



A-580-878; C-580-879
Anti-Circumvention Inquiry: Vietnamese-Completed CORE
(Vietnam Imports)
Public Document
E&C/OVII: CY

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
Inquiries on the Antidumping Duty and Countervailing Duty
Orders on Certain Corrosion-Resistant Steel Products from the
Republic of Korea

I. SUMMARY

We have analyzed the case and rebuttal briefs of the interested parties in the anti-circumvention inquiries of the antidumping (AD) and countervailing duty (CVD) orders on certain corrosion-resistant steel products (CORE). As a result of our analysis, we continue to find, consistent with the *Korea CORE Anti-Circumvention Preliminary Determinations*,¹ that CORE, completed in the Socialist Republic of Vietnam (Vietnam) from hot-rolled steel (HRS) and/or cold-rolled steel flat products (CRS) from the Republic of Korea (Korea), are circumventing the *Korea CORE Orders*. 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 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 Republic of Korea: Affirmative Preliminary Determination of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 84 FR 32871 (July 10, 2019) (*Korea CORE Anti-Circumvention Preliminary Determinations*), and accompanying Preliminary Decision Memorandum (PDM).



- Comment 3: Whether Commerce’s Use of AFA Impermissibly Departs Without Explanation from Its Decision in the China Anti-Circumvention Inquiries.
- Comment 4: Whether Precluding Certain Importers and Exporters From Participating in the Certification Process is Inappropriate and Unfairly Punishes Importers
- Comment 5: Whether Commerce Should Allow Additional Time for Completing Certification for Pre-Preliminary Determinations Entries
- Comment 6: Whether Country-Wide Determinations Are Justified
- Comment 7: Whether Commerce’s Interpretation of Section 781(b) of the Act Supports the CORE Production Process in Vietnam and Expands the Scope of the *Korea CORE Orders*
- Comment 8: Whether Commerce Should Amend the Exporter Certification Language to Prevent Funneling
- Comment 9: Whether to Apply AFA to Certain Vietnamese Producers That Are Affiliated with Those That Are Deemed Non-Responsive
- Comment 10: 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 11: Whether to Apply the Highest the Petition Rate or Investigation Calculated Rate as the Cash Deposit Rate for Non-Responsive Companies
- Comment 12: Whether Commerce Should Continue to Apply AFA to SSSC
- Comment 13: Whether Commerce Should Apply Section 232 Duties Against the Vietnam CORE Products Found Using Korean Substrates

II. BACKGROUND

On July 10, 2019, Commerce published the *Korea CORE Anti-Circumvention Preliminary Determinations*. Pursuant to section 781(e) of the Tariff Act of 1930, as amended (the Act), we informed the International Trade Commission (ITC) of our affirmative preliminary determinations of circumvention and informed the ITC of its ability to request consultations with Commerce regarding the possible inclusion of the products in question within the *Korea CORE Orders*, pursuant to section 781(e)(2) of the Act.²

In accordance with 19 CFR 351.309, we invited parties to comment on the *Korea CORE Anti-Circumvention Preliminary Determinations*. Between August 23 and September 6, 2019, we received case briefs from: (1) ArcelorMittal USA LLC (AMUSA), California Steel Industries, Nucor Corporation, Steel Dynamics, Inc., and United Steel Corporation (collectively, the petitioners); (2) Southern Steel Sheet Co., Ltd. (SSSC); (3) Formosa Ha Tinh Steel (Formosa); (4) Vina One Steel Manufacturing Corporation (Vina One); (5) Hoa Phat Group; (6) Ferrostaal Metals GmbH, Kurt Orban Partners LLC; (7) Macsteel International USA Corp.; (8) Stemcor USA Inc.; (9) Tata International Metals (Americas) Limited and Cumic Steel USA, Inc. (U.S.

² See Commerce’s Letter, “Anti-Circumvention Inquiries of the Antidumping 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 and Countervailing Duty Order,” dated September 17, 2019.

Importers Group); (10) Marubeni-Itochu Steel America, Inc. (MISA); (11) Mitsui & Co. (U.S.A.) Inc. (Mitsui); (12) Duferco Steel Inc.(Duferco); (13) JFE Shoji Trade America, Inc. (JFE Shoji); (14) Optima Steel International, LLC (Optima Steel); (15) Hoa Sen Group (Hoa Sen); (16) Ton Dong A Corporation (Ton Dong A); and (17) California Steel Industries, Inc. and Steel Dynamics, Inc. (California and Dynamics).³ On September 16, 2019, the petitioners, Ton Dong A, Optima Steel, Mitsui, MISA, JFE Shoji, and U.S. Importers Group each filed rebuttal briefs.⁴

³ See SSSC's Letter, "Case Brief of Southern Steel Sheet Co., Ltd. in the Matter of Corrosion Resistant Steel Products from the Republic of Korea, Anti-Circumvention Inquiry," dated August 23, 2019 (SSSC's Case Brief); *see also* Formosa's Letter, "Case Brief of Formosa Ha Tinh Steel," dated August 23, 2019 (Formosa's Case Brief); Vina One's Letter, "Anti-Dumping Duty Order on Certain Corrosion-Resistant Steel from the Republic of Korea (Anti-Circumvention Inquiry, Vietnam Imports) - Case Brief," dated August 23, 2019 (Vina One's Case Brief); Hoa Phat Group's Letter, "Anti-Circumvention Inquiries Involving Corrosion-Resistant Steel – Case Brief of Hoa Phat Group and Its Subsidiaries," dated September 6, 2019 (Hoa Phat Group's Case Brief); U.S Importers Group's Letter, "Certain Corrosion-Resistant Steel Products from South Korea—Case Brief," dated September 6, 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 Korea: Case Brief of Marubeni-Itochu Steel America, Inc.," dated September 6, 2019 (MISA's Case Brief); Mitsui's Letter, "Corrosion-Resistant Steel Products from Korea: Case Brief," dated September 6, 2019 (Mitsui's Case Brief); Duferco's Letter, "Certain Corrosion-Resistant Steel Products from the Republic of Korea: Duferco Steel Inc.'s Letter in Lieu of Case Brief," dated September 6, 2019 (Duferco's Case Brief); JFE Shoji's Letter, "Certain Corrosion-Resistant Steel Products from Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-878, C-580-879: Letter in Lieu of Case Brief," dated September 6, 2019 (JFE Shoji's Case Brief); Optima Steel's Letter, "Certain Corrosion-Resistant Steel Products from Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-878, C-580-879: Letter in Lieu of Case Brief," dated September 6, 2019 (Optima Steel's Case Brief); Hoa Sen's Letter, "Certain Corrosion-Resistant Steel Products from the Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-878, C-580-879: Refiling of Hoa Sen Group's Case Brief," dated September 11, 2019 (Hoa Sen's Case Brief); Ton Dong A's Letter, "Certain Corrosion-Resistant Steel Products from the Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-878, C-580-879: Refiling of Ton Dong A Corporation Case Brief," dated September 11, 2019 (Ton Dong A's Case Brief); Petitioners' Letter, "Certain Corrosion-Resistant Steel Products from the Republic of Korea: Petitioners' Case Brief," dated September 6, 2019 (Petitioners' Case Brief); and California and Dynamics' Letter, "Certain Corrosion Resistant Steel Products from Korea, Petitioner's Case Brief," dated September 6, 2019 (California and Dynamics' Case Brief).

⁴ See Ton Dong A's Letter, "Certain Corrosion-Resistant Steel Products from Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-878, C-580-879: Ton Dong A Corporation Rebuttal Brief," dated September 16, 2019 (Ton Dong A's Rebuttal Brief); *see also* Optima Steel's Letter, "Certain Corrosion-Resistant Steel Products from Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-878, C-580-879: Optima Steel International LLC Rebuttal Brief," dated September 16, 2019 (Optima Steel's Rebuttal Brief); Mitsui's Letter, "Corrosion-Resistant Steel Products from Korea: Mitsui's Rebuttal Brief," dated September 16, 2019 (Mitsui's Rebuttal Brief); MISA's Letter, "Anti-Circumvention Inquiries of the Antidumping and Countervailing Duty Orders on Certain Corrosion-Resistant Steel Products from the Republic of Korea: Rebuttal Brief of Marubeni Itochu Steel America, Inc.," dated September 16, 2019 (MISA's Rebuttal Brief); JFE Shoji's Letter, "Certain Corrosion-Resistant Steel Products from Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-878, C-580-879: JFE Shoji Trade America, Inc Rebuttal Brief," dated September 16, 2019 (JFE Shoji's Rebuttal Brief); U.S. Importers Group's Letter, "Certain Corrosion-Resistant Steel Products from South Korea—Rebuttal Brief," dated September 16, 2019 (U.S. Importers Group's Rebuttal Brief); and Petitioners' Letter, "Certain Corrosion-Resistant Steel Products from the Republic of Korea: Petitioners' Rebuttal Brief," dated September 16, 2019 (Petitioners' Rebuttal Brief).

III. SCOPE OF THE KOREA CORE ORDERS

The products covered by these orders 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 these orders 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 these orders:

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 these orders is dispositive.

IV. SCOPE OF THE ANTI-CIRCUMVENTION INQUIRIES

These anti-circumvention inquiries cover CORE produced in Vietnam from HRS or CRS manufactured in Korea 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 these inquiries, *i.e.* the signature date for the initiation.⁵ Importers and exporters of CORE from Vietnam manufactured from HRS and/or CRS substrate manufactured outside Korea must certify that the HRS and/or CRS substrate made into CORE in Vietnam did not originate in Korea, as provided for in the certifications attached to the accompanying *Federal Register* notice. Otherwise, their merchandise will be subject to AD and CVD duties because Commerce is making affirmative final determinations in these inquiries. For further details *see* Appendices II through IV attached to the accompanying *Federal Register* notice.

V. CHANGES SINCE THE KOREA CORE ANTI-CIRCUMVENTION PRELIMINARY DETERMINATIONS

As discussed below in the sections on “Use of Facts Available and Facts Available with an Adverse Inference” and “Anti-Circumvention Determinations,” Commerce has made certain changes to its *Korea CORE Anti-Circumvention Preliminary Determinations* regarding the application of facts available, the application of adverse facts available, and the analysis of the factors under section 781(b) of the Act. For a complete description of our preliminary analysis, *see* the *Korea CORE Anti-Circumvention Preliminary Determinations* and accompanying PDM. Our preliminary findings, determinations, and conclusions that remain unchanged in these final determinations are incorporated herein by reference. We have addressed interested parties’ comments in the “Discussion of the Issues.”

VI. STATUTORY FRAMEWORK

Section 781 of the Act addresses circumvention of AD and/or CVD orders.⁶ Section 781(b)(1) of the Act provides that Commerce, after taking into account any advice provided by the ITC under section 781(e) of the Act, may include imported merchandise within the scope of an order at any time an order is in effect, if: (A) 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 AD/CVD order; (B) before importation into the United States, such imported merchandise is

⁵ *See Certain Corrosion-Resistant Steel Products from the Republic of Korea and Taiwan: Initiation of AntiCircumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 83 FR 37785 (August 2, 2018) (*Initiation Notice*).

⁶ Specifically, the legislative history to section 781(b) indicates that Congress intended Commerce to make determinations regarding circumvention on a case-by-case basis, in recognition that the facts of individual cases and the nature of specific industries are widely variable. *See* S. Rep. No. 103-412 (1994), at 81-82.

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 the 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.

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 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.⁷ Accordingly, it is Commerce's practice to evaluate each of these five factors as they exist in the third country, depending on the totality of the circumstances of a particular anti-circumvention inquiry.⁸

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 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. USE OF FACTS AVAILABLE AND FACTS AVAILABLE WITH AN ADVERSE INFERENCE

With respect to the non-responsive companies, Commerce finds it necessary to rely on facts available pursuant to section 776(a) of the Act, because they failed to provide necessary information upon which Commerce could rely and, thereby, withheld information requested by Commerce, failed to provide requested information within the established deadlines, and significantly impeded these anti-circumvention inquiries. Further, as discussed below, we find it appropriate to apply facts available with an adverse inference (AFA), pursuant to section 776(b) of the Act, to non-responsive companies because these companies failed to cooperate by not acting to the best of their ability to comply with Commerce's requests for information in these anti-circumvention inquiries.

⁷ See Statement of Administrative Action, accompanying the Uruguay Round Agreements Act (URAA), H. Doc. 103-316, vol. 1 (1994) (SAA) at 893.

⁸ 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*).

A. Legal Standard

Section 776(a)(1) and 776(a)(2) of the Act provide that Commerce shall, subject to section 782(d) of the Act, apply facts otherwise available in reaching the applicable determination if necessary information is not on the record, or if an interested party: (A) withholds information requested by Commerce; (B) fails to provide such information by the deadlines for submission of the information, or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act.

Section 776(b) of the Act provides that, 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, Commerce may use an inference adverse to the interests of that party in selecting from among the facts otherwise available.⁹ In so doing, Commerce is not required to make any assumptions about information an interested party would have provided if the interested party had complied with the request for information.¹⁰ In addition, the SAA explains that Commerce may employ an adverse inference “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”¹¹ The Court of Appeals for the Federal Circuit (CAFC), in *Nippon Steel*, explained that the ordinary meaning of “best” means “one’s maximum effort,” and that the statutory mandate that a respondent act to the “best of its ability” requires the respondent to do the maximum it is able to do.¹² Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.¹³ It is Commerce’s practice to consider, in employing adverse inferences, the extent to which a party may benefit from its own lack of cooperation.¹⁴ Further, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the less than fair value investigation, a previous administrative review, or other information placed on the record.

B. Use of Facts Available with an Adverse Inference to the Non-Responsive Companies

Commerce finds that the non-responsive companies¹⁵ failed to provide necessary information, withheld information requested by Commerce, failed to provide information in a timely manner,

⁹ See 19 CFR 351.308(a).

¹⁰ See section 776(b)(1)(B) of the Act.

¹¹ See SAA, at 870.

¹² See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (CAFC 2003) (*Nippon Steel*).

¹³ See *Nippon Steel*, 337 F.3d at 1382-83; see also *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997).

¹⁴ See, e.g., *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 PDM 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).

¹⁵ The following companies were non-responsive: (1) 190 Steel Pipe Co., Ltd.; (2) Chinh Dai Steel Limited; (3) Dai Thien Loc Corporation; (4) Formosa Ha Tinh Corporation; (5) Hoa Phat Steel Pipe Co.; (6) Hoa Sen Group; (7) Perstima Viet Nam; (8) Prima Commodities Co.; (9) Thai Nguyen Iron and Steel Corp.; (10) Thong Nhat Flat Steel; (11) Ton Dong A Corp.; (12) Trung Nguyen Steel Co, Ltd.; (13) Vietnam Germany Steel JSC; (14) Vietnam Steel

and significantly impeded this proceeding by not submitting the requested information because they did not submit any responses to Commerce's quantity and value questionnaires or our questionnaires about use or non-use of Korean-origin substrate and whether the non-responsive companies have the ability to trace the origin of the substrate. Such information was necessary for Commerce to select respondents appropriately, analyze the factors under section 781(b) of the Act based on company-specific information, and establish an effective certification mechanism for enforcement. Accordingly, Commerce determines that the use of facts available is warranted in making a determination with respect to these non-responsive companies, pursuant to sections 776(a)(1) and (a)(2)(A)-(C) of the Act.

Further, Commerce finds that these non-responsive companies did not cooperate to the best of their ability by failing to provide the requested information.¹⁶ Therefore, we find that an adverse inference is warranted in selecting from the facts otherwise available with respect to these non-responsive companies in accordance with section 776(b) of the Act and 19 CFR 351.308(a). As adverse facts available, Commerce is inferring that all CORE exported by the non-responsive companies from Vietnam to the United States were produced from Korean-origin substrate and that the non-responsive companies satisfy every factor under section 781(b) of the Act for finding circumvention. As a necessary consequence, non-responsive companies are unable to certify that their exports were not produced using Korean-origin substrate. These adverse inferences are based on factual information on the records of these inquiries submitted by the petitioners.¹⁷

Thus, as set forth in greater detail below, relying on our application of AFA for the non-responsive companies, we find that CORE made from Korean-origin substrate that are completed in Vietnam and then exported to the United States are circumventing the *Korea CORE Orders*, and we are applying these findings on a country-wide basis. As a result of our application of AFA, we continue to determine that the non-responsive companies are precluded from participating in the Korean CORE certification process.

VIII. ANTI-CIRCUMVENTION DETERMINATIONS

Commerce must consider the criteria under section 781(b) of the Act to determine whether merchandise completed or assembled in a third country circumvents an order. As explained above, there is no company-specific sales and cost information on the record, and, therefore, we must make our determinations on the basis of facts available. As discussed below, based on an analysis of these criteria, we find that CORE produced in Vietnam, using HRS and CRS substrates manufactured in Korea, and exported to the United States, is circumventing the *Korea CORE Orders*.

Corp.; (15) Vietnam Steel Pipe; (16) Vian Kyoei Steel Ltd.; (17) Vina One Steel Manufacturing; (18) NS BlueScope Vietnam Ltd.; and (19) Southern Steel Sheet Co., Ltd.

¹⁶ See *Nippon Steel*, 337 F.3d at 1382 (CAFC 2003) ("Compliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.").

¹⁷ See Petitioners' Letter, "Certain Corrosion-Resistant Steel Products from the Republic of Korea: Request for Circumvention Ruling Pursuant to Section 781(b) of the Tariff Act of 1930," dated June 12, 2018 (Circumvention Ruling Request).

A. Statutory Analysis

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

Information on the record of this proceeding establishes that the merchandise under consideration is of the same class or kind as merchandise subject to the *Korea CORE Orders*. A comparison of the plain language of the scope of the *Korea CORE Orders* to the information on the record of this proceeding corroborates that CORE from Vietnam is the same class or kind as the CORE from Korea. In addition, the HTSUS headings identified in the scope of the *Korea CORE Orders* are generally exclusive to subject merchandise, and record evidence demonstrates that imports¹⁸ into the United States from Vietnam are classified under the same HTSUS categories. This evidence, taken together with our application of AFA to the non-responsive companies, supports a finding that CORE products that are exported to the United States from Vietnam are of the same class or kind as merchandise that is subject to the *Korea CORE Orders*, in accordance with section 781(b)(1)(A) of the Act.

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

Information on the record of this proceeding establishes that the merchandise under consideration is completed from merchandise that is produced in the foreign country (namely, Korea) that is subject to the *Korea CORE Orders*. As discussed in the *Initiation Notice*, the petitioners assert that Vietnam has little capacity to produce HRS domestically; as a result, it relies heavily on HRS imports. In support of this assertion, the petitioners presented evidence showing substantial imports of Korean HRS and CRS into Vietnam between 2015 and 2017.¹⁹ Specifically, the petitioners provided information showing those shipments increased from 879,537 tons in 2014 to nearly 1.1 million tons in 2015, and continued to grow in 2016 and in 2017.²⁰ Additionally, the petitioners also provided information demonstrating that imports into the United States of CORE from Korea significantly decreased after the imposition of the *Korea CORE Orders*, and that imports into the United States of CORE from Vietnam increased more than ten-fold between 2015 and 2016.²¹

The above evidence, taken together with our application of AFA to the non-responsive companies, supports a finding that CORE that is exported to the United States from Vietnam was completed in Vietnam from Korean-origin HRS and/or CRS substrates prior to importation to the United States, in accordance with section 781(b)(1)(B) of the Act.

¹⁸ See Circumvention Ruling Request at 8 and Exhibit 1.

¹⁹ See Circumvention Ruling Request at 8-10 and Exhibits 2 and 4.

²⁰ *Id.* at 8-9 and Exhibit 2.

²¹ *Id.* at 24 and Exhibit 2.

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

As noted in further detail below, evidence on the record provided by the petitioners indicates that the production of HRS and CRS in Korea, which subsequently undergoes minor processing to make CORE, comprises most of the value associated with the merchandise imported from Vietnam into the United States, and that the processing occurring in Vietnam adds relatively little to the overall value of the finished CORE. This evidence, taken together with our application of AFA to the non-responsive companies, supports a finding that the process of completing CORE in Vietnam from Korean-origin substrates is minor or insignificant, in accordance with sections 781(b)(1)(C) and 781(b)(2) of the Act.

(A) Level of Investment in Vietnam

The petitioners have submitted information indicating that the level of investment necessary to complete CORE in Vietnam is less than the level of investment required to construct a factory that can produce HRS and CRS in Korea. The petitioners compared the investment necessary to install a final processing facility, *e.g.*, a coating mill, with the investment necessary to produce HRS using a fully-integrated production process for producing steel.²² The petitioners cited Commerce's findings in the earlier anti-circumvention rulings regarding Vietnamese CORE using Chinese HRS inputs (*i.e.*, substrate).²³ In that proceeding, Commerce pointed to record evidence showing China expends high levels of investment for CORE production by building integrated steel mills to produce HRS in the range of 250 million to 10 billion U.S. dollars (USD), while Vietnam expends low levels of investment for CORE production by only building cold-rolling mill to produce CRS from HRS substrate for as low as 28 million USD.²⁴ Similar record evidence in this case shows that Korea also expends high levels of investment for CORE production; for example, Hyundai Steel invested 5 billion USD in 2010 for its integrated steel mill. Relying on the *China CORE Anti-Circumvention Final* finding for level of investment in Vietnam, the petitioners claimed the level of investment required in Vietnam to finalize the production of CORE by rolling and coating is far less than the investment required to establish an integrated mill to produce the hot-rolled steel substrate.²⁵ The petitioners concluded that, in comparison to the investment necessary for an integrated steel mill in Korea, the cost of a mill for re-rolling and coating in Vietnam is insignificant.²⁶

²² *Id.* at 11-14 and Exhibits 9-11.

²³ *Id.* 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), and accompanying PDM at 18-19 (*China CORE Anti-Circumvention Prelim*), 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) (*China CORE Anti-Circumvention Final*).

²⁴ See Circumvention Ruling Request at 12-13 citing *China CORE Anti-Circumvention Prelim*, and accompanying PDM at 17, unchanged in *China CORE Anti-Circumvention Final*).

²⁵ *Id.* at 13-14 and Exhibits 8-11 citing *China CORE Anti-Circumvention Prelim*, and accompanying PDM at 18, unchanged in *China CORE Anti-Circumvention Final*, and accompanying IDM at 34-35).

²⁶ See Circumvention Ruling Request at 14 and Exhibits 9-11.

The above evidence, taken together with our application of AFA to the non-responsive companies, supports a finding that the level of investment for completing CORE in Vietnam is minor, in accordance with section 781(b)(2)(A) of the Act.

(B) Level of Research and Development in Vietnam

According to the petitioners, the level of research and development (R&D) needed to produce steel substrate such as HRS is greater than the level of R&D needed to cold-roll HRS into CORE.²⁷ The petitioners cited to Commerce's findings in *China CORE Anti-Circumvention Prelims*, where Commerce found that "the level of R&D is not a significant factor" in Vietnamese CORE producers' processing operations.²⁸ The petitioners contended that, rather than developing its own technology, the Vietnamese steel industry uses technology developed abroad.²⁹ As an example of Vietnamese producers using technology developed abroad, the petitioners provided evidence that Vietnamese producer Ton Dong A Corp installed European and Japanese equipment in its new CORE facility.³⁰ Furthermore, the petitioners explained that CSVC, the sole mill in Vietnam with galvalume (the process of galvanizing followed by annealing) capability needed for auto and appliance use, is a joint venture between Taiwanese and Japanese parent companies.³¹ The petitioners provided various further sources to support the contention that steel mills in Vietnam relied on foreign technology and cheap domestic labor.³² The petitioners compared the R&D expenditures of POSCO Korea, the largest steel producer in Korea, with several Vietnamese steel companies, such as Dong A, CSVC, Hoa Phat Group, and Thai Nguyen Iron and Steel Corporations, and suggest that the level of R&D in Vietnam for CORE production is minimal to non-existent.³³

The above evidence, taken together with our application of AFA to the non-responsive companies, supports a finding that the level of R&D in Vietnam compared to the level of R&D in Korea is minor, in accordance with section 781(b)(2)(B) of the Act.

(C) Nature of the Production Process in Vietnam

(D) The Extent of the Production Facilities in Vietnam

According to the petitioners, the production process undertaken by Vietnamese producers of CORE is less complex and significant than making the steel substrate.³⁴ Citing Commerce's finding in the *China CORE Anti-Circumvention Final*, the petitioners contend that, while the processes of galvanizing steel are not trivial, they are insignificant compared to the greater steel-making processes that include smelting iron, making, casting, and hot-rolling steel.³⁵ The

²⁷ *Id.* at 14-16.

²⁸ *Id.* at 14.

²⁹ *Id.* at 12-16 and Exhibit 10.

³⁰ *Id.* The petitioners cited several other examples, including CSVC, Hoa Phat Group and Thai Nguyen Iron and Steel Corporation.

³¹ *Id.*

³² *Id.* at 15 and Exhibit 13.

³³ *Id.* at 14-16 and Exhibit 15 citing *China CORE Anti-Circumvention Final*, and accompanying IDM at 40.

³⁴ See Circumvention Ruling Request at 16-21.

³⁵ *Id.* citing *China CORE Anti-Circumvention Final*, and accompanying IDM at 40-42.

galvanizing process is the end of the production line, and it adds a small part of the total value, requires little capital, and a small proportion of input by weight and volume.³⁶ Thus, the petitioners explained that even relatively sophisticated galvanizing operations will involve less intensive processing than processing steel substrate.³⁷ Moreover, the petitioners contended that more capital is required to build an integrated steel mill that includes blast furnace, casting, and hot rolling, as compared to building a cold-rolling and coating facility.³⁸ A larger amount of capital also represent larger production facilities, more equipment and workers.

The above evidence, taken together with our application of AFA to the non-responsive companies, supports a finding that the nature of the production process and the extent of the production facilities in Vietnam to compared to Korea are insignificant, in accordance with sections 781(b)(2)(C) and 781(b)(2)(D) of the Act.

(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

The petitioners pointed to Commerce's finding in the *China CORE Anti-Circumvention Final* to contend that "the value of the materials, labor, energy, overhead, and other items consumed in the production of CORE represents an insignificant value when compared to the value of the merchandise sold to the United States."³⁹ Moreover, the petitioners maintained that Commerce's quantitative and qualitative finding in the *China CORE Anti-Circumvention Final* that the finishing process in Vietnam adds only a small part of the total value of the CORE exported to the United States also applies to this Korean case.⁴⁰ As the Korean steel industries have more sophisticated and advanced technology than those in either China or Vietnam, the petitioners assert that the percentage of value added for Korean substrate is likely to be even higher than the percentage of value found to be added in Chinese substrate.⁴¹ Based on these assertions, the petitioners conclude that every factor required by the statute that Commerce considered in making its affirmative findings in the *China Anti-Circumvention Finals* also exist in Korea.⁴²

Additionally, the petitioners cited the recent ITC investigation of CORE from China, India, Italy, Korea and Taiwan, stating that the information contained therein demonstrates that the cost of Korean HRS inputs accounts for 69 to 79 percent of the price of CORE.⁴³ Additionally, the petitioners explained that the price of Korean CRS inputs accounts for 84 to 90 percent of the price of CORE.⁴⁴

The above evidence, taken together with our application of AFA to the non-responsive companies, supports a finding that the completion process performed in Vietnam represents a

³⁶ See Circumvention Ruling Request at 16-21.

³⁷ *Id.*

³⁸ *Id.* at 17-20.

³⁹ *Id.* at 22(citing *China CORE Anti-Circumvention Final*, and accompanying IDM at 9.

⁴⁰ *Id.* citing *China CORE Anti-Circumvention Final*, and accompanying IDM at 22.

⁴¹ See Circumvention Ruling Request at 22-24 and Exhibits 14 and 17.

⁴² *Id.* at 24 citing *China CORE Anti-Circumvention Final*, and accompanying IDM at 9-10.

⁴³ See Circumvention Ruling Request at 23-24.

⁴⁴ *Id.*

small proportion of the value of the merchandise exported to the United States, in accordance with section 781(b)(2)(E) of the Act.

Whether the Value of the Merchandise Produced in Korea is a Significant Portion of the Total Value of the Merchandise Exported to the United States

We attempted to collect surrogate value data from interested parties to analyze the respondents' costs, but CSVK, Nam Kim, MISA, NVSSC, Maruichi, and the non-responsive companies have not submitted necessary cost information on the record. As a result, we could not determine the precise value of the Korean-origin merchandise relative to the total value of the merchandise, inclusive of the value added in Vietnam by these companies.

The only information on the record indicates that the value of the merchandise under consideration attributable to the production process in Korea is significant.⁴⁵ Specifically, the petitioners provided information that the value of the HRS and CRS substrate made in Korea constitutes a significant portion of the total value of the completed CORE exported to the United States from Vietnam.⁴⁶ This evidence, taken together with our application of AFA to the non-responsive companies, supports a finding that the value of the Korean-origin merchandise used by the non-responsive companies to produce CORE in Vietnam represents a significant portion of the total value of the merchandise exported to the United States, in accordance with section 781(b)(1)(D) of the Act.

Other Factors to Consider

In determining whether to find merchandise assembled or completed in a foreign country circumventing an order, section 781(b)(3) of the Act instructs Commerce to consider several additional factors: pattern of trade, affiliation, and increase in imports. Each of these factors is examined below.

(A) Pattern of Trade and Sourcing

The first factor to consider under section 781(b)(3) of the Act is changes in the pattern of trade, including changes in sourcing patterns. The petitioners contended that exports of CORE from Vietnam to the United States skyrocketed as exports from Korea declined in the period after the filing of the petition in the underlying investigation, as compared to the period before it.⁴⁷ The petitioners further explained that while recent exports of CORE from Vietnam to the United States have declined slightly, this decline is largely due to Commerce's investigation of circumvention of the AD and CVD orders on CORE from China.⁴⁸ The petitioners also point to the fact that exports of HRS from Korea to Vietnam also increased after the original investigation commenced.⁴⁹ This evidence, taken together with our application of AFA to the non-responsive companies, supports a finding that the pattern of trade during the period of these

⁴⁵ *Id.* at 21-24.

⁴⁶ *Id.*

⁴⁷ *Id.* at 24 and Exhibit 2.

⁴⁸ *Id.*

⁴⁹ *Id.*

inquiries indicates that circumvention of the *Korea CORE Orders* has occurred, in accordance with section 781(b)(3)(A) of the Act.

(B) Affiliation

The second factor to consider under section 781(b)(3) of the Act is whether or not the manufacturer or exporter of the CORE in Korea is affiliated with the Vietnamese entity that assembles or completes the merchandise exported to the United States. Generally, we consider circumvention to be more likely to occur when the manufacturer of the subject merchandise is related to the third country entity.⁵⁰ The petitioners pointed out that Korea's largest steel manufacturer, POSCO, has 13 Vietnamese affiliates and offices, including POSCO-Vietnam, which has the capacity to produce 700,000 tons of CRS.⁵¹ This evidence, taken together with our application of AFA to the non-responsive companies, supports a finding that Vietnamese companies are affiliated with their suppliers of HRS and CRS in Korea.

(C) Increased Imports

The third factor to consider under section 781(b)(3) of the Act is whether imports into the third country (*i.e.*, Vietnam) of the merchandise described in section 781(b)(1)(B) of the Act (*i.e.*, HRS and CRS) have increased since the initiation of the underlying CORE AD and CVD investigations. Based on the publicly-available import data submitted on the record by the petitioners, imports of Korean HRS and CRS substrate into Vietnam have increased significantly in recent years, and imports of Vietnamese CORE into the United States have rapidly increased since the *Korea CORE Orders* were published.⁵² This evidence, taken together with our application of AFA to the non-responsive companies, supports a finding that there has been a substantial increase in imports of HRS and CRS from Korea into Vietnam, in accordance with section 781(b)(3)(C) of the Act.

Conclusion Regarding Statutory Factors

Pursuant to sections 781(b)(1)(A) and (B) of the Act, we find, based on record evidence and the use of AFA, that the CORE produced in Vietnam and imported into the United States is within the same class or kind of merchandise that is subject to the *Korea CORE Orders* and was completed in Vietnam before importation to the United States. Additionally, pursuant to sections 781(b)(1)(C) and 781(b)(2) of the Act, we find, based on record evidence and using AFA, that the process of completing the CORE in Vietnam from the Korean substrate is minor and insignificant. Furthermore, in accordance with section 781(b)(1)(D) of the Act, we find, based on record evidence and using AFA, that the value of the HRS and CRS substrate produced in Korea is a significant portion of the total value of the CORE exported from Vietnam to the United States. Finally, after considering the additional factors under section 781(b)(3) of the Act, we find, based on record evidence and using AFA, that these factors support finding that

⁵⁰ See, e.g., *Certain Tissue Paper Products from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination*, 73 FR 21580, 21586 (April 22, 2008), unchanged in *Tissue Paper Final Circumvention Determination*.

⁵¹ See Circumvention Ruling Request at 24-25.

⁵² *Id.* at 24 and Exhibit 2.

circumvention of the *Korea CORE Orders* is occurring. Therefore, we find that all CORE from Vietnam produced using substrate from Korea is circumventing the *Korea CORE Orders*.

IX. 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

*Respondents' Comments (including Hoa Sen's Case Brief, Ton Dong A's Case Brief, Optima's Case Brief, Formosa's Case Brief, Vina One's Case Brief, Hoa Phat Group's Case Brief, U.S. Importers Group's Case Brief)*⁵³

- 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. 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.
- Commerce should not apply facts available to these companies for failing to respond to a questionnaire that they never received.

*Petitioners' Rebuttal Brief*⁵⁴

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

Commerce 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 CORE to the United States and the origin of the imported HRS being processed into CORE."⁵⁵ The FedEx delivery confirmations confirm that these companies did not receive the

⁵³ See Hoa Sen's Case Brief at 5-7; see also Ton Dong A's Case Brief at 5-7; Optima's Case Brief at 8-9; Formosa's Case Brief at 6; Vina One's Case Brief at 4; Hoa Phat Group's Case Brief at 2; and U.S. Importers Group's Case Brief at 1-6.

⁵⁴ See Petitioners' Rebuttal Brief at 46-47.

⁵⁵ See *Initiation Notice*, 83 FR at 37877.

questionnaire.⁵⁶ 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 Lacks Statutory Authority to Apply AFA Where Respondents Did Not Deprive Commerce of Information Regarding Its Ability to Trace Inputs

*Hoa Sen's Case Brief and Ton Dong A's Case Brief*⁵⁷

- 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.⁵⁸ 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 withheld or otherwise failed to provide. Commerce cannot apply facts available or AFA to respondents who did not provide information that Commerce did not request.⁵⁹
- There is no evidence on the record that Hoa Sen or Ton Dong A do not have the ability to trace their exports of CORE to the United States to the HRS substrate used to produce CORE. Thus, Commerce must either re-open the record to request the necessary information, or allow Hoa Sen and Ton Dong A to participate in the certification process.

*Petitioners' Rebuttal Brief*⁶⁰

- Commerce's practice is to permit importers and exporters to participate in a certification process only when they can demonstrate traceability.⁶¹ Consistent with this practice, in the

⁵⁶ See Memorandum, "Anti-Circumvention Inquiries of the Antidumping Duty and Countervailing Duty Orders on Cold-Rolled Steel Flat Products from the Republic of Korea: FedEx Questionnaire Delivery Confirmations," dated August 15, 2019.

⁵⁷ See Hoa Sen's Case Brief at 12-15; *see also* Ton Dong A's Case Brief at 12-14.

⁵⁸ See Hoa Sen's Case Brief at 13; *see also* Ton Dong A's Case brief at 12 (citing *Steel Wire Garment Hangers from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 76 FR 66895 (October 28, 2011) (*Garment Hangers China Anti-Circumvention Final*), and accompanying Issues and Decision Memorandum (IDM) at 8).

⁵⁹ 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 (CAFC 1996); *Olympic Adhesives, Inc v. United States*, 899 F.2d 1565, 1572-75 (CAFC 1990); and *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, No. 97-08-11344, 1999 WL 1991194 at *12-13 (CIT 1990).

⁶⁰ See Petitioners' Rebuttal Brief at 47-51.

⁶¹ *Id.* at 38 and 50 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 Prelim*) unchanged in *Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of*

preliminary results of this inquiry, 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.

- 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.

Commerce Position: We find these issues to be moot with respect to Hoa Sen and Ton Dong A. As explained above in Comment 1, in these final determinations, 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 these proceedings.

Comment 3: Whether Commerce’s Use of AFA Impermissibly Departs Without Explanation from Its Decision in the China Anti-Circumvention Inquiry

*Ton Dong A’s Case Brief*⁶² and *Hoa Sen’s Case Brief*⁶³

- In its final determination in the anti-circumvention inquiries concerning the *China CORE Orders*,⁶⁴ Commerce permitted non-responsive companies to participate in the certification program. In contrast, Commerce precluded non-responsive companies from the certification process in the *Korea CORE Anti-Circumvention Preliminary Determinations*.⁶⁵
- 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 ether 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.”⁶⁶
- In the anti-circumvention inquiries of CORE from China, Commerce did not exclude companies that did not respond to the quantity and value 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

China: Final Affirmative Determination of Circumvention of the Antidumping Duty Order, 84 FR 29164 (June 21, 2019) (*Butt-Weld Pipe Fittings China Anti-Circumvention Final*); 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 China ARPP Anti-Circumvention Final*).

⁶² See *Ton Dong A’s Case Brief* at 17-20.

⁶³ See *Hoa Sen’s Case Brief* at 16-19.

⁶⁴ See *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); see also *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*).

⁶⁵ See *Ton Dong A’s Case Brief* at 17; see also *Hoa Sen’s Case Brief* at 16; and *China CORE Anti-Circumvention Final*.

⁶⁶ See *Ton Dong A’s Case Brief* at 17; see also and *Hoa Sen’s Case Brief* at 16-17 citing *Allegheny Ludlum Corp. v. United States*, 112 F. Supp. 2d 1141, 1147 (CIT 2000); and *Hussey Copper, Ltd. v. United States*, 843 F. Supp. 413, 418-19 (CIT 1993) (*Hussey Copper, Ltd. v. United States*).

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 871(b) of the Act.”⁶⁷

- In the anti-circumvention inquiries on CORE from China, 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.”⁶⁸
- In the anti-circumvention inquiries on CORE from China, 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 *China CORE Orders* would be applied to CORE produced from non-Chinese substrate.⁶⁹
- In the *Korea CORE Anti-Circumvention Preliminary Determinations*, however, Commerce took an entirely different position, though the factual and legal circumstances were identical. Commerce did not because it cannot, provide any reason why these concerns are attendant in the instant inquiries but not in the anti-circumvention inquiries on CORE from China, where the same circumstances were present. If the certification procedures were “adequate and appropriate” in the anti-circumvention inquiry of CORE from China, it is not clear why they are not “adequate and appropriate” here, given that the *Korea CORE Anti-Circumvention Preliminary Determinations* explicitly links the certification regime under the *China CORE Anti-Circumvention Final*.⁷⁰
- It is not clear why a company’s use of Korean HRS or CRS substrate would render it ineligible for the CORE from Korea certification regime. Ton Dong A and Hoa Sen also argue that they demonstrated their ability to trace exports to the substrate inputs used to produce them in the CORE from China anti-circumvention inquiry. Thus, there is no reason why Ton Dong A and Hoa Sen should be barred from participating in the certification process.

*Duferco’s Case Brief*⁷¹

- Commerce’s determination to preclude certain companies from participating in the certification process stands in stark contrast to its determination in *China CORE Orders*. This change of course is without any clear rationale or explanation, and puts unfair burdens on U.S. importers who maintain detailed record as to the materials used in production of their exports to establish that they should not be subject to AD/CVD orders. Exporters and importers have relied on the rules established by Commerce in the *China CORE Orders* circumvention case, to ensure they are in accordance with Commerce’s requirements. It is both arbitrary and capricious for Commerce to preclude importers and exporters from filing

⁶⁷ See Ton Dong A’s Case Brief at 17; see also Hoa Sen’s Case Brief at 17 citing *China CORE Anti-Circumvention Final*, and accompanying IDM at 24.

⁶⁸ See Ton Dong A’s Case Brief at 18; see also Hoa Sen’s Case Brief at 17 citing *China CORE Anti-Circumvention Final*, and accompanying IDM at 25.

⁶⁹ See Ton Dong A’s Case Brief at 18; see also Hoa Sen’s Case Brief at 17 citing *China CORE Anti-Circumvention Final*, and accompanying IDM at 28-29.

⁷⁰ See Ton Dong A’s Case Brief at 18-19; see also Hoa Sen’s Case Brief at 18 citing *Korea CORE Anti-Circumvention Preliminary Determinations*, and accompanying PDM at 18-19; and *China CORE Anti-Circumvention Final*, and accompanying IDM at 28-29.

⁷¹ See Duferco’s Case Brief at 2-3.

certifications in the instant review for products for which they have maintained records showing they were not produced from Korean HRS substrate.

*Importer Group's Case Brief*⁷²

- 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.⁷³
- 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.⁷⁴
- In the *Korea CORE Anti-Circumvention Preliminary Determinations*, Commerce made a fundamental change in the certification regime—with no prior notice to outside parties, including importers—by excluding from the certification process those companies which Commerce determined had chosen not to respond to the quantity and value questionnaire.⁷⁵
- 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 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 3 entry when the objective facts demonstrate that it is a Type 1 entry), but it also distorts the official import statistics by erroneously reporting the importation of a product from Vietnam as a product of Korea.⁷⁶
- As the CAFC 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 *Korea CORE Anti-Circumvention Preliminary Determinations*, 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.⁷⁷

⁷² See U.S. Importers Group's Case Brief at 11-14.

⁷³ *Id.* at 11 citing *China CORE Anti-Circumvention Prelim* at Appendix II unchanged in *China CORE Anti-Circumvention Final*.

⁷⁴ *Id.* at 11-12 citing Memorandum, “Recipients of Quantity and Value Questionnaire in Anti-Circumvention Inquiry from Vietnam (A-570-026 and C-570-027),” dated December 12, 2016; and Commerce's Letter, “Anti-Circumvention Inquiries of the Antidumping and Countervailing Duty Orders of Cold-Rolled Steel and Corrosion-Resistant Steel from the People's Republic of China: Rejection of Untimely Submission on January 25, 2017,” dated December 12, 2016.

⁷⁵ See U.S. Importers Group's Case Brief at 12-13.

⁷⁶ *Id.* at 13.

⁷⁷ *Id.* at 13-14 citing *Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1007 (CAFC 2003) (*Consolidated Bearings Co. v. United States*); *RHP Bearings v. United States*, 288 F.3d 1334, 1347 (CAFC 2002) (*RHP Bearings v. United States*); and *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (CAFC 2001) (*SKF USA Inc. v. United States*).

*MISA's Case Brief*⁷⁸

- 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.⁷⁹
- Commerce deviated from its practice in the anti-circumvention inquiry of CORE from China, where Commerce did not impose a “blacklist” or any restrictions on the producers or exporters that could participate in the certification process.⁸⁰
- In the *Korea CORE Anti-Circumvention Preliminary Determinations*, 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.⁸¹
- Commerce’s change of practice 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.⁸²

*Petitioners' Rebuttal Brief*⁸³

- 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’s 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.⁸⁴
- 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.”⁸⁵
- Congressional guidance set forth in the SAA is to apply AFA to parties that fail to respond to Commerce’s requests for information.⁸⁶

⁷⁸ See MISA’s Case Brief at 8-9.

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* citing *China CORE Anti-Circumvention Final*, and accompanying IDM at 27-29.

⁸¹ *Id.* at 8.

⁸² *Id.* at 8-9.

⁸³ See Petitioners’ Rebuttal Brief at 44-51.

⁸⁴ *Id.* at 45.

⁸⁵ See Petitioners’ Rebuttal Brief at 45 citing *Union Steel v. United States*, 755 F. Supp. 2d 1304, 1311 (CIT 2011; and *Seah Steel Vina Corp. v. United States*, 182 F. Supp. 3d 1316, 1327 (CIT 2016)).

⁸⁶ *Id.* at 45-46 citing *SKF USA Inc. v. United States*, 391 F. Supp. 2d at 1335 (*SKF USA Inc. v. United States*), and SAA at 870.

- In *Tianjin Magnesium*, 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.”⁸⁷
- 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.”⁸⁸
- 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.⁸⁹
- 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.”⁹⁰
- 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 the certification process.⁹¹
- In *Tissue Paper China MFVN Anti-Circumvention Final*, Commerce denied an uncooperative respondent, MFVN, the opportunity to participate in a certification process after previously allowing a cooperative respondent in a separate anti-circumvention inquiry under the same order, Quinjiang, to participate in a certification program. Commerce later barred yet another uncooperative respondent in 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*, 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

⁸⁷ *Id.* at 46 citing *Tianjin Magnesium Int’l Co. v. United States*, 844 F. Supp. 2d 1342, 1348 (CIT 2012) (*Tianjin Magnesium*).

⁸⁸ *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 Mexico 2008-2009 Final*), and accompanying IDM at Comment 4.

⁸⁹ See Petitioners’ Rebuttal Brief at 46.

⁹⁰ *Id.* at 46-47 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 China MFVN Anti-Circumvention Final*), and accompanying IDM at Comment 4; and *Certain Tissue Paper Products from the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 73 FR 57591 (October 3, 2008) (*Tissue Paper China Quinjiang Anti-Circumvention Final*).

⁹¹ *Id.* at 47 citing *Pipe Mexico 2008-2009 Final*, and accompanying IDM at Comment 4; *Tissue Paper China MFVN Anti-Circumvention Final*, and accompanying 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 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 China Sunlake Anti-Circumvention Final*).

addressing circumvention” because MFVN failed to participate and Commerce lacked information with which to evaluate MFVN’s ability to trace its inputs.⁹²

- 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 China Anti-Circumvention Final*, 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.” Commerce was faced with an identical situation in this case, where Commerce issued 27 quantity and value questionnaires and received responses from only nine companies.⁹³
- All Vietnamese producers and exporters 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 China Anti-Circumvention Prelim*, predated the initiation of the instant anti-circumvention inquiry.⁹⁴
- 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.”⁹⁵
- 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.”⁹⁶

Commerce 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.⁹⁷

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

⁹² See Petitioners’ Rebuttal Brief at 47-49 citing *Max Fortune Indus. Co. v. United States*, Slip Op. 2013-52 (CIT 2013) (*Max Fortune*).

⁹³ *Id.* at 49-50 citing *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, IDM at 13.

⁹⁴ *Id.* at 50.

⁹⁵ *Id.* at 50-51 citing *Max Fortune*.

⁹⁶ *Id.* at 51 citing *Shenzhen Xinboda Indus. Co. v. United States*, Slip. Op. 2017-160 (CIT 2017) (*Shenzhen Xinboda*).

⁹⁷ See Ton Dong A’s Case Brief at 15-17; see also Hoa Sen’s Case Brief at 16-19.

explanation for the change in practice.”⁹⁸ 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.⁹⁹ 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.”¹⁰⁰ Thus, while “an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently,”¹⁰¹ 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,”¹⁰² or “acted differently {in a particular} case than it has *consistently* acted in similar circumstances without reasonable explanation.”¹⁰³

The methodology used in the CORE from China and CRS from China anti-circumvention determinations does not constitute an “established procedure.”¹⁰⁴ 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.”¹⁰⁵ 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 CAFC.¹⁰⁶ 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*¹⁰⁷ and *Aluminum Extrusions China Anti-Circumvention*

⁹⁸ See *SeAH*; see also *Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1007 (CAFC 2003) (*Consolidated Bearings*).

⁹⁹ See *Union Steel v. United States*, 755 F. Supp. 2d 1304, 1310-11 (CIT 2011); see also Petitioners’ Rebuttal Brief at 57.

¹⁰⁰ See *SeAH*; see also *Huvis Corp. v. United States*, 525 F. Supp. 2d 1370, 1378 (CIT 2007); *Ranchers-Cattlemen Action Legal Fund. v. United States*, 74 F. Supp. 2d 1353, 1374 (CIT 1999) (*Ranchers*); and Petitioners’ Rebuttal Brief at 57.

¹⁰¹ See *SeAH*; see also *RHP Bearings v. United States*, 288 F.3d 1334, 1347 (CAFC 2002); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (CAFC 2001); *Transactive Corp. v. United States*, 91 F.3d 232, 237 (CAFC 1996); and *Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1007 (CAFC 2003).

¹⁰² See *Shenzhen Xinboda*, slip. op. 17-160, at 11; see also Petitioners’ Rebuttal Brief at 47.

¹⁰³ See *Consolidated Bearings*, 348 F.3d at 1007 (emphasis added); see also *RHP Bearings v. United States*, 288 F.3d 1334, 1347 (CAFC 2002).

¹⁰⁴ See *SeAH*; see also *Huvis Corp. v. United States*, 525 F. Supp. 2d 1370, 1378 (CIT 2007).

¹⁰⁵ See Petitioners’ Rebuttal Brief at 46 citing *Pipe Mexico 2008-2009 Final*, and accompanying IDM at Comment 4.

¹⁰⁶ *Id.* at 44-47; see also sections 776(a)(1), (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 2008-2009 Final*, and accompanying IDM at Comment 4.

¹⁰⁷ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.

Final.¹⁰⁸ In *Max Fortune*, the CIT affirmed Commerce’s practice of barring uncooperative respondents from a certification process.¹⁰⁹ 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 one established in *CORE China Anti-Circumvention Final*; (2) *CRS China Anti-Circumvention Final*; (3) *CRS Korea Anti-Circumvention Final*, and (4) *CORE Taiwan Anti-Circumvention Final*.¹¹⁰

However, in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 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.¹¹¹ 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.¹¹² 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.¹¹³ 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: (1) *Butt-Weld Pipe Fittings China Anti-Circumvention Final*; (2) *Aluminum Extrusions China Anti-Circumvention Final*; (3) *Tissue Paper China MFVN Anti-Circumvention Final*; (4) *Tissue Paper China Quijiang Anti-Circumvention Final*; and (5) *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

¹⁰⁸ 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*).

¹⁰⁹ See *Max Fortune*; see also *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 China MFVN Anti-Circumvention Final*), and accompanying IDM; *Tissue Paper China Quijiang Anti-Circumvention Final*; and *Tissue Paper China Sunlake Anti-Circumvention Final*.

¹¹⁰ See *Certain Corrosion-Resistant Steel Products from Taiwan: Affirmative Final Determination of Anti-Circumvention Inquiry on the Antidumping Duty Order*, dated concurrently with this notice (*CORE Taiwan Anti-Circumvention Final*).

¹¹¹ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, and accompanying IDM (“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).”).

¹¹² See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.

¹¹³ *Id.*

extent to which a party may benefit from its own lack of cooperation.”¹¹⁴ 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 Korean CORE certification process.”¹¹⁵ 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 the *China CORE Anti-Circumvention Final* and the *CRS China Anti-Circumvention Final*.¹¹⁶ 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 inquiries.

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.¹¹⁷ 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.¹¹⁸

Ton Dong A and Hoa Sen point out that, in the *China CORE Anti-Circumvention Final* issues and decision memorandum, 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.¹¹⁹ The parties also argue that barring uncooperative unresponsive companies is unnecessary and inappropriate.¹²⁰

¹¹⁴ See *Korea CORE Anti-Circumvention Preliminary Determinations*, and accompanying PDM at 11 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 PDM 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).

¹¹⁵ See *Korea CORE Anti-Circumvention Preliminary Determinations*, and accompanying PDM at 13.

¹¹⁶ *Id.*, and accompanying PDM at 12-13, 20-23; see also Customs AD/CVD message number 9225302 at paragraph 5a.(ii); and customs AD/CVD message number 9225305 at paragraph 5a.(ii) (available at <https://aceservices.cbp.dhs.gov/adcvdweb>).

¹¹⁷ See Petitioners’ Rebuttal Brief at 58 (citing *Tissue Paper China MFVN Anti-Circumvention Final*, and accompanying IDM at Comment 4; and *Tissue Paper China Quijiang Anti-Circumvention Final*).

¹¹⁸ See, e.g., *Butt-Weld Pipe Fittings from China Anti-Circumvention Final*; *Tissue Paper from China: Sunlake Anti-Circumvention Preliminary*; *Tissue Paper China MFVN Anti-Circumvention Final*; and *Max Fortune*.

¹¹⁹ See Ton Dong A’s Case Brief at 15-16; see also Hoa Sen’s Case Brief at 16.

¹²⁰ See Ton Dong A’s Case Brief at 15-16; see also Hoa Sen’s Case Brief at 16.

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 *Korea 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 CRS Anti-Circumvention Final* are not relevant to the question of whether to bar uncooperative respondents from participating in such a certification process.¹²¹

MISA and the Importers Group claims that outside parties were provided no notice of the potential for Commerce to bar uncooperative companies from the certification process.¹²² 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."¹²³ Moreover, Commerce recently decided to bar uncooperative companies in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.¹²⁴ Notably, in the *Butt-Weld Pipe Fittings China Anti-Circumvention Prelim*, 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 Prelim* and Commerce's earlier decisions in *Tissue Paper China Sunlake Anti-Circumvention Prelim* 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.¹²⁵

The Importer's 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 Korea certification process. The Importer's Group further alleges that doing so forced importers of

¹²¹ See *China CRS Anti-Circumvention Final*, and accompanying IDM at 21-29 (compare these statements to Commerce's statements in *Korea CRS Anti-Circumvention Preliminary Determinations*, and accompanying PDM at 12-13).

¹²² See U.S. Importers Group's Case Brief at 11.

¹²³ See Petitioners' Rebuttal Brief at 35 (citing *Initiation Notice*, 83 FR at 37785-86 and 37790).

¹²⁴ See *Butt-Weld Pipe Fittings from China Anti-Circumvention Prelim*, and accompanying PDM at 8-9 and 12 unchanged in *Butt-Weld Pipe Fittings from China Anti-Circumvention Final*.

¹²⁵ See *Butt-Weld Pipe Fittings from China Anti-Circumvention Prelim* unchanged in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*; see also *Tissue Paper China Sunlake Anti-Circumvention Preliminary*; and *Tissue Paper China MFVN Anti-Circumvention Final* (which was upheld in *Max Fortune*).

record to incorrectly report type “1” Vietnamese entries as type “3” Korean entries.¹²⁶ However, barring uncooperative companies from participating in the certification process has been shown to be necessary to ensure cooperation in future anti-circumvention inquiries.¹²⁷ Commerce is directed by the SAA to consider whether an uncooperative party could benefit from its failure to cooperate.¹²⁸ 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 4: Whether Precluding Certain Importers and Exporters from Participating in the Certification Process is Inappropriate and Unfairly Punishes Importers

*Ton Dong A’s Case Brief*¹²⁹ and *Hoa Sen’s Case Brief*¹³⁰

- The results of an AFA finding cannot be purposefully punitive. Rather, the purpose of AFA is to “encourage future cooperation and ensure that a respondent does not obtain a more favorable antidumping or countervailing duty rate by failing to cooperate.”¹³¹
- Where the application of AFA in AD and CVD reviews yield particularly high margins, Commerce “must provide a clear explanation for its choice and ample record support for its determination.”¹³²
- Where the result is not a dumping or countervailing rate but, as here, a decision to 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.¹³³
- There is no evidence either that all of Ton Dong A’s or Hoa Sen’s CORE production is sourced from Korea or, alternatively, that Ton Dong A or Hoa Sen are unable to trace the

¹²⁶ See U.S. Importers Group’s Case Brief at 11 and n.39.

¹²⁷ See, e.g., *Max Fortune*; *Tissue Paper China MFVN Anti-Circumvention Final*, and accompanying IDM at Comment 4; *Tissue Paper China Quijiang Anti-Circumvention Final*; *Tissue Paper China Sunlake Anti-Circumvention Final*; and *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, and accompanying IDM at 13.

¹²⁸ See SAA at 870.

¹²⁹ See *Ton Dong A’s Case Brief* at 17-18.

¹³⁰ See *Hoa Sen’s Case Brief* at 17-19.

¹³¹ See *Ton Dong A’s Case Brief* at 17 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*); see also *Hoa Sen’s Case Brief* at 17 citing *Mukand*, 767 F.3d at 1307; and *F.lli De Cecco*, 216 F.3d at 1032.

¹³² See *Ton Dong A’s Case Brief* at 17 citing *Lifestyle Enterprise, Inc.*, 768 F. Supp. 2d at 1298); see also *Hoa Sen’s Case Brief* at 17 (citing *Lifestyle Enterprise, Inc.*, 768 F. Supp. 2d at 1298.

¹³³ See *Ton Dong A’s Case Brief* at 17-18 citing *Qingdao Taifa Grp Co. v. United States*, 34 CIT 1435, 1443, n.7 (2010) (*Qingdao Taifa*); see also *Hoa Sen’s Case Brief* at 17-18 citing *Qingdao Taifa*, 34 CIT at 1443, n.7.

substrate for their exports to the United States.¹³⁴

- 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.¹³⁵

*JFE Shoji's Case Brief*¹³⁶

- 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 *Korea CORE Anti-Circumvention Preliminary Determinations*, is impermissibly punitive not just with respect to the non-responsive companies but also with respect to Optima and JFE Shoji. As a result of this application of AFA, JFE Shoji is now responsible for posting tens of millions of dollars in cash deposits. As a result, the AFA finding is clearly contrary to section 776(b) of the Act and the requirement that Commerce minimize the collateral impact of imposing AFA on one party to the extent that other parties are affected.¹³⁷

*Duferco's Case Brief*¹³⁸

- Parties must be permitted to demonstrate that their products are not subject to antidumping and countervailing duty orders. Commerce cannot punish parties by precluding them from demonstrating to Customs that certain exports are not produced from Korean HRS substrate. For Commerce to create a presumption that an imported product contains Korean substrate is a conclusion that is not supported by law or the facts on the record. 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 Korean substrate.

*Mitsui Case Brief*¹³⁹

- Commerce initiated the circumvention inquiries to determine whether CORE imported from Vietnam using Korean substrate is circumventing the *Korea CORE Orders*. To the extent there were non-responsive companies, their lack of a response was in the circumvention inquiries; it had nothing to do with the certification requirements applicable to the import process.¹⁴⁰
- The statute limits the use of AFA to Commerce's proceeding and not to subsequent import activities which are governed by customs law.¹⁴¹

¹³⁴ See Ton Dong A's Case Brief at 16-17; see also Hoa Sen's Case Brief at 18.

¹³⁵ See Ton Dong A's Case Brief at 18 citing *Tai Shan City Kam Kiu Aluminium Extrusion Co. v. United States*, 58 F. Supp. 3d 1384, 1396 (CIT 2015) (*Tai Shan*); see also Hoa Sen's Case Brief at 18 citing *Tai Shan*, 58 F. Supp. 3d at 1396.

¹³⁶ See JFE Shoji's Case Brief at 45.

¹³⁷ See JFE Shoji's Case Brief at 5 citing *Archer Daniels Midland Co., v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013).

¹³⁸ See Duferco's Case Brief at 3-4.

¹³⁹ See Mitsui's Case Brief at 7-8.

¹⁴⁰ *Id.* at 7.

¹⁴¹ *Id.* at 7.

- There is no support for Commerce’s claim that the statutory provisions governing the use of facts available to determine margins of dumping or subsidies 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.¹⁴²
- Commerce stands the statute on its head by preventing the issuance of documentation that it states is necessary to prove the facts as to the product that is being imported.¹⁴³
- Commerce may use facts available, and perhaps AFA, where a respondent fails to provide necessary information in response to a questionnaire. However, in the *Korea CORE Anti-Circumvention Preliminary Determinations*, 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.¹⁴⁴

*Importer Group’s Case Brief*¹⁴⁵

- The statute does not permit the punitive use of AFA. However, Commerce’s certification exclusion decision is strictly punitive because it is not a necessary part of Commerce’s circumvention determination. In fact, after Commerce made its countrywide circumvention determination, there were no gaps remaining in the record that needed to be filled with “facts available” or with facts adverse to the interests of respondents.
- If Commerce’s concern is that its certification exclusion decision was necessary to prevent circumvention by the non-responsive companies, this is completely at odds with Commerce’ countrywide circumvention determination which presumes that all CORE from Vietnam are circumventing the orders on CORE from Korea. Limiting eligibility for the certification process does not prevent circumvention; rather, it serves only to punish the “non-responsive companies” and to prevent the U.S. companