decided to bar uncooperative companies in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.[113] Notably, in the *Butt-Weld Pipe Fittings China Anti-Circumvention Preliminary*, in which uncooperative butt-weld pipe fittings producers were initially barred from a certification process, was completed before Commerce issued quantity and value questionnaires and complete questionnaires to the uncooperative producers. Thus, both *Butt-Weld Pipe Fittings China Anti-Circumvention Preliminary* and Commerce's earlier decisions in *Tissue Paper China Sunlake Anti-Circumvention Preliminary* and in *Tissue Paper China MFVN Anti-Circumvention Final* (as upheld in *Max Fortune*) provided notice that Commerce might bar uncooperative parties from an anti-circumvention certification process.[114]

The U.S. Importers Group also argues that is it absurd for Commerce to accept a certification and supporting documentation from a party in the *China CORE Anti-Circumvention Final* certification process, but bar the same company from participating in the CORE from Taiwan certification process. The U.S. Importers Group further alleges that doing so forced importers of

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[109] *See* Ton Dong A Case Brief at 18-19 and Hoa Sen Case Brief at 18 (citing *China CORE Anti-Circumvention Final* IDM at 24, 25, and 28).
[110] *See China CORE Anti-Circumvention Final* IDM at 22-29 (compare these statements to Commerce's statements in *Preliminary Determination* and accompanying Preliminary Determination Memorandum at 11-13).
[111] *See* U.S. Importers Group's Case Brief at 11.
[112] *See* Petitioners' Rebuttal Brief at 35 (citing *Initiation Notice*, 83 FR at 37785-86 and 37790).
[113] *See Butt-Weld Pipe Fittings China Circumvention Preliminary Determination* PDM at 8-9 and 12 (unchanged in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*).
[114] *See Tissue Paper China Sunlake Anti-Circumvention Preliminary, and Tissue Paper from China: MFVN Anti-Circumvention Final* (which was upheld in *Max Fortune*).

record to incorrectly report type "01" Vietnamese entries as type "03" Taiwanese entries.[115] However, barring uncooperative companies from participating in the certification process has been shown to be necessary to ensure cooperation in future anti-circumvention inquiries.[116] Commerce is directed by the SAA to consider whether an uncooperative party could benefit from its failure to cooperate.[117] Permitting unresponsive uncooperative companies in this inquiry to participate in the certification process would allow them to benefit from their uncooperative behavior. Without the ability to bar uncooperative parties from participating in a certification program in accordance with Commerce's practice in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, *Tissue Paper China Sunlake Anti-Circumvention Preliminary*, and *Tissue Paper China MFVN Anti-Circumvention Final*, potential respondents would be able to avoid certain immediate costs and inconvenience by ignoring Commerce's requests for information while having no reason to fear any specific future negative consequences from their unwillingness to cooperate. Accordingly, we continue to find that barring uncooperative parties from the certification process is warranted.

Comment 5: Whether Precluding Certain Importers and Exporters from Participating in the Certification Process is Inappropriate and Unfairly Punishes Importers

Duferco's Letter

- Parties must be able to demonstrate that their products are made without product subject to AD and CVD orders.[118] Commerce cannot punish parties by precluding them from demonstrating to Customs that certain exports are not produced from Taiwanese substrate.[119] For Commerce to create a presumption that an imported product contains Taiwanese substrate is a conclusion that is not supported by law or the facts on the record.[120] If a party can trace its exports to clearly identify the inputs used to produce them, Commerce should not preclude them from certifying to the absence of Taiwanese substrate.[121]

Hoa Sen and Ton Dong A's Case Briefs

- The results of an AFA finding cannot be purposely punitive. Rather, the purpose of AFA is to "encourage future cooperation and ensure that a respondent does not obtain a more favorable AD or CVD rate by failing to cooperate.[122]

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[115] *See* U.S. Importers Group's Case Brief at 11 and Footnote 37.
[116] *See, e.g.*, *Max Fortune*, No. 11-340, slip op. 13-52; *see also Tissue Paper from China: MFVN Anti-Circumvention Final* IDM at Comment 4; *Tissue Paper from China: Quijiang Anti-Circumvention Final*; *Tissue Paper from China: Sunlake Anti-Circumvention Final*; and *Butt-Weld Pipe Fittings China Anti-Circumvention Final* IDM at 13.
[117] *See* SAA at 870.
[118] *See* Duferco's Letter at 4.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *See* Hoa Sen's Case Brief at 20; *see also* Ton Dong A Case Brief at 20, both case briefs citing *Mukand, Ltd. v. United States*, 767 F. 3d 1300, 1307 (Fed. Cir. 2014) and *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027,1032 (Fed. Cir. 2000)).

- Where the application of AFA in AD and CVD reviews yields particularly high margins, Commerce "must provide a clear explanation for its choice and ample record support for its determination."[123]
- Where the result is not a dumping or countervailing duty rate but a decision to, as here, preclude a company entirely from a certification process, so as to presume that everything it exports to the United States is from a country with an order, the result, just like a high margin in a dumping investigation, is draconian and is not supported by evidence.[124]
- There is no evidence either that all of Hoa Sen's and Ton Dong A's production of CORE is sourced from Taiwan or, alternatively, that Hoa Sen and Ton Dong A are unable to trace the substrate from their exports to the United States.[125]
- Commerce makes no effort whatsoever to show why precluding companies from the certification program is necessary to deter future non-compliance, which, given the lack of an adequate explanation that may indicate some other legitimate purpose or evidence to support its result, indicates that the purpose of precluding companies from participating in the certification process is punitive.[126]

JFE Shoji and Optima Steel's Letters

- Commerce's application of AFA to imports produced by the allegedly non-responsive companies, in particular their preclusion from participation in the certification program established pursuant to the *Preliminary Determination*, is impermissibly punitive not just with respect to the non-responsive companies, but also with respect to Optima Steel and JFE Shoji.[127] As a result of Commerce's *Preliminary Determination*, Optima Steel and JFE Shoji are now responsible for posting millions of dollars in cash deposits.[128] As a result, the AFA finding is contrary to section 776(b) of the Act and the requirements that Commerce minimizes the collateral impact of imposing AFA on one party to the extent that other parties are affected.[129]

Mitsui's Case Brief

- Commerce initiated the circumvention inquiries to determine whether CORE imported from Vietnam using Taiwanese substrate is circumventing the *Taiwan CORE Order*.[130] To the extent there were non-responsive companies, their lack of a response was in the circumvention inquiry; it had nothing to do with the certification requirements applicable to the import process.[131]

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[123] *See* Hoa Sen's Case Brief at 20; *see also* Ton Dong A Case Brief at 20, both case briefs citing *Lifestyle Enterprise, lnc.*, 768 F. Supp. 2d, at 1298.
[124] *See* Hoa Sen Case Brief at 20; *see also* Ton Dong A Case Brief at 20, both case briefs citing *Qingdao Taifa Grp Co. v. United States*, 34 CIT 1435,1443 and n.7 (2010)).
[125] *See* Hoa Sen's Case Brief at 21; *see also* Ton Dong A Case Brief at 20-21.
[126] *See* Hoa Sen's Case Brief at 21; *see also* Ton Dong A Case Brief at 21, both case briefs citing *Tai Shan City Kam Kiu Aluminum Extrusion Co. v. United States*, 58 F. Supp. 3d 1384, 1396 (CIT 2015).
[127] *See* JFE Shoji's Rebuttal Brief at 5-7; *see also* Optima Steel's Rebuttal Brief at 8-9.
[128] *See* JFE Shoji's Rebuttal Brief at 8; *see also* Optima Steel's Rebuttal Brief Rebuttal Brief at 10.
[129] *See* JFE Shoji's Rebuttal Brief at 8; *see also* Optima Steel's Rebuttal Brief at 9, citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp 2d 1331, 1342 (CIT 2013).
[130] *See* Mitsui's Case Brief at 8.
[131] *Id.*

- The statute limits the use of AFA to Commerce's proceeding and not to subsequent import activities which are governed by customs law.[132]
- There is no support for Commerce's claim that the statutory provisions governing the use of facts available to determine margins of dumping or subsidy rates in AD and CVD proceedings and the use of adverse inferences in selecting from the facts available (*i.e.*, AFA) authorize it to preclude the use of documentation related to customs clearance or liquidation of customs entries.[133]
- Commerce stands the statute on its head by preventing the issuance of documentation which Commerce states is necessary to prove the facts as to the product which is being imported.[134]
- Commerce may use facts available, and in appropriate circumstances AFA, where a respondent fails to provide information needed to make a determination in response to a questionnaire. However, in the *Preliminary Determination*, Commerce has gone further, claiming it may use its AFA authority to preclude an importer from providing the facts as to the CORE it is importing, something which has nothing to do with circumvention inquiries.[135]

U.S. Importers Group's Case Brief

- The statute does not permit the punitive use of AFA.[136] There were serious deficiencies in the service of the Q&V questionnaires in this proceeding.[137] This, thus, raises serious questions about how companies that did not receive the questionnaire can be found to have "withheld information" that was never requested of them. The statute does not support the AFA finding on the basis of inadvertent failure to cooperate.[138]
- Commerce's application of AFA is clearly punitive and contrary to the statute and past Commerce practice.[139] First, Commerce decided to exclude the non-responsive companies along with their importers from the certification process. The certification exclusion decision is strictly punitive because Commerce has already made a country-wide determination and it will affect all of the companies involved.[140] Such punitive action does not prevent circumvention; it only serves to punish the "non-responsive companies" and to prevent U.S. importers from demonstrating that the CORE they export is not subject to the *Taiwan CORE Order*.[141]
- Second, though not explicitly referred to as AFA, is the three-country hierarchy for applying cash deposit rates.[142] In lieu of the China rates established in the *China CORE Circumvention Determination*, Commerce determined that importers should have to pay the

[132] *Id.*
[133] *Id.*, citing section 776(a)(2) and (b) of the Act.
[134] *Id.*
[135] *Id.* at 9.
[136] *See* U.S. Importers Group's Case Brief at 6, citing section 776(b) of the Act.
[137] *Id.*
[138] *Id.* at 6-7, citing *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 195 F. Supp. 3d 1334, 1346 (CIT 2016).
[139] *Id.* at 7.
[140] *Id.*
[141] *Id.* at 8-9.
[142] *Id.* at 9.

AD and CVD all-others rate of 8.31 percent and 1.19 percent, respectively, applicable to the orders of CORE from Korea – not because this proceeding involves Korea but because the Korean rates are higher than the AD rate for Taiwan CORE.[143]

MISA Case Brief[144]

- In its final determination, Commerce should clarify that MISA may import CORE from Vietnam through the certification process regardless of the identity of the Vietnamese producer or exporter. This is because Commerce found MISA to be a cooperative respondent. To deny MISA the right to participate in the certification process for particular shipments based on the non-responsiveness of a Vietnamese producer or exporter would be inequitable, and would violate CAFC rulings against applying an adverse rate to a cooperating party.[145]
- When Commerce applies AFA to a respondent because requested information was not provided, Commerce is required to identify what requested information is missing from the record.[146] Here, Commerce never requested information on which Vietnamese CORE imports did or did not use Taiwanese substrate. Thus, the fact that the "non-responsive" companies did not answer the Q&V questionnaire did not create a gap in the administrative record for Commerce to make the determination of which Vietnamese CORE imports used Taiwanese substrate. That is the information Commerce needs to solicit through the certification process. If certain exporters or importers do not (or cannot) provide the requisite certifications and backup documentation as requested in Commerce's certification process, only then would Commerce have a basis to determine, on the basis of facts available (adverse or otherwise) that particular entries are ineligible for exemption from the countrywide finding of circumvention.
- In its *Preliminary Determination*, Commerce stated it would direct CBP to suspend liquidation and to require a cash deposit of estimated duties on unliquidated entries of CORE produced in Vietnam that were entered, or withdrawn from warehouse, for consumption on or after August 2, 2018, the date of initiation of the anti-circumvention inquiry. However, in its initiation notice, Commerce did not inform the public that it would apply AFA to bar allegedly uncooperative exporters from participating in the certification process. The CIT has held that suspension of liquidation in an anti-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 the administrative action. In *Tai-Ao*, the CIT addressed an anti-circumvention inquiry where the initiation notice did not clearly indicate that the investigation applied to Chinese exporters other than one specifically-named exporter.[147] The CIT held that, "Commerce cannot suspend liquidation until the date at which it provided the parties notice that their products could be subject to the administrative action."[148] Thus, if Commerce continues to

[143] *Id.*, citing *Preliminary Determination*.
[144] *See* MISA Case Brief at 1-11.
[145] *Id*. at 4 (citing *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1378 (Fed. Cir. 2012)).
[146] *Id*. at 5 citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).
[147] *Id*. at 10 citing *Tai-Ao Aluminum (Taishan) Co., Ltd. v. United States*, Consol. Ct. No. 17-00216, 2019 WL 2407985 (CIT June 7, 2019) (*Tai-Ao*).
[148] *Id*. at 8.

ban the "noncooperating" companies from participating in the certification process, Commerce cannot apply that decision to imports that were entered prior to publication of the *Preliminary Determination.*

Petitioners' Rebuttal Brief

- In the *Initiation Notice*, Commerce explained that it was initiating the anti-circumvention inquiry "on a country-wide basis (*i.e.*, not exclusive to the producers mentioned immediately above)" and would be reviewing "information from the Vietnamese producers and exporters concerning their shipments of CORE to the United States and the origin of any imported HRS and CRS being processed into CORE."[149]
- Commerce precluded from the certification process all Vietnamese producers, exporters, or their importers for which Commerce had no information to evaluate the companies' abilities to trace the origin of their inputs.[150]
- In conducting a country-wide anti-circumvention inquiry, Commerce must evaluate a representative selection of companies to determine whether "merchandise has been completed or assembled in other foreign countries," and must take necessary action to prevent evasion, including creating a certification process.[151]
- While Commerce has the authority to create a certification process to prevent evasion of an order, Commerce also has the discretion to determine that a certification process is not appropriate under certain circumstances.[152]
- Commerce has previously emphasized that the foreign producers' ability to "trace the country of origin of its shipments and identify which shipments to the United States are of Chinese origin on a transaction-specific basis," is crucial to the administration of affirmative anti-circumvention findings.[153]
- Commerce's establishment of a certification process "to administer {this} affirmative finding," requiring "that entries of CORE from Vietnam that are made from HRS and/or CRS substrate sourced from a country other than Taiwan be certified as such," and precluding from the certification process Vietnamese producers and exporters which failed to demonstrate their ability to trace the origin of their steel substrate by failing to participate in the anti-circumvention inquiry was inconsistent with Commerce's obligation to administer the law in a manner that "prevent{s} evasion of the Taiwan CORE Order" and determinations in CORE from China and CORE from Korea.[154]

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[149] *See* Petitioners' Rebuttal Brief at 31-32, citing *Initiation Notice*, 83 FR at 37790.
[150] *Id.* at 32.
[151] *Id.*, citing *Butt-Weld Pipe Fittings China Circumvention Determination* IDM at 20, *Preliminary Determination* PDM 18, section 781(b)(E) of the Act, and *Tissue Paper from China: Quijang Anti-Circumvention Final*.
[152] *Id.* at 33.
[153] *Id.*, citing *Butt-Weld Pipe Fittings China Circumvention Determination* IDM at 25 and Comment 3; *see also Butt-Weld Pipe Fittings from China Preliminary Determination* PDM at 11; *Steel Wire 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 accompanying IDM at 8; *Certain Tissue Paper Products From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 78 FR 40101 (July 3, 2013) (*Tissue Paper from China: ARPP Anti-Circumvention Final*) at Comment 2.
[154] *Id.* at 35, citing *Butt-Weld Pipe Fittings China Circumvention Determination*; *see also Preliminary Determination* PDM at 12-13 and 22.

- Commerce should reject MISA's argument that Commerce should clarify that its imports are eligible for exemption from cash deposit regardless of the identity of the Vietnamese producer or exporter. Commerce has an established practice of requiring certifications from both importers or exporters. To require otherwise would enable non-cooperative respondents to continue dumping by shipping through cooperative importers. Commerce's practice has been upheld by the CAFC.[155]
- MISA is incorrect in arguing that Commerce cannot suspend liquidation from the date of initiation, but must suspend it from the date of the preliminary determination because only upon issuance of the preliminary determination did Commerce provide notice to parties that their products could be subject to an administrative action. The initiation notice put all parties on notice that a failure to cooperate would result in AFA. Commerce has a longstanding practice of precluding AFA entities from the certification process. Thus, MISA was aware from the date the *Initiation Notice* was published that a failure to cooperate could result in preclusion from the certification process. Accordingly, Commerce's suspension of liquidation from the date of initiation was appropriate.
- MISA is incorrect that Commerce cannot apply facts available until it has solicited information on which entries were produced from Taiwanese substrate. Without the information solicited in the Q&V questionnaire, Commerce cannot determine whether the respondent can trace its substrate. Thus, a company that fails to respond to the Q&V questionnaire is subject to AFA because it has withheld requested information.

Commerce's Position: Commerce's decision to bar uncooperative respondents from the certification process is an agency practice affirmed by the CIT, is not impermissibly punitive, and minimizes the impact of AFA findings on innocent parties to the extent possible, while ensuring Commerce's AFA finding has probative value, consistent with Commerce's established practice. The petitioners are correct that, while Commerce has the authority to create a certification process to prevent evasion of an order, Commerce also has the discretion to determine that a certification process is not appropriate under certain circumstances.[156]

Commerce notified interested parties that it was initiating the anti-circumvention inquiry "on a country-wide basis (*i.e.*, not exclusive to the producers mentioned)" and would be reviewing "information from the Vietnamese producers and exporters concerning their shipments of CORE to the United States and the origin of any imported HRS and CRS being processed into CORE."[157] In conducting a country-wide anti-circumvention inquiry, Commerce must evaluate a representative selection of companies to determine whether "merchandise has been completed or assembled in other foreign countries," and must take necessary action to prevent evasion.[158] Commerce is not required by the Act or regulations to impose a certification regime in instances where such a regime is inconsistent with preventing evasion and permits uncooperative parties to benefit from their lack of cooperation. Commerce's previous findings that foreign producers' ability to "trace the country of origin of its shipments and identify which shipments to the United

[155] *Id.* at 55 (citing *KYD, Inc., v. United States*, 607 3.d 760, 768 (Fed. Cir. 2010) (*KYD*)).
[156] *See, e.g., Garment Hangers China Anti-Circumvention Final* IDM at Comment 4.
[157] *See Initiation Notice*, 83 FR at 37790.
[158] *See Butt-Weld Pipe Fittings China Anti-Circumvention Final* IDM at 21; *see also Preliminary Determination* PDM at 13-18; section 781(b)(1)(E) of the Act, and *Tissue Paper from China: Quijiang Anti-Circumvention Final*.

States are of Chinese origin on a transaction-specific basis," is crucial to administration of affirmative anti-circumvention findings.[159] Commerce is not obligated to permit a previously uncooperative party to certify if that party has, by its unwillingness to cooperate, prevented Commerce from using that party's information to conduct its analysis, or to assess and verify such party's ability to trace its inputs to particular U.S. sales. Rather, Commerce's establishment of a certification process in which non-cooperative respondents may not participate is consistent with Commerce' obligation to administer the law in a manner that prevents evasion of the orders.[160]

Thus, we disagree with the argument submitted by Ton Dong A, Hoa Sen, Optima, and JFE Shoji that barring uncooperative producers and their importers from the certification process is impermissibly punitive and is not supported by evidence,[161] and that the purpose of precluding companies from participating in the certification process is punitive.[162] Similarly, we disagree with Duferco's argument that Commerce's decision to preclude uncooperative respondents is capricious and arbitrary.[163] Commerce's decision to bar uncooperative respondents from participating in the certification process had proven necessary to ensure cooperation and does not go beyond what is minimally necessary and reasonable to ensure cooperation. Therefore, in a case where the affirmative anti-circumvention determination is made entirely on record evidence without an adverse inference, as was the case in *Preliminary Determination*, uncooperative respondents would be able to benefit from not responding to the Q&V questionnaire merely by the fact that they avoided the inconvenience and expense of participating, including being selected as a mandatory (complete questionnaire) respondent, knowing that their lack of participation might not (or would not) alter Commerce's affirmative finding of circumvention. Further, if parties do not respond to Commerce's Q&V questionnaires in the future, then Commerce may erroneously have insufficient information in future anti-circumvention proceedings, upon which to initiate. Also, an uncooperative respondent retains the right to participate in a future changed circumstance review, and thus to remedy its uncooperative status and gain the opportunity to participate in a certification regime. For these reasons, Commerce's decision to bar non-cooperating respondents from the certification regime is legitimately based on the need to induce cooperation, and is not merely punitive.

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[159] *See Butt-Weld Pipe Fittings China Anti-Circumvention Final* IDM at Comment 3; *see also Garment Hangers China Anti-Circumvention Final* IDM at Comment 4; and *Tissue Paper China ARPP Anti-Circumvention Final* IDM at Comment 2.

[160] *See Butt-Weld Pipe Fittings China Anti-Circumvention Final*; *see also Preliminary Determination* PDM at 12-13, 22.

[161] *See* Ton Dong A Case Brief at 20 citing *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1307 (Fed. Cir. 2014) (*Mukand*), and *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (*F.lli De Cecco*), *Lifestyle Enterprise, lnc.*, 768 F. Supp. 2d at 1298) (*Lifestyle Enterprise*), and *Qingdao Taifa Grp Co. v. United States*, 34 C.I.T. 1435, 1443, n.7 (2010) (Qingdao Taifa); *see also* Hoa Sen Case Brief at 20 (citing *Mukand*, *F.lli De Cecco*, *Lifestyle Enterprise*, and *Qingdao Taifa*); Optima Case Brief at 4, 6-7; and JFE Shoji Letter at 3-5.

[162] *See* Ton Dong A Case Brief at 21 citing *Tai Shan City Kam Kiu Aluminum Extrusion Co. v. United States*, 58 F. Supp. 3d 1384, 1396 (CIT 2015) (*Tai Shan*); *see also* Hoa Sen Case Brief at 21 citing *Tai Shan*, 58 F. Supp. 3d at 1396.

[163] *See* Duferco Case Brief at 3.

We also disagree with Optima's and JFE Shoji's argument that the AFA finding is contrary to section 776(b) of the Act and the requirements that Commerce minimizes the collateral impact of imposing AFA on one party to the extent that other parties are affected and "relevant information exists elsewhere on the record."[164] Similarly, we also disagree with Mitsui's arguments that the Act limits the use of AFA to Commerce's proceeding and not to subsequent import activities which are governed by customs law,[165] that there is not support authorizing Commerce to preclude the use of documentation related to customs clearance or liquidation of customs entries,[166] and that Commerce ignores the statute by preventing the issuance of documentation that it states is necessary to prove the facts as to the product which it is being imported.[167] Commerce has previously barred uncooperative parties from certification processes in anti-circumvention proceedings, and this practice was previously upheld by the CIT.[168] In *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, Commerce also made a country-wide affirmative anti-circumvention determination, and established a similar certification regime as the ones established in *China CORE Anti-Circumvention Final*, *China CRS Anti-Circumvention Final*, the *Preliminary Determination*, *Korea CRS Anti-Circumvention Preliminary Determination*, and *Korea CORE Anti-Circumvention Preliminary Determination*.

In *Butt-Weld Pipe Fittings China Anti-Circumvention Preliminary*, Commerce preliminarily barred one respondent, Pantech, and its importers from participating in the certification process because Commerce found that Pantech had failed to cooperate and had failed to establish that it was able to trace the country of origin of its inputs.[169] Commerce reversed itself with respect to Pantech in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, but not because Commerce determined that a stricter general stance toward such deficiencies and uncooperativeness was unwarranted. Rather, Commerce did so with respect to Pantech because Pantech had demonstrated its cooperation and because Commerce had successfully verified Pantech's ability to trace its inputs.[170] Importantly, Commerce continued to find several other unresponsive companies in the same inquiry to be uncooperative and continued to bar these companies from the certification process.[171] Commerce took a similar stance in the earlier anti-circumvention proceedings *Tissue Paper from China Sunlake Anti-Circumvention Preliminary* and *Tissue Paper China MFVN Anti-Circumvention Final*. In *Max Fortune*, the CIT affirmed Commerce's

[164] *See* Optima Steel Case Brief at 7-9 citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013).
[165] *See* Mitsui Case Brief at 8.
[166] *Id*. at 8 citing sections 776(a)(2) and 776(b) of the Act.
[167] *Id*. at 8.
[168] *See Max Fortune*, no. 11-340, slip op. 13-52.
[169] *See Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 84 FR at 29165 ("In the *Preliminary Determination*, Pantech Steel Industries Sdn. Bhd. (Pantech) and its importers were precluded from participating in the certification process. However, because Commerce has verified Pantech's ability to trace the country of origin for its shipments of butt-weld pipe fittings, we will allow Pantech and its importers to participate in the certification process for unliquidated entries of butt-weld pipe fittings from Malaysia that were entered, or withdrawn from warehouse, for consumption on or after August 21, 2017 (the initiation date of this anti-circumvention inquiry).").
[170] *See Butt-Weld Pipe Fittings Anti-Circumvention Preliminary Determination* and accompanying Preliminary Decision Memorandum at 8-10; and *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 84 FR at 29165.
[171] *See Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 84 FR at 29165.

practice of barring uncooperative respondents from a certification process.[172] Each of these applications of AFA necessarily impacted importers, but this is almost always the case any time Commerce applies AFA in AD or CVD proceedings, as importers of record are necessarily liable for duties in AD and CVD proceedings. Accordingly, we continue to find that barring uncooperative parties from the certification process is warranted.

Furthermore, we disagree with MISA that Commerce should clarify that it may import CORE from Taiwan regardless of the identity of the producer or exporter. We find that not requiring both the exporter and importer to certify would create a loophole that would enable non-cooperating exporters to export through cooperating importers, and thereby continue circumventing. Furthermore, requiring a certification from producers or exporters has been upheld by the CAFC. As the petitioners pointed out, in *KYD* the respondent set forth the same argument. The CAFC rejected KYD's argument, stating that it "…would allow an uncooperative foreign exporter to avoid the adverse inferences permitted by statute simply by selecting an unrelated importer, resulting in easy evasion of the means Congress intended for Commerce to use to induce cooperation with its antidumping investigations."[173]

We also disagree with MISA that Commerce can suspend liquidation only from the date of the *Preliminary Determination*. As the petitioners have pointed out, the *Initiation Notice* clearly put all parties on notice that the failure to cooperate could lead to the application of AFA. Thus, in *Tai-Ao* (that MISA cites), Commerce's initiation notice did not state that the anti-circumvention inquiry applied to any companies other than the one named company. Here, our *Initiation Notice* stated:

> {C}ommerce intends to issue questionnaires to solicit information from the Vietnamese producers and exporters concerning their shipments of CORE to the United States and the origin of any imported HRS and CRS being processed into CORE. A company's failure to respond completely to Commerce's requests for information may result in the application of partial or total facts available, pursuant to section 776(a) of the Act, which may include adverse inferences, pursuant to section 776(b) of the Act.[174]

Finally, we disagree with MISA that Commerce can apply AFA only to particular entries after the importer or exporter has failed to certify the origin of the substrate. The failure to respond to a Q&V questionnaire constitutes withholding requested information, seriously impeding the investigation, and a failure to act to the best of one's ability. Under these circumstances, Commerce may apply AFA with an adverse inference under section 776 of the Act.

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[172] *See Max Fortune*, No. 11-340, slip op. 13-52; *see also Tissue Paper from China: MFVN Anti-Circumvention Final*, *Tissue Paper from China: Quijiang Anti-Circumvention Final*, and *Tissue Paper from China: Sunlake Anti-Circumvention Final*.
[173] *See KYD*, 607 F. 3d at 768.
[174] *See Initiation Notice*, 83 FR at 37790.

Comment 6: Whether Commerce Should Allow Additional Time for Completing Certifications for Pre-Preliminary Determination Entries

Mitsui's Case Brief

- In the instructions to CBP dated August 13, 2019, Commerce required importers and exporters to complete the Importer and Exporter Certifications within 30 days of publication of the *Preliminary Determination* for entries made during August 2, 2018 through July 18, 2019. Thus, the certifications were required to be completed several days before the Customs instructions were provided.[175]
- Commerce recognized in the anti-circumvention inquiries of CORE from China that it takes time for importers to complete and obtain the requisite certifications and, therefore, extended the deadline to 45 days after publication of the *China CORE Preliminary Circumvention Determination.*[176]
- The 30-day deadline imposed in the *Preliminary Determination* is unreasonable because the *Preliminary Determination* and Preliminary Decision Memorandum were conflicting, creating significant confusion regarding the certification process. Importers therefore had to await clarification instructions, which Commerce did not provide until after the deadline for preparing the certification. Accordingly, assuming Commerce's present certification requirements were appropriate, Commerce should extend the certification deadline as it did in the China circumvention proceeding.

No other party commented on this issue.

Commerce's Position: We agree with Mitsui that the Customs instructions relaying the certification requirements did not post until more than 30 days after the *Preliminary Determination* published, which was the deadline for parties to complete their certifications for shipments and/or entries made during the August 2, 2018 through July 18, 2019 period. Accordingly, we also agree it is appropriate to extend the period for filing certifications for those shipments and/or entries. Therefore, Commerce is extending the deadline for completion of the exporter and importer certifications for shipments and/or entries made during the August 2, 2018 through July 18, 2019 period until 30 days after the *Federal Register* publication of this final determination and will issue appropriate Customs instructions relaying that information. Additionally, we note that the additional informational requirements for shipments and/or entries made after the final determination do not apply to the certifications for shipments and/or entries made during the August 2, 2018 through July 18, 2019 period. Finally, although Mitsui argues that the *Preliminary Determination* and the Preliminary Decision Memorandum contained conflicting information about the certification process, Mitsui did not elaborate on this point and after reviewing both documents, Commerce was not able to identify the alleged conflict. Accordingly, we cannot address Mitsui's argument further.

[175] *See* Mitsui's Case Brief at 14.
[176] *See China CORE Preliminary Circumvention Determination*.

Comment 7: Whether a Country-Wide Determination is Justified

Formosa's Case Brief

Commerce made affirmative anti-circumvention determinations on a country-wide basis, which is inconsistent with Commerce's longstanding approach of making such determinations on a company-specific basis based on an evaluation of the conduct of specific respondents.[177]

Petitioners' Rebuttal Brief

- Commerce's preliminary country-wide findings in the *Preliminary Determination* were consistent with the statute and Commerce practice. Commerce has the authority to conduct country-wide circumvention inquiries and has a practice of doing so.[178]
- As Commerce explained in *Butt-Weld Pipe Fittings from China Circumvention Determination*, there is no language in section 781 of the Act, or under 19 CFR 351.225, which suggests anti-circumvention determinations must necessarily be limited to individual companies.[179] The country-wide determinations are consistent with *Butt-Weld Pipe Fittings from China Circumvention Determination* and the May 2019 preliminary determination in *Aluminum Extrusions from China*.[180]

Commerce's Position: We disagree with Formosa that we are precluded from making country-wide findings in these proceedings because we have previously made other anti-circumvention determinations on a company-specific basis. Section 781(b) of the Act specifies factors to consider when investigating whether merchandise completed or assembled in a third country is circumventing an AD or CVD order. As we have explained in *Butt-Weld Pipe Fittings from China Circumvention Determination*, there is no language under section 781(b), or under 19 CFR 351.225, that suggests that anti-circumvention determinations must necessarily be limited to individual companies. Here, Commerce informed parties in the Initiation Notice of the merchandise subject to these inquiries which was not limited to any individual company, and further informed parties that Commerce would issue questionnaires to Vietnamese producers and exporters.[181]

Commerce has taken this approach in other anti-circumvention inquiries, where the facts warrant such a finding.[182] Furthermore, Commerce has previously issued affirmative findings of circumvention that applied to all imports of CORE from Vietnam, regardless of manufacturer or producer, unless accompanied by a certification stating that such CORE has not been produced from HRS and/or CRS sourced from China.[183] Thus, we continue to hold the view that the statute confers Commerce with the authority to issue country-wide determinations of circumvention, where appropriate.

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[177] *See* Formosa's Case Brief at 5.
[178] *See* Petitioners' Rebuttal Brief at 8.
[179] *Id.* at 9.
[180] *Id.* at 9-10, citing *Aluminum Extrusion from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 84 FR 22445 (May 17, 2019) (*Aluminum Extrusions from China*).
[181] *See Initiation Notice*, 83 FR at 37790.
[182] *See China CRS Circumvention Determination* IDM at Comment 3.
[183] *See China CORE Circumvention Determination* IDM.

Additionally, absent country-wide findings, our concern is that additional unidentified Vietnamese companies could rely on Taiwanese HRS and/or CRS as their substrate in the future. This is, after all, the very nature of these inquiries. Taiwanese HRS and/or CRS can simply be rerouted to Vietnam to avoid duties on the completed products. Thus, limiting these affirmative determinations and accompanying certification requirements to certain companies creates the possibility of future circumvention by other companies that may not be identified. As a result, the country-wide findings in these determinations is necessary to ensure that circumvention does not happen now or in the future.

Comment 8: Whether Commerce's Interpretation of Section 781(b) of the Act Applies to the CORE Production Process in Vietnam and Expands the Scope of the *Taiwan CORE Order*

CSVC's Case Brief

- The statute outlines the distinction between "production" and "completion and assembly;" it is clear that CSVC's operations in Vietnam constitute "production."[184] CSVC's production process is identical to those of the Taiwanese producers that Commerce previously examined; thus, CSVC's operations must be considered the "full" production of CORE and not mere "completion or assembly" of an incomplete CORE into a final CORE product.[185]
- The anti-circumvention provision was designed to address the "snap together" operations, and it was not intended to expand the scope to cover substantial manufacturing operations performed in third countries.[186] CSVC performs extensive further manufacturing operations to transform the purchased input to CORE, *i.e.*, from hot-rolled coil to cold-rolled coil, and from cold-rolled coil to CORE coil.[187]
- Citing *Cold-Rolled Steel from Argentina*, Commerce has repeatedly found the processing of hot-rolled coil into CORE results in a substantial transformation of those inputs.[188] Moreover, in order to perform CORE production activities, CSVC has obtained the necessary certifications for its galvanized products.[189] Thus, CSVC's manufacturing operations cannot be considered simply assembly or completion and should not be subject to an anti-circumvention inquiry.
- CSVC's CORE is properly considered a product of Vietnam, not Taiwan, under the World Trade Organization (WTO) Rules of Origin, which is the practice of CBP and Commerce.[190]

[184] *See* CSVC's Case Brief at 4-5.
[185] *Id.* at 5-6.
[186] *Id.* at 6.
[187] *Id.* at 7.
[188] *Id.*, citing, *e.g.*, *Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 FR 37066 (July 9, 1993) (*Cold-Rolled Steel from Argentina*); *see also Notice of Final Determination of Less Than Fair Value: Wax and Wax/Resin Thermal Transfer Ribbons from France*, 69 FR 10674, 10675 (March 8, 2004) (*Wax and Wax Ribbons from France*).
[189] *Id.*
[190] *Id.* at 14-15.

Hoa Sen and Ton Dong A's Case Briefs

- The statute only authorizes Commerce to find circumvention of imported merchandise that is completed or assembled in another foreign country before importation into the United States.[191] Dictionary definitions of "assemble" is "to fit together the parts of" and "complete" is defined as making things "whole or perfect."[192]
- For more than 25 years following the investigation of flat-rolled steel products, Commerce has maintained that HRS, CRS, and CORE are separate and distinct classes or kinds of merchandise or like products.[193] When making such determinations, Commerce has assessed its substantial transformation rule and, while acknowledging the inconsistency with Customs rulings, determined that "the new article becomes a product of the country in which it was processed or manufactured."
- Commerce has previously found that CORE steel is not of the same class or kind as CRS steel because "galvanizing constitutes substantial transformation {such that} cold-rolled steel that is galvanized in a subject country is substantially transformed into a product of that country."[194] Commerce since then has only made one circumvention determination, CORE produced in Vietnam, where the third-country processing at issue results in a substantial transformation.[195]
- Use of HRS and/or CRS to produce CORE is complex and constitutes more than assembly or completion; the ITC has also treated HRS, CRS, and CORE as separate and distinct products as each undergoes an additional step unique to their production.[196] Commerce has been careful in its orders on HRS, CRS and CORE to only include steel that is substantially transformed into the product and inside the country that is subject to the order.[197]
- Thus, Commerce's prior affirmative finding of circumvention in CORE produced in Vietnam using Chinese-origin HRS and CRS ignored years of Commerce's precedent without an adequate explanation of why the substantial transformation standard was no longer relevant to a determination of circumvention.[198] Commerce also did not provide justification based on the governing statutory language.[199]
- The record evidence demonstrates that the production of CORE from either HRS or CRS substrate is significant and complex and constitutes more than assembly or completion of an imported substrate.[200] The properties of the product change at each of the processing states, *e.g.*, hot-rolling, cold-rolling, and galvanizing.[201]
- Commerce appears to arbitrarily select a large enough figure as a benchmark to find each of the statutory factors laid out in the statute to demonstrate circumvention is minor or

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[191] *See* Ton Dong A's Case Brief at 22, Hoa Sen's Case Brief at 21-22.
[192] *Id.*
[193] *See* Hoa Sen's Case Brief at 22-23; *see also* Ton Dong A's Case Brief at 23-24, all citing *Cold-Rolled Steel from Argentina* at Appendix I (Scope Issues).
[194] *Id.*, citing *Cold-Rolled Steel from Argentina* (recognizing that inconsistent application of the substantial transformation rule to include all foreign products regardless of where they were substantially transformed "would result in inconsistent application of the AD/CVD law" and could lead to "absurd result{s}").
[195] *See* Ton Dong A and Hoa Sen's Case Briefs at 23-24.
[196] *Id.* at 24.
[197] *Id.* at 25.
[198] *Id.* at 26.
[199] *Id.*
[200] *See* Hoa Sen's Case Brief at 22.
[201] *Id.*

insignificant without considering whether the comparison is fair.[202] The term "minor" or "insignificant" applies a very large threshold to find a circumvention; the CORE production process simply does not meet this threshold.[203]

- Commerce thus turned the meaning of the words upside down and exceeded its authority by unlawfully expanding the definition and scope of the circumvention.[204] Particularly, Commerce has consistently defined "'minor processing' as processing that does not result in substantial transformation or a change in country of origin of the product that is processed."[205] There is no court precedent which has found the substantial transformation standard is inconsistent with the minor or insignificant provision of the statute.[206]
- While the statute allows Commerce to expand the scope, it does not include the power to expand the scope to include merchandise that is not contained in the physical description of the scope, let alone those that are "unequivocally excluded from the order in the first place."[207] This would allow the circumvention statute to be used to expand an order to include merchandise not described by the physical characteristics of the order without any consideration where it is produced.[208]
- The CIT recognized Commerce's authority to make country of origin determinations and found determining "the country where the unfairly traded merchandise is produced or manufactured" is critical.[209] Expanding the scope of the language to include merchandise that is substantially transformed into those characterized by the physical description of the merchandise and in the country subject to the order would disrupt the statutory scheme of the AD/CVD order, risk complicating and overlapping scopes, and be inconsistent with the ITC's prior injury findings.[210]
- As *SunPower Remand* suggests, the risk of creating overlapping and complicated scopes would lead to situations where Commerce would be forced to exclude the merchandise found to be circumventing the prior order for a more recent circumvention finding involving a substantially transformed merchandise from a third country containing the same physical characteristics enumerated in that order.[211] CORE from Vietnam is potentially subject to at least four orders, CORE from China, Korea, Taiwan and possibly in the future, Vietnam.[212] If Commerce were to initiate an investigation on CORE from

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[202] *See* Ton Dong A's Case Brief at 27; *see also* Hoa Sen's Case Brief at 27.
[203] *Id.*
[204] *Id.*
[205] *See* Hoa Sen's Case Brief at 28; *see also* Ton Dong A's Case Brief at 28, citing *Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 69 FR 74495 (December 14, 2004) (*Stainless Steel Plate from Belgium*) and accompanying IDM at Comment 4.
[206] *Id.*
[207] *See* Hoa Sen's Case Brief at 28-29; *see also* Ton Dong A's Case Brief at 28-29, citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998) (*Wheatland Tube*).
[208] *See* Hoa Sen's Case Brief at 29; *see also* Ton Dong A's Case Brief at 29.
[209] *See* Hoa Sen's Case Brief at 29-30; *see also* Ton Dong A's Case Brief at 29-30, citing *E.I. Du Pont de Nemours & Co. v. United States*, 8 F. Supp. 2d 854, 859 (CIT 1998).
[210] *See* Hoa Sen's Case Brief at 30; *see also* Ton Dong A's Case Brief at 30.
[211] *See* Hoa Sen's Case Brief at 30; *see also* Ton Dong A's Case Brief at 30-31; Hoa Sen's Case Brief at 30, citing *Sun Power Corp. v. United States*, Consol. Ct. No. 15-00067, Slip Op. 16-56 (June 18, 2016) (*SunPower Remand*) ("A single product cannot be subject to two different antidumping orders that cover merchandise from two different countries.").
[212] *See* Hoa Sen's Case Brief at 30-31; *see also* Ton Dong A's Case Brief at 31-32.

Vietnam, it would be forced to exclude CORE produced in Vietnam, *i.e.*, CORE substantially transformed in Vietnam that uses HRS and/or CRS substrate from Korea, if it was to avoid an overlapping order.[213]

- The creation of such a complicated scope is akin to the complicated scope that the CIT rejected in *Wheatland Tube* where the Federal Circuit concluded that the Congress did not authorize Commerce to find a "minor alteration" when it resulted in a change in the class or kind of merchandise.[214] Similarly, Congress did not intend to grant Commerce the ability to find "minor or insignificant" processing if it yielded a different class or kind of merchandise.[215]
- The scope of the *Taiwan CORE Order* clearly excludes HRS or CRS that is not galvanized and would be subject to the orders of either HRS or CRS from Taiwan, which Commerce has classified as distinct classes or kinds of merchandise.[216] It is contrary to the statutory scheme of the AD and CVD laws to now attempt to include HRS or CRS produced in Taiwan that is imported to Vietnam and galvanized in Vietnam within the *Taiwan CORE Order*.[217]

JFE Shoji and Optima's Letters

- Changes from HRS to CRS and from CRS to CORE cannot under any circumstance be deemed to be minor and insignificant as Commerce found in its *Preliminary Determination*.[218] HRS, CRS, and CORE are and have always been separate classes or kinds of merchandise for both Commerce and the ITC.[219] Commerce appears to have ignored the facts or the governing law. Commerce's *Preliminary Determination* is unlawful.[220]

U.S. Importers Group's Case Brief

- This results in the imposition of AD duties on merchandise that is outside the scope of the *Taiwan CORE Order*, and it is contrary to the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures, as well as U.S. AD and CVD laws.[221]

Petitioners' Rebuttal Brief

- Contrary to parties' arguments, Congress granted Commerce broad discretion under the statute to enforce the United States' trade remedy laws through circumvention proceedings.[222] Commerce lawfully conducted inquiry by adhering to the statutory framework and applied the facts to make its *Preliminary Determination*.[223] Commerce

[213] *See* Hoa Sen's Case Brief at 31; *see also* Ton Dong A's Case Brief at 31.
[214] *See* Hoa Sen's Case Brief at 31; *see also* Ton Dong A's Case Brief at 31.
[215] *See* Hoa Sen's Case Brief at 32; *see also* Ton Dong A's Case Brief at 32.
[216] *Id.*
[217] *Id.*
[218] *See* JFE Shoji's Letter at 5; *see also* Optima's Letter at 7.
[219] *Id.*
[220] *Id.*
[221] *See* U.S. Importers Group's Case Brief at 14.
[222] *See* Petitioners' Rebuttal Brief at 10.
[223] *Id.*

should, thus, reject parties' arguments that this anti-circumvention proceeding unlawfully expanded the scope of the *Taiwan CORE Order*.[224]

- Analysis of trade patterns, *i.e.*, U.S. imports of CORE from Taiwan, U.S. imports of CORE from Vietnam, exports of Taiwanese inputs to Vietnam, suggests shifts in shipping and sourcing patterns following the imposition of AD duties of Taiwanese CORE.[225] In order to address and regulate "new forms of injurious dumping," Congress granted Commerce "substantial discretion in interpreting {the statutory} terms." Commerce thus properly exercised the "broad discretion" to find circumvention in this proceeding.[226]
- In the *Preliminary Determination*, Commerce has provided full analysis of the five statutory criteria established in the statute.[227] It is unreasonable for certain parties to claim that the "minor or insignificant" processing analyses conducted in the *Preliminary Determination* were not comprehensive and well supported by record evidence.[228] Parties cite to no meaningful authority with their argument that Commerce has turned the meaning of the words "upside down."[229] The dictionary definitions cited by parties in no way undermine Commerce's determination; converting HRS and/or CRS to CORE is "to make whole or perfect," in accordance with the statute.[230]
- Certain parties' contentions that the production of CORE from either HRS or CRS substrate is significant and complex and constitutes more than mere assembly or completion lack statutory evidence.[231] Similarly, parties' reference to ITC precedent to argue that the ITC has treated HRS, CRS, and CORE as separate and distinct "like products" also lack merit.[232] Congress has enacted the anti-circumvention statute, and none of statutory factors include a "substantial transformation" test. Rather, it focuses on assessing both quantitative and qualitative factors to determine the CORE processing in Vietnam.[233] Thus, parties' contention that Commerce has not explained its departure from its traditional practice or its deviation from court interpretations is incorrect.[234]
- The authoritative text provided in the SAA rebuts parties' contentions and supports Commerce's conclusion that the substantial transformation test is inapplicable in a third country circumvention proceeding.[235] Congress explicitly provided Commerce the directive to apply practical measurements regarding minor alterations even where such alterations to an article technically transform it into a different article.[236] Congress' intent that "minor" changes could result in the production of a different article, whether or not

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[224] *Id.*
[225] *Id.* at 12.
[226] *Id.* at 12-14, citing H.R. Rep. No. 100-40, 1st Sess., Pt. 1 at 3 (1987)
[227] *Id.* at 15-17.
[228] *Id.* at 17.
[229] *Id.* at 15.
[230] *Id.* at 18.
[231] *Id.* at 18-19.
[232] *Id.*, citing *Certain Flat-Rolled Carbon Steel Products from Argentina, Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. 701-TA- 319-332,334,336-342,344, and 347 - 353 and 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619, USITC Pub. 2664 (Aug. 1993) (Final).
[233] *Id.* at 19.
[234] *Id.* at 19-21.
[235] *Id.* at 21-22.
[236] *Id.* at 22, citing S. Rep No. 100-71 at 100.

{the finished good is} included in the same tariff classification, also manifests itself in the anti-circumvention statute.[237]

- Thus, while the substantial transformation analysis may have certain similarities to the statutory factors provided in section 771(b) of the Act, Congress provided an explicit statutory provision for including in the scope of an order merchandise completed in a third country.[238] These factors do not include reference to a substantial transformation test that is used for country of origin or Customs classification purposes.[239]
- Parties' contention that Commerce's circumvention ruling creates overlapping and complicating scopes is incorrect because the statute requires Commerce to consult with the ITC before reaching a final affirmative circumvention determination. *Wheatland Tube* concerned a scope inquiry, not a determination involving a third-country completion/assembly; it also concerned products expressly excluded from an order and the absurd result of including within an order products expressly excluded from that order.[240] As HRS and CRS were not explicitly excluded from the scope, it would not be inconsistent to include the merchandise in the AD order.[241]
- Because the circumvention statute contemplates including within an order merchandise that is deemed the same class or kind, which is also linked to the ITC's like product determination, Congress authorized the ITC to advise Commerce if there is an injury problem by including products found to be circumventing the order.[242] The precedent in *Wheatland Tube* is not dispositive because Commerce's decision involved a scope inquiry and was limited to a determination of circumvention addressing minor alterations to merchandise subject to an existing AD order.[243]
- Commerce thus followed Congress' authority to ensure that the ITC's injury determinations would not be undermined by circumvention proceedings that were otherwise intended to provide protection to the injured domestic industry.[244]

Commerce's Position: We disagree with certain parties' contentions that our interpretation of section 781(b) of the Act is inappropriate and that we unlawfully expanded the scope of the *Taiwan CORE Order*. As explained in prior anti-circumvention proceedings,[245] Commerce's practice for determining substantial transformation in country-of-origin determinations is distinct from our practice under section 781 of the Act of determining whether merchandise being completed or assembled into a product in a third country is circumventing an order. Because the analyses are distinct, a finding that the process of finishing HRS or CRS into CORE constitutes

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[237] *Id.*
[238] *Id.* at 22-23.
[239] *Id.* at 23.
[240] *Id.* at 23-24.
[241] *Id.*, citing *Initiation Notice*, 83 FR at 37786.
[242] *Id.* at 24-25, citing section 781(e) of the Act.
[243] *Id.* at 25, citing *Wheatland Tube*, 161 F.3d at 1371 (discussing scope injury and the statutory minor alterations provision).
[244] *Id.* at 26.
[245] *See, e.g.*, *China CORE Circumvention Determination* IDM at Comments 1 and 2; *China CRS Anti-Circumvention Determination* IDM at Comment 1 and 2.

substantial transformation does not preclude finding that the process is minor or insignificant in an analysis under section 781(b) of the Act.

In determining whether merchandise is subject to an AD and/or CVD order, Commerce considers whether the merchandise is: (1) the type of merchandise described in the order; and (2) from the particular country which the order covers.[246] Thus, Commerce's determination on whether merchandise meets these parameters involves two separate inquiries, *i.e.*, whether the product is of the type described in the order, and whether the country of origin of the product is that of the subject country.[247] In determining country of origin of a product, Commerce's usual practice has been to conduct a substantial transformation analysis.[248] The substantial transformation analysis asks "whether, as a result of the manufacturing or processing, the product loses its identity and is transformed into a new product having a new name, character, and use"[249] and whether "{t}hrough that transformation, the new article becomes a product of the country in which it was processed or manufactured."[250] Commerce may examine a number of factors[251] when conducting its substantial transformation analysis, and the weight of any one factor can vary from case to case and depends on the particular circumstances unique to the products at issue.[252]

As explained above, Commerce's application of a substantial transformation analysis does not preclude Commerce from also applying an analysis based on statutory criteria established in section 781(b) of the Act, because these two analyses serve different purposes.[253] Section 781(b) of the Act provides that Commerce may include merchandise completed or assembled in foreign countries within the scope of an order if the "merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of" an

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[246] *See Bell Supply Co., LLC v. United States*, 179 F. Supp. 3d 1082, 1091 (CIT 2016) (*Bell Supply II*); *see also Sunpower Corp. v. United States*, 179 F. Supp 3d 1286, 1298 (CIT 2016) (*Sunpower*); and *Cold-Rolled Steel from Argentina*.

[247] *See Sunpower*, 179 F. Supp. 3d at 1298; *see also Final Determination of Sales at Less Than Fair Value: 3.5" Microdisks and Coated Media Thereof from Japan*, 54 FR 6433, 6435 (February 10, 1989).

[248] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Glycine from India*, 73 FR 16640 (March 28, 2008) and accompanying IDM at Comment 5; *see also Stainless Steel Plate from Belgium* IDM at Comment 4.

[249] *See Bell Supply Co., LLC v. United States*, 888 F.3d 1222, 1230 (Fed. Cir. 2018) (*Bell Supply CAFC*) (quotations and citations omitted).

[250] *See Cold-Rolled Steel from Argentina*, 58 FR 37065 (quoted in *Ugine and Alz Belgium N.V. v. United States*, 571 F. Supp. 2d 1333, 1337 n.5 (2007)).

[251] Specifically, Commerce's analysis includes factors such as: (1) the class or kind of merchandise; (2) the physical properties and essential component of the product; (3) the nature/sophistication/extent of the processing in the country of exportation; (4) the value added to the product; (5) the level of investment; and (6) ultimate use. *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review*, 76 FR 3086 (January 19, 2011) and accompanying IDM at Comment 6; *see also Laminated Woven Sacks from the People's Republic of China: Final Results of First Antidumping Duty Administrative Review*, 76 FR 14906 (March 18, 2011) (*LWS from China*) and accompanying IDM at Comment 1b; and *Final Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the People's Republic of China*, 71 FR 16116 (March 30, 2006) and accompanying IDM at Comment 1.

[252] *See LWS from China* IDM at Comment 1b.

[253] *See Bell Supply CAFC*, 888 F.3d at 1230 ("Although substantial transformation and circumvention inquiries are similar, they are not identical.").

AD or CVD order, and such merchandise "is completed or assembled … from merchandise which … is produced in the foreign country with respect to which such order { } applies…." To include such merchandise within the scope of an AD or CVD order, Commerce must determine and assess whether: the process of assembly or completion in the foreign country is minor or insignificant; the value of the merchandise produced in the country subject to the AD or CVD order is a significant portion of the merchandise exported to the United States; and, the action is appropriate to prevent evasion of such order or finding.[254] As part of this analysis, Commerce also considers additional factors such as: pattern of trade, including sourcing patterns; whether the manufacturer and/or exporter of the parts or components is affiliated with the person who assembles or completes the merchandise sold in the United States from the parts of components produced in a foreign country; and, whether imports of the parts or components produced in such foreign country into the country in which they are assembled or completed have increased after the initiation of the investigation which resulted in the issuance of such order or finding.[255] As such, the purpose of this anti-circumvention inquiry under section 781(b) of the Act is to determine whether merchandise from the country subject to the AD and/or CVD orders that is processed, *i.e.*, completed or assembled into a finished product, in a third country into a merchandise of the type subject to the AD and/or CVD order should be considered within the scope of the AD and/or CVD order at issue.

While certain parties argue that Commerce ignored years of its practice and failed to consider its prior substantial transformation findings in issuing its *Preliminary Determination*, we disagree that we were inconsistent with our prior determinations. Commerce recognizes that it has previously found cold-rolling and galvanizing to constitute substantial transformation.[256] Our *Preliminary Determination* is consistent with prior findings in that we have found that the finished product – CORE produced in Vietnam from Chinese HRS and CRS substrate – should be considered to be within the order on CORE from China, and not within the orders on HRS or CRS from China. In other words, we acknowledge that the processing constitutes transformation into a different product, but, as explained above, this does not preclude that the processing can be otherwise minor, insignificant, and performed to circumvent an order. For example, in *Diamond Sawblades from China Circumvention Determination*, we found that, although the process of joining diamond sawblades cores and segments constitutes substantial transformation because it imparts the essential character of a diamond sawblade, that joining process was minor and insignificant pursuant to our analysis under section 781(b) of the Act. Therefore, we determined that diamond sawblades produced by the respondent in Thailand from cores and/or segments produced in China are within the order on diamond sawblades and parts thereof from China.[257]

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[254] *See* sections 781(b)(C)-(E) of the Act.
[255] *See* section 781(b)(3) of the Act.
[256] *See, e.g.*, *Cold-Rolled from Argentina*, 58 FR 37066 ("{G}alvanizing changes the character and use of the steel sheet, *i.e.*, results in a new and different article."); *see also Stainless Steel Plate from Belgium* IDM at Comment 4 ("In this case, we determine that because hot-rolling constitutes substantial transformation, the country of origin of U&A Belgium's merchandise which is hot-rolled in Germany, and not further cold-rolled in Belgium, is Germany."); and *Wax and Wax Ribbons from France*, 69 FR 10674, 10675 (listing the conversion of CRS to CORE as an example of substantial transformation).
[257] *See Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Determination of Anti-Circumvention Inquiry*, 84 FR 33920 (July 16, 2019) (*Diamond Sawblades from China Circumvention Determination*).

Additionally, we disagree with certain parties' contentions that, because Commerce has found that galvanizing and cold-rolling processes result in substantial transformation, CORE processed in Vietnam from Taiwanese substrate has a country of origin of Vietnam and cannot be properly covered by the scope of the *Taiwan CORE Order*. Although an AD or CVD order would not *normally* cover merchandise that has a country of origin other than the country subject to the order, the statute expressly provides an exception to the general rule in the cases of circumvention because, in general, "{c}ircumvention can only occur if the articles are from a country not covered by the relevant AD or CVD orders."[258] While we recognize our prior determinations involving steel products, *e.g.*, *Cold-Rolled Steel from Argentina*, those determinations concerned the substantial transformation analysis used to determine country of origin. A reading of section 781(b) of the Act that requires the imported merchandise to have the same country of origin as the merchandise subject to the AD/CVD order at issue would severely undermine section 781(b) of the Act because the merchandise would already be subject to the order and there would be no need to engage in an anti-circumvention analysis. Accordingly, Commerce interprets the requirement in section 781(b) of the Act that the merchandise imported into the United States be of "the same class or kind" as the merchandise that is subject to the AD and/or CVD order to mean that the imported merchandise must be the same type of product as the subject merchandise. In other words, the imported merchandise meets the physical description of the subject merchandise and is only distinct because of its different country-of-origin designation.

With regard to the anti-circumvention statute established by Congress, we agree with the petitioners that the language provided in the SAA reaffirms Commerce's prior determinations in not applying the substantial transformation test in third-country anti-circumvention proceedings. The court affirmed that "{t}the legislative history indicates that {section 781 of the Act} can capture merchandise that is substantially transformed in third countries, which further implies that {section 781 of the Act} and the substantial transformation analysis are not coextensive."[259] When Congress passed the Omnibus and Trade Competitiveness Act in 1988, it explained that section 781 of the Act "addresses situations where 'parts and components … are sent from the country subject to the order to the third country for assembly and completion."[260] Congress also stated that "{t}he third country assembly situation will *typically* involve the same class or kind of merchandise, where Commerce has found that the de facto country of origin of merchandise completed or assembled in a third country is the country subject to the antidumping or countervailing duty order."[261] Thus, Congress contemplated that where Commerce had made an affirmative circumvention determination, the imported merchandise found to be circumventing would be within the AD or CVD order at issue and would be treated as having the same country of origin as the country subject to the order. Subsequently, when implementing the URAA in 1994, Congress further recognized in the SAA the problem arising from foreign exporters attempting to "circumvent an {} order by purchasing as many parts as possible from a third country" and assembling them in a different country, such as the United States.[262] Similarly, the

[258] *See Bell Supply CAFC*, 888 F.3d at 1229.
[259] *See Bell Supply CAFC*, 888 F.3d at 1231.
[260] *Id.*
[261] *See* H.R. Rep. No. 100-576 at 603 (emphasis added).
[262] *See* SAA at 893.

SAA demonstrates that Congress was aware of Commerce's substantial transformation analysis and the potential interplay of such an analysis with a circumvention finding under section 781 of the Act. Further, as Commerce noted, "*outside of a situation involving circumvention* of an antidumping duty order, a substantial transformation of a good in an intermediate country would render the resulting merchandise a product of the intermediate country rather than the original country of production."[263] In sum, it is evident from the above that Congress anticipated that circumvention could result in a situation where, despite the merchandise undergoing some change that warranted a new country of origin pursuant to a substantial transformation analysis, the merchandise could still be considered to be within the AD or CVD order at issue, if, pursuant to section 781(b) of the Act, Commerce determined the existence of circumvention. As such, Congress has already contemplated that substantial transformation did not preclude a finding of circumvention under the statute.

Moreover, the parties' arguments fail to recognize the Federal Circuit's statement that "{i}n order to effectively combat circumvention of antidumping duty orders, 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*."[264] The Act "identifies four articles that may fall within the scope of a duty order without unlawfully expanding the order's reach,"[265] *inter alia*, merchandise completed or assembled in foreign countries using merchandise produced in the country with respect to which the AD or CVD order applies.[266] Similarly, the Federal Circuit has explained that "if Commerce applies the substantial transformation test and concludes that the imported article has a country of origin different from the country identified in an AD or CVD order, then Commerce can include such merchandise within the scope of an AD and CVD order only if it finds circumvention under {section 781(b) of the Act}."[267]

CSVC, as well as Hoa Sen and Ton Dong A, argue that Commerce's previous findings that processing HRS and/or CRS substrate into finished CORE constitutes substantial transformation undermine the finding that the further processing taking place in Vietnam is minor and insignificant for purposes of section 781(b)(1)(C) of the Act. As described extensively above, we note that the parties' contentions ignore the distinct purposes of the two analyses, *i.e.*, the substantial transformation analysis and the factors established in the anti-circumvention statute, and the separate factors considered. In other words, substantial transformation is focused on whether the input product loses its identity and is transformed into a new product having a new name, character and use, and thus a new country of origin. Conversely, section 781(b) of the Act focuses on the extent of processing applied to subject merchandise in a third country and whether such processing is minor or insignificant *in comparison* to the entire production process of the finished subject merchandise.[268] Under section 781(b) of the Act, we also examine whether such

[263] *Id.* at 844 (emphasis added).
[264] *See Deacero S.A. de C.V. v. United States*, 817 F.3d 1332, 1338 (Fed. Circ. 2016) (*Deacero*) (emphasis added).
[265] *Id.*
[266] *See* section 781(b) of the Act. The other three articles are: (1) merchandise completed or assembled in other foreign countries with respect to which the AD or CVD order applies; (2) merchandise altered in form or appearance in minor respects … whether or not included in the same tariff classification; and (3) later-developed merchandise. *See* section 781(a), (c)-(d) of the Act.
[267] *See Bell Supply CAFC*, 888 F.3d at 1230.
[268] *See* Comment 13 for further analysis on this issue.

further processing in a third country can reasonably be moved across borders, thereby allowing parties to change the country of origin and avoid the discipline of an order. Thus, we find that there is nothing contradictory in finding an input substrate to be substantially transformed into a finished product, in terms of its physical characteristics and uses, while also finding the process of effecting that transformation to be minor vis-à-vis the manufacturing process of producing a finished product. Further, as the Federal Circuit has explained, "even if a product assumed a new identity, the process of 'assembly or completion' may still be minor or insignificant, and undertaken for the purpose of evading an AD or CVD order."[269] The SAA illustrates this possibility in its discussion of the anti-circumvention provisions of the Act through its references to "parts" and finished products.[270] It is evident from this discussion that the "parts" and the finished goods assembled are two different products. Nevertheless, the process of assembling such parts into a final product may be minor.[271] Furthermore, section 781(b) of the Act requires that we examine other factors, *e.g.*, patterns of trade including sourcing patterns, and whether imports into the third country have increased after initiation of the relevant AD or CVD investigation.

We further disagree with Hoa Sen and Ton Dong A's contention that we have arbitrarily selected large enough figures as benchmarks to find each of the statutory criteria in section 781(b)(2) of the Act. As discussed more in detail in Comment 13, under section 781(b)(2) of the Act, we examine the five criteria against the entire manufacturing process of producing a finished product. The purpose of this analysis is to compare each criterion to the experience of a producer that performs the entire manufacturing process of a finished product, including the production steps that take place prior to cold-rolling and galvanizing. Thus, we find that it is appropriate to select benchmarks of a Taiwanese producer of the HRS and/or CRS substrate.

Lastly, with regard to certain parties' contentions that the affirmative determination of this circumvention inquiry will impermissibly expand the scope of the order and complicate administering these orders, we disagree. We reiterate that, although an AD or CVD order would not *normally* cover merchandise that has a country of origin other than the country subject to the order, the statute expressly provides an exception to the general rule in the cases of circumvention because generally "{c}ircumvention can only occur if the articles are from a country not covered by the relevant AD or CVD orders."[272] Accordingly, when it makes an affirmative circumvention determination, 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*."[273]

When an affirmative circumvention ruling results in a determination that the inquiry merchandise is within the scope of the order at issue, the anti-circumvention provisions of the Act instruct

[269] *See Bell Supply CAFC*, 888 F.3d at 1230.
[270] *See* SAA at 893.
[271] *Id.* ("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 antidumping duty order by establishing a screwdriver operation in the United States that purchases as many parts as possible from a third country.").
[272] *See Bell Supply CAFC*, 888 F.3d at 1229.
[273] *See Deacero*, 817 F.3d at 1338 (emphasis added).

Commerce to notify the ITC of its affirmative ruling, so that the ITC may consider the effect on its injury determination of the proposed inclusion of the inquiry merchandise within the circumvented order, which we did in the instant proceeding.[274] As such, we find that Hoa Sen and Ton Dong A's reference to *Wheatland* is inapposite because it involved a scope inquiry and not an anti-circumvention proceeding that requires consultation with the ITC.

Comment 9: Whether Commerce Should Amend the Exporter Certification Language to Prevent Funneling

Petitioners' Case Brief

- Commerce should adjust the Taiwan certification language to prevent the non-responsive companies from "funneling," *i.e.*, exporting CORE they produce in Vietnam through cooperating Vietnamese respondents and, thereby, benefiting from a lower cash deposit rate.[275]
- The current certification scheme does not prohibit cooperative exporters, though they should have direct knowledge of the producer's identity and location, from exporting CORE from producers who are ineligible to participate in the certification regime.[276]
- The prospective of funneling is likely in this proceeding because some non-responsive companies have affiliates that may be allowed to participate in the certification process.[277] Specifically, Hoa Phat Steel Sheet Co., Ltd. (HPSS) can export CORE produced by its affiliates, Hoa Phat Joint Stock Company (Hoa Phat JSC) and Hoa Phat Steel Pipe Co., Ltd. (HPSP), as they are currently ineligible to participate.[278]
- Commerce should close this loophole by requiring exporters to certify that the CORE they export was not produced by those that are currently ineligible to certify.[279]
- Commerce should amend the exporter certification established in paragraph 6b of the AD suspension of liquidation and cash deposit instructions by clarifying that the CORE exported to the United States was not produced by those ineligible to participate in the certification scheme.[280]

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[274] *See* Commerce's Letter to the ITC, "Anti-Circumvention Inquiries of the Antidumping Duty and Countervailing Duty Orders of Certain Corrosion-Resistant Steel Products and Cold-Rolled Steel Flat Products from the Republic of Korea and the Antidumping Duty Order of Certain Corrosion-Resistant Steel Products from Taiwan: Notification of Affirmative Preliminary Determinations of Circumvention of the Antidumping Duty and Countervailing Duty Order," dated September 17, 2019 (ITC Letter).

[275] *See* Petitioners' Case Brief at 7, citing *Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 75 FR 70208 (November 17, 2010) (*Activated Carbon from China*) and accompanying IDM at Comment 1 (funneling is where "firms with high cash deposit rates shift{} their exports to the United States through firms with low cash deposit rates through illegitimate business activities." *See also Tung Mung Dev. Co. v. United States*, 219 F. Supp 2d. 1333, 1343 (CIT 2002) (Commerce should modify the exporter certification to prevent funneling and fulfill its "duty to avoid the evasion of antidumping duties.") (*Tung Mung*).

[276] *Id.* at 8.

[277] *Id.* at 9.

[278] *Id.*

[279] *Id.* at 8.

[280] *Id.*

CSVC's Rebuttal Brief

- CSVC takes no position with respect to Commerce's certification requirements for non-responsive respondents; however, if Commerce were to adopt the petitioners' request, it should make clear that the certification requirement does not prevent cooperative parties from certifying CORE exports produced from Vietnamese substrate.[281]
- As explained in the *Preliminary Determination*, the certification process intends to identify entries that are not subject to AD duties under the *Taiwan CORE Order*.[282] Commerce determined that CORE produced in Vietnam using substrates sourced from Taiwan are subject to the *Taiwan CORE Order*.[283] Thus, CORE manufactured in Vietnam using Vietnamese substrate cannot be subject to the same order.[284]
- It is a well-established practice that Commerce may not penalize a cooperative party for non-cooperation by an unaffiliated entity.[285] CSVC has responded to every questionnaire and request for information throughout this proceeding, it has fully participated in an on-site verification. As there is no basis to penalize a cooperative party, Commerce cannot subject CSVC to any certification restrictions that are based on AFA applicable to non-responsive parties in this proceeding.[286]

Hoa Sen, JFE Shoji, Optima Steel, and Ton Dong A's Rebuttal Briefs

- Certain companies that Commerce has previously identified as "non-responsive" were "non-responsive" solely because they never received the Q&V questionnaire. Commerce also issued the Q&V questionnaire to Formosa which only produced HRS substrate in Vietnam.[287] Precluding companies such as Formosa from certifying is contrary to law because none of Formosa's HRS used to produce CORE in Vietnam is of Taiwanese-origin.[288]
- The only information Commerce initially sought during the Q&V questionnaire stage was related to the company's Q&V of CORE exports, not its ability to trace substrate.[289] Commerce thus cannot lawfully preclude so-called "non-responsive" companies from participating in the certification process when they were never asked whether they have the ability to trace the source of their substrate.[290]

[281] *See* CSVC's Rebuttal Brief at 2.
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *See* Hoa Sen's Rebuttal Brief at 14-15; *see also* JFE Shoji's Rebuttal Brief at 14; Optima Steel's Rebuttal Brief at 14; and Ton Dong A's Rebuttal Brief at 14-15.
[288] *See* Hoa Sen's Rebuttal Brief at 14-15; *see also* JFE Shoji's Rebuttal Brief at 14; Optima Steel's Rebuttal Brief at 14; and Ton Dong A's Rebuttal Brief at 14-15.
[289] *See* Hoa Sen's Rebuttal Brief at 15; *see also* JFE Shoji's Rebuttal Brief at 14; Optima's Rebuttal Brief at 15; and Ton Dong A's Rebuttal Brief at 15.
[290] *See* Hoa Sen's Rebuttal Brief at 15; *see also* JFE Shoji's Rebuttal Brief at 14; Optima's Rebuttal Brief at 15; and Ton Dong A's Rebuttal Brief at 15.

- If Commerce is to establish a certification regime pursuant to a circumvention decision, consistent with the prior circumvention on the AD and CVD orders of CORE from China, the proper certification regime would be to allow all companies to certify.[291]

U.S. Importers Group's Rebuttal Brief

- The petitioners did not provide evidence that "funneling" has occurred or is occurring with respect to imports of Vietnamese CORE that is subject to this anti-circumvention inquiry.[292] The best solution to address this concern is to require all companies to participate in the certification process.[293]
- The certification process established by Commerce provides CBP to review not only the exporter and importer certifications, but also supporting documentation such as mill test certificates.[294] Such documentation will confirm the actual producer of CORE produced in Vietnam and the source of the substrate used to produce the product.

MISA's Rebuttal Brief

- The petitioners provided no basis under the governing statute, Commerce's regulations, or past practice to restrict the certification regime to prohibit non-producing exporters from participating when they obtain Vietnamese CORE from companies on Commerce's blacklist.[295]
- The two authorities on which the petitioners relied, *Activated Carbon from China* and *Tung Mung Dev. Co.*, are both inapposite to the situation in this proceeding.[296]
- Specifically, *Activated Carbon from China* involved an administrative review where Commerce stated that its practice is to apply combination rates only in new shipper reviews and administrative reviews on a case-by-case basis.[297] Commerce ultimately determined that it is unnecessary to apply combination rates.[298]
- Moreover, *Tung Mung Dev. Co.* involved a rare "middleman" investigation within the context of an AD investigation and did not address circumvention allegations. The petitioners argued against the application of combination rates, and Commerce rejected their argument as "pure speculation."[299]
- Commerce is not obligated to depart from its normal administrative remedies under its "duty to avoid the evasion of antidumping duties," unless the petitioners can point to affirmative evidence of collusion.[300]

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[291] *See* Hoa Sen's Rebuttal Brief at 15; *see also* JFE Shoji's Rebuttal Brief at 14; Optima Steel's Rebuttal Brief at 15; Ton Dong A's Rebuttal Brief at 15.
[292] *See* U.S. Importers Group's Rebuttal Brief at 4.
[293] *Id.*
[294] *Id.*
[295] *See* MISA's Rebuttal Brief at 5.
[296] *Id.* at 3.
[297] *Id.*, citing *Activated Carbon from China* IDM at Comment 1.
[298] *Id.*
[299] *Id.* at 4, citing *Tung Mung Dev. Co.*, 219 F. Supp.2d at 1335 (*Tung Mung Dev. Co.*).
[300] *See Tung Mung Dev. Co.*, 219 F. Supp 2d at 1344 (concluding that "{s}ince no evidence of collusion surfaced during verification of the producer and the middleman, Defendant-Intervenors' argument amounts to pure speculation" and therefore there was no duty to dispense with combination rates in a middleman dumping situation).

- For this instant proceeding, any exporter that participate in the certification process must be able to demonstrate that the CORE exported from Vietnam was not using Taiwanese-origin HRS and/or CRS substrate.[301] There is thus no need for Commerce to take additional measures against non-producing exporters to prevent funneling, because in the end, an exporter must satisfy Commerce and CBP that the substrate is not of Taiwanese origin.[302]

Mitsui's Rebuttal Brief:

- Commerce has inappropriately required both importer and exporter certification stating that the Vietnamese CORE is not made from Taiwanese substrate, and not a certification from the Vietnamese mill.[303]
- This issue is only relevant for non-responsive mills who also serve as exporters.[304] Such treatment should not apply to exporters unaffiliated with those non-responsive exporters/mills.[305] Similarly, the petitioners take issue with Vietnamese companies that have numerous affiliates. Such preclusion should not apply to exporters that are unaffiliated with non-responsive Vietnamese mills.[306]
- If Commerce had desired that the mill issues the certification, it would have done so.[307] Having not done so in the *Preliminary Determination* and not issued further comment and notice, it would be improper to change this definition in the final determination. An exporter can provide evidence regarding the origin of the substrate used in the CORE it is exporting produced in Vietnam.[308]
- The petitioners note that funneling is "an illegitimate business activity" used by firms with high cash deposit rates to shift its exports to firms with low cash deposit rates.[309] Mitsui, however, has been a legitimate exporter for a long time, and it is not funneling in any sense of the word.[310]
- The petitioners' request to amend the exporter certification language goes beyond preventing funneling; it prevents an exporter form certifying that the CORE they export from Vietnam is not produced from Taiwanese substrate. Such request expands the application of AFA and must be rejected.[311]

Commerce's Position: We agree with the petitioners that the current exporter certification language does not address situations where non-cooperative and, thus, ineligible companies can funnel the CORE they produce by exporting through eligible exporters and/or producers. However, we disagree with the petitioners that the two cases referenced in their case brief, *Activated Carbon from China* and *Tung Mung* are applicable here because: (1) we found that the assignment of a combination rate was not necessary and not an appropriate measure to address improper funneling; and (2) *Tung Mung* involved a middleman dumping situation in an AD

[301] *See* MISA's Rebuttal Brief at 4.
[302] *Id.* at 4-5.
[303] *See* Mitsui's Rebuttal Brief at 3.
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.* at 4.
[310] *Id.*
[311] *Id.*

investigation where the producer had no knowledge of the middleman's dumping – the fact pattern does not apply here. Thus, as further explained in Comment 1, we have changed our *Preliminary Determination* to allow certain companies that provided evidence that they did not receive our Q&V questionnaire to participate in the certification process. Additionally, as discussed in Comment 5, for this final determination, we continue to preclude certain companies that received, but did not respond to, our Q&V questionnaire from the certification process. We also find that prohibiting non-responsive and thus uncooperative companies from participating in the certification process has been shown to be necessary to ensure cooperation in future anti-circumvention inquiries.

Moreover, the legislative history demonstrates Congress' intent to address "'loopholes' that have seriously undermined the effectiveness of the remedies provided by the antidumping and countervailing proceedings."[312] Congress also granted Commerce "substantial discretion in interpreting {statutory} terms … so as to allow {Commerce} the flexibility to apply the provisions in an appropriate manner."[313] As such, consistent with *Butt-Weld Pipe Fittings from China Circumvention Determination, Tissue Paper from China: Sunlake Anti-Circumvention Final*, and *Tissue Paper from China: MFVN Anti-Circumvention Final*, we find that it is appropriate to address changes from the *Preliminary Determination* and amend the exporter certification language.

Specifically, we are amending our exporter certification language to require exporters to identify the producer of the CORE they export from Vietnam and to continue to be able to demonstrate the source of the substrate used to produce the CORE they export. In addition, in order to address non-responsive and uncooperative producers in Vietnam, we are prohibiting exporters from certifying that the CORE was not produced from HRS and/or CRS substrate manufactured in Taiwan for any shipment of CORE produced by non-responsive companies. With regard to Hoa Phat JSC and its affiliates, based on the discussion presented in Comment 10, we are prohibiting HPSS and Hoa Phat JSC from certifying that CORE was not produced from HRS and/or CRS substrate manufactured in Taiwan for any shipment of CORE produced by HPSP.

Comment 10: Whether to Apply AFA to Certain Vietnamese Producers That Are Affiliated With Those That Are Deemed Non-Responsive

Hoa Phat Group's Case Brief

- Hoa Phat JSC and its subsidiaries, HPSP and HPSS maintain that:
  - Hoa Phat JSC never received Commerce's Q&V questionnaire in this anti-circumvention inquiry. The Federal Express delivery information on the record of this anti-circumvention inquiry confirmed that the Q&V questionnaire was not properly sent to Hoa Phat JSC.[314]
  - HPSP received the Q&V questionnaire and erroneously concluded it did not need to answer it. HPSP should be given a chance to remedy this error.[315]

[312] *See* H.R. Rep. No. 40,100th Congress. 1st Sess., Part 1 at 135 (1987).
[313] *See* Senate Report No.71, 100th Congress 1st Sess. (1987) at 100.
[314] *See* Hoa Phat Group's Case Brief at 2.
[315] *Id.*

- HPSS never received the Q&V questionnaire, and was not identified by Commerce as an intended recipient of a Q&V questionnaire. As a result, HPSS must have access to the certification procedure Commerce has established.[316]

- Commerce has ample discretion to allow post-preliminary factual submissions or (at minimum) simply remove Hoa Phat JSC from the list of companies ineligible to participate in the Taiwan CORE certification process.[317]

Petitioners' Case and Rebuttal Briefs

- HPSS's affiliates, Hoa Phat JSC and HPSP, are ineligible to participate following each company's failure to respond timely to Commerce's Q&V questionnaire. This presents an opportunity for the non-responsive affiliates (Hoa Phat JSC and HPSP) to avoid Commerce's AFA determination by funneling their CORE through HPSS, who is eligible to participate in the Taiwan certification process.[318] To address the likelihood of funneling, Commerce should amend the exporter certification to prevent non-cooperating companies from undermining Commerce's AFA determination by funneling.[319]
- HPSP did not dispute that it failed to respond to Commerce's questionnaire, and did not provide any basis for reversing Commerce's lawful application of AFA pursuant to section 776(b) of the Act. Given the court-affirmed practice applying AFA for the failure to submit responses to Q&V questionnaires, the request by HPSP for Commerce to overlook its failure to cooperate and permit it to participate in the Taiwan CORE certification process should be denied.[320]

Commerce's Position: For this final determination, we are not applying AFA to Vietnamese companies who did not receive our questionnaires. The records of this inquiry show that Hoa Phat JSC and HPSS did not receive Q&V questionnaires. As such, there is no basis to find that either Hoa Phat JSC and HPSS failed to cooperate to the best of their ability. Thus, in our instructions to CBP following publication of this final determination, we intend to state that Hoa Phat JSC and HPSS are eligible to participate in the certification process.

However, we have rejected HPSP's request to participate in the certification process. HPSP does not dispute the fact that the FedEx delivery confirmation on the records of these inquiries shows that it received the Q&V questionnaire. To avoid circumvention by HPSP through the potential "funneling" of U.S. shipments through Hoa Phat JSC and HPSS, we have included language in our instructions to CBP stating that HPSS and Hoa Phat JSC are ineligible to participate in the Taiwanese Certification Process when the CORE they export was produced by HPSP or any other non-responsive company. *See also* Comment 9.

[316] *Id.*
[317] *Id.* at 3.
[318] *See* Petitioners' Case Brief at 8-9.
[319] *Id.*
[320] *See* Petitioners' Rebuttal Brief at 33.

Comment 11: Whether Commerce Should Preclude Companies That Failed to Cooperate in Both the CORE from China and CORE from Taiwan Inquiries from Participating in the Certification Regime

Petitioners' Case Brief

- The *Preliminary Determination* failed to address widespread uncooperativeness among Vietnamese CORE producers in the *China CORE Circumvention Determination.*[321]
- In this final determination, Commerce should identify the non-responsive companies from the CORE from China anti-circumvention inquiries and preclude them from participation in the Taiwan CORE Certification Process.[322]
- In addition, Commerce should also identify which of the non-responsive companies in the *Preliminary Determination* also failed to cooperate in the *China CORE Circumvention Determination* and preclude them from participating in the China CORE Certification Process.[323]
- Commerce should assign serial non-responsive companies the AD and CVD all-others rates from the *China CORE Orders.*[324]
- The suspension of liquidation cash deposit instructions accompanying the *Preliminary Determination* sow confusion on this issue by stating "the companies listed below are currently not eligible to certify that their CORE are not made from Korean or Taiwanese HRS and/or CRS substrate. These companies *may* be eligible to certify their CORE is not made from Chinese HRS and/or CRS substrate."[325]
- Because all three CORE circumvention inquiries and certification process relate to CORE produced in Vietnam, and apply to importers and exporters, there is substantial overlap in the Vietnamese companies which are subject to the three CORE certification processes.[326]
- Companies that failed to participate in all three of the Vietnam-related circumvention inquiries should be expressly precluded from participating in any certification process concerning CORE exported from Vietnam.[327]
- In *Butt-Weld Pipe Fittings from China Circumvention Determination*, Commerce held that "non-responsive companies, along with their importers, are not eligible to participate in the certification process at this time."[328] Although Commerce followed this practice in the *Preliminary Determination* and in the concurrent CORE from Korea and CRS from Korea

[321] *See* Petitioners' Case Brief at 10-11.
[322] *Id*. at 11.
[323] *Id.*, citing *Certain Corrosion-Resistant Steel Products from India, Italy, the People's Republic of China, the Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders*, 81 FR 48390 (July 25, 2016); *Certain Corrosion-Resistant Steel Products from India, Italy, Republic of Korea and the People's Republic of China: Countervailing Duty Order*, 81 FR 48387 (July 25, 2016) (collectively, *China CORE Orders*).
[324] *Id.* at 11.
[325] *Id.*, citing customs AD/CVD message number 9224305 at paragraph 5a.(ii) and customs AD/CVD message number 9224303 at paragraph 5a.(ii) (available at https://aceservices.cbp.dhs.gov/adcvdweb).
[326] *Id.* at 13, citing CORE from China certification list, CORE from Korea Certification list, and CORE from Taiwan certification list (*e.g.*, customs AD/CVD message number 9224305 at paragraph 5a.(ii) and customs AD/CVD message number 9224303 at paragraph 5a.(ii) (available at https://aceservices.cbp.dhs.gov/adcvdweb).
[327] *Id.* at 13.
[328] *Id.* at 12-13, citing *Butt-Weld Pipe Fittings China Circumvention Determination.*

anti-circumvention inquiries, it had not yet implemented this practice when it issued the *China CORE Circumvention Determination*.[329]

U.S. Importers Group's Rebuttal Brief

- There is no legal basis for Commerce to incorporate the U.S. industry's demand to retroactively exclude companies which allegedly did not respond to the Q&V questionnaires in the *China CORE Circumvention Determination* for the China CORE Certification Process. The China Certification Process has been part of a compliance process implemented by CBP for more than a year and a half, which resulted from inquiries completed more than one year ago which are closed and cannot be revisited.[330]
- The practices adopted in subsequent unrelated proceedings cannot be grafted retroactively onto these earlier and now closed proceedings.[331]
- Commerce never found that specific companies failed to respond to the Q&V questionnaire in the *China CORE Circumvention Determination*. Although Commerce noted that it "expected responses from 39 producers and 17 importers" and that it received 32 responses, Commerce has never identified the 24 companies that allegedly did not respond to the Q&V questionnaire in those proceedings.[332]

Hoa Sen and Ton Dong A's Rebuttal Briefs, JFE Shoji and Optima Steel's Letters

- There is no legal authority for revisiting the final results of another anti-circumvention inquiry as part of an AFA decision in the instant anti-circumvention inquiry.[333]
- Thus, Commerce correctly permitted all producers, exporters, and importers to participate in the CORE from China Certification Process.[334]

Mitsui's Rebuttal Brief

- The petitioners' request that Commerce should modify its decision in *China CORE Circumvention Determination* in the context of this instant anti-circumvention inquiry is clearly misplaced.[335] Commerce cannot retroactively change its decision in *China CORE Circumvention Determination* based on the instant final determination.[336]
- The petitioners' request highlights the fact that the *Preliminary Determination* in the instant anti-circumvention inquiry departs from the findings in the *China CORE Circumvention Determination*. This is why Mitsui has argued that Commerce should not retroactively apply the exporter certification preclusion in the Taiwan CORE anti-circumvention proceeding. However, Commerce's practice in the *China CORE Circumvention Determination* is not an issue arising from the instant anti-circumvention inquiry.[337]

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[329] *Id.* at 13.
[330] *See* U.S. Importers Group's Rebuttal Brief at 5, citing *China CORE Circumvention Preliminary Determination*.
[331] *Id.* at 5.
[332] *Id.* at 5-6, citing *China CORE Circumvention Final* IDM at 48 and footnote 163; *see also China CORE Circumvention Preliminary Determination* PDM at 2-5.
[333] *See* Hoa Sen's Rebuttal Brief at 16; *see also* Ton Dong A's Rebuttal Brief at 16; and JFE Shoji's Letter at 15; *see also* Optima Steel's Letter at 16.
[334] *Id.*
[335] *See* Mitsui's Rebuttal Brief at 4.
[336] *Id.* at 4-5.
[337] *Id.* at 4-5.

Commerce's Position: We find that there is no legal authority to use the outcome of the instant anti-circumvention ruling as the basis to preclude parties that may have been uncooperative in the *China CORE Circumvention Determination* from participating in the Taiwan CORE Certification Process or the China CORE Certification Process. Moreover, there is no legal authority to preclude non-responsive companies in the instant anti-circumvention inquiries from participation in the China CORE Certification Process.

The petitioners are correct that, although Commerce barred uncooperative parties from participating in a certification process in *Butt-Weld Pipe Fittings from China Circumvention Determination* and the *Preliminary Determination*, we had not implemented this practice when we issued the *China CORE Circumvention Determination*. We note that the petitioners did not provide any statutory basis to retroactively applying the same practice to uncooperative parties in the *China CORE Circumvention Determination*. Moreover, the petitioners did not provide any legal authority to support their contention that we should retroactively bar non-responsive companies in the instant anti-circumvention inquiry from participation in the China CORE Certification Process.

We also disagree with the petitioners' contention that the liquidation instructions accompanying the *Preliminary Determination* somehow "sow{s} confusion" by stating that the companies listed in the Preliminary Decision Memorandum are not eligible to certify that their CORE is not made from Taiwanese substrate, but that these companies may be eligible to certify their CORE is not made from Chinese substrate. As the petitioners concede, the *China CORE Circumvention Determination* did not preclude uncooperative parties from participating in the China CORE Certification Process. Therefore, some of the non-responsive companies in the instant anti-circumvention inquiries may remain eligible to certify that their CORE is not made from Chinese substrate, and Commerce's use of the word "may" in the liquidation is appropriate.

This Taiwan CORE anti-circumvention decision and the accompanying customs instructions do not change any decisions which have been made or may be made in the future in proceedings under the *China CORE Orders*. Accordingly, we continue to find that Commerce's decisions in the instant inquiry to bar non-cooperative parties from the Taiwan CORE certification processes should not be extended retroactively to the China CORE Certification Processes that resulted from the *China CORE Circumvention Determination*.

Comment 12: Whether to Apply the Highest of the Petition Rate or Investigation Calculated Rate as the Cash Deposit Rate for Non-Responsive Companies

Petitioners' Case Brief

- According to the *Preliminary Determination*, the non-responsive companies are currently subject to the all-others rate applicable to the *Taiwan CORE Order*, 3.66 percent. However, because this rate is not an adverse rate, it is insufficient to induce compliance in future segments of this proceeding, or other anti-circumvention inquiries conducted by Commerce.[338]

[338] *See* Petitioners' Case Brief at 3-6.

- In the final determination of this inquiry, therefore, Commerce should apply two cash deposit rates. For cooperative respondents eligible to participate in the Taiwan certification process that consumed Taiwanese-origin substrate, the cash deposit rate should be the all-others rate established in the suspension of liquidation instructions, 3.66 percent, or the rate applicable to their Taiwanese producer if that producer already has its own rate. For uncooperative respondents ineligible to participate in the Taiwan certification process, the cash deposit rate should be 86.17 percent.[339]

JFE Shoji's and Optima Steel's Rebuttal Briefs

- The imposition of the highest rate calculated in the petition for the CORE Taiwan investigation as the AFA rate is contrary to law.[340]
- As the record attests, Commerce never sent the questionnaire to either Ton Dong A, and thus, Ton Dong A never had an opportunity to respond to it. Since there is no evidence on the record that either company ever received the questionnaire, Commerce has no basis to apply AFA since, as the CIT has made clear, it is not reasonable for Commerce to conclude that a respondent that did not receive a questionnaire can be found not to have acted to the best of its ability for the sole reason, as is the case here, that it did not respond to the questionnaire that it never received.[341]
- Use of the highest rates from the petition for the CORE Taiwan investigation as the AFA rates in the instant inquiries is contrary to section 776(c) of the Act and 19 CFR 351.308(c). The petitioners' argument regarding application of the highest antidumping duty rate calculated in the petition for the CORE Taiwan investigation (*i.e.*, 86.17 percent) is contrary to law because this rate is not an actual rate calculated in this proceeding, and thus, would result in a layering of AFA rates on top of one another such that the petition rate for which the petitioners argue cannot be corroborated.[342]
- As the CIT stated in *POSCO v. United States*, it is contrary to the corroboration requirement to use an AFA rate calculated in another proceeding that is only partially based on AFA because a respondent's own data is used. It is even more contrary to the corroboration requirement to use an AFA rate such as that argued by the petitioners which is delivered wholly from AFA.[343]

U.S. Importers Group's Rebuttal Brief

- Applying an AD rate based on the highest margins alleged in the petition or calculated in the original investigation would be arbitrary, punitive, and unnecessary to ensure cooperation in Commerce's proceedings.[344]

[339] *Id.* at 6-7.
[340] *See* JFE Shoji's Rebuttal Brief at 8; *see also* Optima Steel's Rebuttal Brief at 9.
[341] *See* JFE Shoji's Rebuttal Brief at 9-10; *see also* Optima Steel's Rebuttal Brief at 9-10.
[342] *See* JFE Shoji's Rebuttal Brief at 12-13; *see also* Optima Steel's Rebuttal Brief at 13.
[343] *See* JFE Shoji's Rebuttal Brief at 13; *see also* Optima Steel's Rebuttal Brief at 13-14, both citing to *POSCO v. United States*, 296 F. Supp. 3d 1320, 1353 (CIT 2018) (*POSCO v. United States*).
[344] *See* U.S. Importers Group's Rebuttal Brief at 2.

- Commerce has already applied an AFA presumption to the companies in question by excluding them from the certification process. Any further application of AFA under these circumstances would be punitive.[345]
- As was explained in *China CORE Circumvention Determination*, Commerce applied the all-others rate from the CVD order and the rate determined for 'separate rate' companies from the AD order. These rates are the statutorily determined rates for exports of subject merchandise.[346]
- Commerce's application of AFA in prior investigations does not encompass the amount of the combined AD/CVD margins that should be imposed but instead restricts certain respondents' ability to demonstrate whether any AD/CVD margins should be applied at all. That penalty is more than sufficient to encourage indeed, ensure compliance on the part of these and any other companies to respond to Commerce's questionnaires in these or other similar proceedings.[347]

MISA's Rebuttal Brief

- Commerce should reject the petitioners' request to increase the cash deposit rate for non-responsive exporters to the petition rate; instead, if Commerce insists on requiring case deposits for all CORE exported by the blacklisted Vietnamese producers, Commerce should continue to apply the all-others rate.[348]
  The petitioners do not explain why application of the Taiwan CORE all-others rate is insufficient to deter Vietnamese exporters from failing to cooperate. Like in the *BMW of North America LLC v. United States*, the similar fact pattern here does not warrant Commerce engaging in the overreach that petitioners urge in this case. Commerce should not apply the draconian remedy of setting the AD cash deposit rate based on the petition in the Taiwan CORE investigation.[349]

Mitsui's Rebuttal Brief

- The deposit rate for CORE from allegedly non-responsive mills must be based on the rates in the *Taiwan CORE Order*.[350] As an anti-circumvention proceeding, CORE from Vietnam is being considered Taiwan CORE because of the Taiwanese substrate. Thus, the deposit rate must be from the *Taiwan CORE Order*. The deposit rate should be that of the substrate producer if known, and if not known then the all-others rate.[351]

Commerce's Position: We find that the imposition of the highest petition rate in the Taiwan CORE Order as the AFA rate would be contrary to section 776 of the Act and 19 CFR 351.308(c). Applying a rate based on the highest margin alleged in the petition or calculated in the original investigation would be arbitrary and punitive and unnecessary to ensure cooperation in Commerce's proceedings. The adverse inference with respect to the non-responsive companies is that the substrate they used in the production of merchandise under consideration is

[345] *Id.* at 2-3.
[346] *Id.* at 3.
[347] *Id.*
[348] *See* MISA's Rebuttal Brief at 5-6.
[349] *Id.* at 7-9.
[350] *See* Mitsui's Rebuttal Brief at 1.
[351] *Id.* at 2.

of Taiwanese origin, and if the substrate is not of Taiwanese origin, the non-responsive companies are necessarily unable to certify that it is not Taiwanese. As a consequence of this adverse inference, antidumping and countervailing duties apply to all exports of merchandise under consideration.

Therefore, we are continuing to apply the all-others rate from the *Taiwan CORE Order* to exports of merchandise under consideration by the non-responsive companies. These rates are the statutorily determined rates for exports of subject merchandise (*i.e.*, CORE from Taiwan). We are not applying a separate AFA rate specific to the non-responsive companies because Commerce did not seek information about dumping or subsidization from the non-responsive companies and there is no gap in the information on the record that an AFA rate would fill. In this final determination, we continue to apply the all-others rate in effect for the *Taiwan CORE Order* to non-responsive companies.

Comment 13: Whether CSVC's Manufacturing Operations in Vietnam Constitute Circumvention Under the Statutory Criteria Established in Section 781(b)(2) of the Act

CSVC's Case Brief

- CSVC's CORE manufacturing operations do not constitute circumvention.[352] CSVC established its facilities six years before the petition to investigate CORE from Taiwan, and they are not temporary or transitory.[353]
- The word "circumvent" is defined as "to manage to get around especially by ingenuity or stratagem."[354] The establishment of CSVC's production facility in Vietnam six years before there was an AD investigation of CORE from Taiwan does not satisfy the definition.[355]
- By waiting until years after the original petition was filed, then seeking retroactively to expand the scope of the *Taiwan CORE Order* to cover Vietnamese production, the petitioners are circumventing the statutory scheme.[356] Further, retroactively imposing duties on products produced in a plant that was planned and completed years before there was an order is inconsistent with the instructions Congress gave in the SAA.[357]
- CSVC's investment in Vietnam was not an attempt to get around the *Taiwan CORE Order* by stratagem; rather, it was a legitimate investment needed to produce CORE in Vietnam.[358] Such investments are not minor or insignificant, nor are they temporary.[359] CSVC's investments are equivalent in scope to those of CORE producers around the

[352] *See* CSVC's Case Brief at 3.
[353] *Id.*
[354] *Id.*
[355] *Id.*
[356] *Id.* at 4.
[357] *Id.*
[358] *Id.* at 8.
[359] *Id.*

world.[360] CSVC's level of investment is much greater than the net investments of the Indian company used as a basis for surrogate financial ratios.[361]

- Commerce's comparison of the investments made by China Steel Corporation (CSC) in Taiwan to that of CSVC is inappropriate because, as noted by the ITC, there is a distinction between integrated mills (capable of producing CORE from iron ore) and re-rolling mills (which produce CORE from HRS and/or CRS).[362] Commerce has also previously found that it is inappropriate to compare a re-roller's investment in rolling mills to an integrated mill's investment because a rolling mill is distinct segment of the steelmaking industry.[363]
- Because CSVC is a re-roller, the level of CSVC's investment must be based on a comparison to the investment level of other non-integrated CORE producers.[364] In fact, the Taiwanese producers that were examined in the investigation of CORE from Taiwan were all re-rollers and their investments were comparable to those of CSVC. Thus, there is no basis to find that CSVC has circumvented the *Taiwan CORE Order*.[365]
- Commerce verified the relationship between CSVC and CSC and reviewed the purchasing process and documentation for CSVC's purchase of HRS inputs from Taiwan and found no discrepancies.[366] For the final determination, Commerce should calculate the value added to the imported HRS by comparing the average price of HRS CSVC paid to the average U.S. price of CORE sold for the relevant period.[367] Based on the comparison of these two average price points, the value of further processing cost cannot be characterized as "minor" or "insignificant."[368]
- Even if Commerce found the prices CSVC paid for its Taiwanese substrate were not at arm's length, it would not be appropriate to resort to a factors of production analysis to determine the value added by CSVC's production.[369] Pursuant to the statute, Commerce should use the reported transaction prices from CSVC's suppliers to other unaffiliated purchases or the actual costs incurred by CSVC's suppliers.[370]
- Further, neither the Agreement on Subsidies and Countervailing Measures nor the Agreement on the Rules of Origin that are part of the Antidumping Agreement permit the use of surrogate values when deriving the value-added when there is a substantial transformation.[371] Thus, there is no basis for Commerce to rely on surrogate values when calculating the value added in Vietnam.[372]

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[360] *Id.*
[361] *Id.* at 9.
[362] *Id.* at 10.
[363] *Id.*, citing *e.g.*, *Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany and the United Kingdom; Negative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders*, 64 FR 40336, 40345 (July 26, 1999) (*Hot-Rolled Lead and Bismuth Carbon Circumvention Determination*).
[364] *Id.* at 10-11.
[365] *Id.* at 11.
[366] *Id.* at 12.
[367] *Id.* at 13.
[368] *Id.* at 14.
[369] *Id.*
[370] *Id.*
[371] *Id.* at 13.
[372] *Id.*

Commerce's Position: While there is no disagreement that CSVC's facility in Vietnam was established years before the *Taiwan CORE Order* went into effect, we note that this anti-circumvention inquiry was initiated on a country-wide basis.[373] Accordingly, we selected CSVC for individual examination to serve as a basis of a decision concerning whether there was circumvention of the *Taiwan CORE Order*.[374] We requested, and CSVC timely provided, information needed to assess the statutory factors established in section 781(b) of the Act. Based on our analysis of the information submitted by CSVC, and our further corroboration at verification, we continue to find that CSVC's manufacturing operations in Vietnam are considered minor and insignificant in comparison to those of Taiwanese suppliers of HRS and/or CRS substrate.

In order to determine whether the further manufacturing process in Vietnam is minor or insignificant, we assessed the five criteria laid out in section 781(b)(2) of the Act. Specifically, we reviewed CSVC's level of investment, R&D, the nature of the production process, the extent of production facilities in Vietnam, and the value of the further processing cost incurred in Vietnam and compared to that of a Taiwanese producer of HRS and/or CRS. As an initial matter, we disagree with CSVC that it is inappropriate to compare the five statutory criteria identified above to that of a Taiwanese supplier. In the *Initiation Notice*, we stated our intention to examine the extent of further processing in Vietnam in comparison to a Taiwanese producer of CORE substrate, *i.e.*, HRS and/or CRS. Our recent practice has been to follow the statutory criteria established in section 781(b) of the Act and compare the total investment required (as well as the R&D, production process, and facilities) from the beginning of the production process in the country subject to an AD order to the total level of investment (also, separately, the R&D, the extent of the production process, and facilities) required to perform the finishing steps in a third country.[375] We thus find that it is relevant to assess the entire process of producing CORE, including the production of primary iron and steel inputs from basic materials. Comparing the entire production process for CORE against the production process for finishing

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[373] *See Initiation Notice*, 83 FR at 37790.

[374] *See* Memorandum, "Respondent Selection for the Anti-Circumvention Inquiry of Certain Corrosion-Resistant Steel Products from Taiwan," dated March 22, 2019.

[375] *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 (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) (*SDGEs from China Circumvention Determination*); *see also Polyethylene Retail Carrier Bags from Taiwan: Affirmative Preliminary Determination of Circumvention of Circumvention of the Antidumping Duty Order*, 79 FR 31302 (June 2, 2014) and the accompanying Preliminary Decision Memorandum at 9-10, unchanged in *Polyethylene Retail Carrier Bags from Taiwan: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 79 FR 61056 (collectively, *PRCBs from Taiwan Circumvention Determination*); and *Second Redetermination Pursuant to Court Remand Order in Bell Supply Co., LLC v. United States*, Ct. No. 14-00066 at 24, 27 (August 11, 2016) (*Bell Supply Second Remand Redetermination*) (*sustained in Bell Supply Co., LLC v. United States*, 190 F. Supp. 3d 1244 (CIT 2016) (*Bell Supply III*)). The decision in *Bell Supply III* was vacated by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) regarding Commerce's Second Remand Redetermination, but not because Commerce made an incorrect level of investment comparison in its anti-circumvention analysis. Rather, the Federal Circuit vacated and remanded to the CIT as to whether Commerce properly applied its substantial transformation analysis. *Bell Supply CAFC*, 888 F.3d at 1231. Therefore, we are citing to Commerce's Second Remand Redetermination as evidence of Commerce's practice to compare the level of investment in the finishing process occurring in a third country to the level of investment of a fully integrated steel producer.

HRS and/or CRS into CORE is reasonable in the circumvention context because it is relevant to whether a producer would reasonably move its further processing across borders to avoid the discipline of an order. We also note that we applied the same methodology in the *China CORE Circumvention Determination* where we examined the shift of one or more of the last few production steps to a third country.[376]

Further, CSVC argues that we should compare its investments to that of a Taiwanese CORE producer. Comparing investments of CORE producers in Vietnam and Taiwan, however, would be inaccurate as Taiwanese CORE producers do not perform the production steps prior to the production of CORE, *i.e.*, melting iron and casting steel, and thus would lead to an incomplete analysis of the level of investment. Our more recent practice, as evidenced in *SDGEs from China Circumvention Determination*, *PRCBs from Taiwan Circumvention Determination*, and *Bell Supply III*, seeks to capture the level of investment in the larger production process. Comparing the five statutory factors of a Vietnamese CORE producer to that of a Taiwanese CORE producer would not accurately capture the complete set of production steps for producing CORE. As the SAA also highlights, anti-circumvention analyses are highly case- and evidence-specific;[377] our level of investment analysis and comparison of CSVC's to that of a Taiwanese supplier, CSC in this instant proceeding, is based on the evidence on the record.[378]

While we recognize that in *Hot-Rolled Lead and Bismuth Carbon Circumvention Determination*, we did not compare the investment and manufacturing operations of U.S. finishers to those of upstream foreign integrated producers of substrates, we explained that the circumstances applicable to that case were unique.[379] As we have made more recent circumvention determinations where we considered the level of investment that captures the larger production process that includes the production of input substrates, for this final determination, we have continued to rely on the information provided with regard to CSC.

With respect to the relationship between CSVC and CSC, CSVC explained and provided documentation to demonstrate that it is affiliated with the Taiwanese steel producer which owned more than half of CSVC's outstanding shares.[380] CSVC also explained that it purchased HRS and CRS substrate from various sources, including Taiwan.[381] In order to determine whether

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[376] *See Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Preliminary Determination of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 82 FR 58170 (December 11, 2017) and accompanying Preliminary Determination Memorandum at 17-22, unchanged in *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).
[377] *See* SAA at 893 ("Commerce will evaluate each of {the factors under section 781(b(2)(A)-(E) of the Act as they exist either in the United States or a third country, depending on the particular circumvention scenario. No single factor will be controlling.").
[378] *See*, *e.g.*, CSVC's IQR at 2-3, 29-31, 36, and Appendices 6-A and 6-B. *See also* CSVC's SQR at 3-12, 30-31 and Appendices 1S-2 and 1S-16.
[379] *See Hot-Rolled Lead and Bismuth Carbon Circumvention Determination*, 64 FR at 40345-40346. Specifically, Commerce explained that "a comparison of operations undertaken, and the investment needed by an integrated mill would not represent an appropriate standard in this case."
[380] *See* CSVC's Letter, "Anti-Circumvention Inquiry on Corrosion-Resistant Steel Products from Taiwan – Response to the Department's March 29 Questionnaire," dated April 26, 2019 (CSVC's IQR) at 2 and Appendix 38.
[381] *See* CSVC's IQR at Appendix 38; *see also* CSVC's SQR at 25 and Appendices 1S-9-A-2 and 1S-12-A.

purchases of HRS and CRS from Taiwanese suppliers were made at arm's length, we requested CSVC to report sample sales the Taiwanese suppliers made to both CSVC and an unaffiliated customer during the same month, as well as the Taiwanese suppliers' weighted-average COP for year 2017.[382] As discussed more in CSVC's Final Analysis Memorandum, we find that the prices of Taiwanese HRS paid by CSVC were not at arm's length.[383]

CSVC also contends that Commerce's *Preliminary Determination* inappropriately used an SV to measure CSVC's HRS purchases from Taiwan. CSVC argues that if Commerce found that CSVC's purchases of HRS from CSC were not at arm's length, it should have used the reported prices for transactions from CSC to an unaffiliated customer, or the actual costs incurred by CSVC's Taiwanese suppliers. Based on our analysis of the submitted information, we agree with CSVC that it is appropriate to revise our *Preliminary Determination*. Thus, pursuant to section 773(f)(2) and (3), we have revised our calculation of CSVC's further processing cost incurred in Vietnam and used the weighted -average of CSVC's Taiwanese suppliers' actual COP incurred in 2017 to value CSVC's purchases of HRS from Taiwan.[384]

Comment 14: Whether Nam Kim Should Be Eligible For Certification

Petitioners' Case Brief[385]

- Nam Kim failed to respond to fundamental information requests concerning substrate sourcing and failed to demonstrate that it can be trusted to provide accurate exporter certifications. As such, Nam Kim should not be eligible to participate in the certification process without first proving it can tie all substrate purchases through production to CORE exported to the United States.
- Nam Kim failed to provide full responses with respect to tracing substrate purchased from domestic and third country suppliers and reported that it cannot trace domestic or third country substrate into the CORE it produces.
- At verification, Nam Kim was unable to trace the country of origin of its substrate to CORE exported to the United States.
- Commerce uncovered other issues with Nam Kim's previously reported data, including that Nam Kim was unable to identify the origin of some of its cold-rolled coil inputs.
- In *Tissue Paper Products from China*, Commerce stated that it has "authority to determine if a certification program will adequately address circumvention or if other measures, such as suspension of all merchandise from a particular producer are warranted."[386] The CIT has affirmed that where Commerce finds that "there is no basis to conclude that…a certification procedure would be reliable means of addressing circumvention" that it may decline to adopt certification procedures.[387]

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[382] *See* CSVC's IQR at Appendices 24-A, 24-B; *see also* CSVC's SQR at 25 and Appendices 1S-12-A and 1S-12-B; CSVC's Letter, "Anti-Circumvention Inquiry on Corrosion-Resistant Steel Products from Taiwan – Response to the Department's July 3 Questionnaire," dated July 10, 2019 (CSVC's 2nd SQR) at 2-3 and Appendices 2S-1-A, 2S-1-B, and 2S-1-C.
[383] *See* CSVC's Final Analysis Memorandum at Attachment.
[384] *Id.*
[385] *See* Petitioners' Case Brief at 14-21.
[386] *See Tissue Paper from China: ARPP Anti-Circumvention Final* IDM at Comment 1.
[387] *See Max Fortune Indus. Co. v. United States*, Slip Op. 13-52 (CIT Apr. 15, 2013).

- In *CRS from China Circumvention Determination*, Commerce declined to apply AFA because omission of certain data did not prevent Commerce from using the respondent's data for the required analysis in that circumvention inquiry.[388] Here, Commerce verified that Nam Kim does not have the ability to provide accurate certifications because Nam Kim is not able certify the country of origin of Nam Kim's substrate for each shipment of CORE to the United States.[389] Therefore, Commerce should find Nam Kim ineligible to participate in the certification regime.

Nam Kim's Rebuttal Brief[390]

- Section 776(b) of the Act authorizes Commerce to use an inference adverse to that party in selecting from among the facts otherwise available only if Commerce finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.
- Section 782(c)(1) of the Act states that Commerce shall consider the ability of an interested party to provide information upon a prompt notification by that party that it is unable to submit the information in the form and manner required, and that party also provides a full explanation for the difficulty and suggests an alternative form in which the party is able to provide the information.
- Nam Kim has provided information and data Commerce requested to the best of its ability throughout the proceeding, whether in its questionnaire and supplemental questionnaire responses or at the on-site verification with Commerce. Nam Kim has always submitted the requested information by its established deadlines.[391]
- The petitioners incorrectly argue that Nam Kam does not have the ability to produce requested and necessary information, but the record demonstrates that Nam Kim is able to provide all requested information and, to the best of its ability, answered Commerce's requests for information and data.[392]
- Commerce's practice has been to preclude companies in a circumvention inquiry from participating in the resulting certification process only when Commerce has determined that those companies have been non-responsive or non-cooperative to the extent that AFA should be applied. The petitioners failed to provide any legal precedent to support preclusion of a company from participating in a certification process absent an AFA finding.
- In *Butt-Weld Pipe Fittings from China Circumvention Determination*, Commerce declined to preclude a respondent from participating in the verification process despite the fact that a respondent submitted incorrect information in its original Q&V questionnaire response and the corrected information was not submitted within the established deadline. Commerce found that the respondent promptly notified Commerce of the error, participated in verification and demonstrated to Commerce's satisfaction that it was able to trace the

[388] *See CRS from China Circumvention Determination* IDM at Comment 9.
[389] *See* Petitioners' Case Brief at 20-21.
[390] *See* Nam Kim's Rebuttal Brief at 2-11.
[391] *Id.* at 3-4.
[392] *Id.* at 5-9.

country of origin of its shipments and identify which shipments to the United States are of Chinese origin on a transaction-specific basis.[393]

- In *CRS China Anti-Circ*, Commerce declined to preclude a respondent from the certification process despite the respondent's omission of some data did because the omission did not prevent Commerce from undertaking the required analysis.[394] Similarly, Nam Kim demonstrated that it was able to trace its HRS substrate but also has supplied abundant information related to its production process, providing Commerce the information needed to evaluate and value its processes in Vietnam for producing CORE using HRS substrate in order to determine whether circumvention exists.[395]

Commerce's Position: There is no basis for precluding Nam Kim from the certification process. Despite the petitioners' contention, the record clearly demonstrates that Nam Kim is able to trace the substrate of the CORE that was exported to the United States. As the verification report notes, Nam Kim's U.S. customers require a certificate of origin for the substrate for all purchases of CORE.[396] Commerce spot checked both Nam Kim's sales of CORE produced with Taiwanese substrate and of all CORE Nam Kim sold to the United States and confirmed that these sales included certificates of origin.[397] Additionally, at verification, Commerce had Nam Kim demonstrate the manual process it used to tie the substrate purchased from Taiwan to the finished CORE.[398] Not only is there no indication on the record that Nam Kim was not able to certify the country of origin of the substrate for each shipment of CORE to the United States, but, in fact, the record demonstrates that Nam Kim was able to provide a certificate of origin for substrate used to produce CORE sold to the United States. The record also indicates that Nam Kim is able to trace all substrate purchased from Taiwan through to the final CORE produced, which is the proceeding at hand.

The petitioners' argument relies on the fact that Nam Kim was unable to trace the origin of certain third-country substrate. As described above, the record clearly demonstrates that none of this third-country substrate was processed into CORE that was shipped to the United States. Using the information and data provided by Nam Kim, Commerce has been able to undertake all analyses required to make its country-wide determination. It is Commerce's finding that Nam Kim has fully cooperated in this inquiry and there is no basis for precluding Nam Kim from the certification process.

IX. RECOMMENDATION

Based on our analysis of the comments received and our findings at verification, we recommend adopting the above positions. We recommend finding, based on the analysis and findings detailed above and in the *Preliminary Determination*, that CORE produced in Vietnam using HRS and/or CRS sourced from Taiwan is circumventing the *Taiwan CORE Order*. We further recommend continuing to apply this finding to all CORE produced in Vietnam using HRS and/or

[393] *See Butt-Weld Pipe Fittings from China Circumvention Determination* IDM at Comment 3.
[394] *See CRS from China Circumvention* IDM at Comment 9.
[395] *See* Nam Kim's Rebuttal Brief at 11.
[396] *See* Nam Kim Verification Report at 9.
[397] *Id.* at 9-10.
[398] *Id.*

CRS sourced from Taiwan that is exported from Vietnam to the United States, except for shipments complying with the certification requirements described in the *Federal Register* notice.

If this recommendation is accepted, we will publish the final determination in this inquiry in the *Federal Register*.

☒	☐
Agree	Disagree

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance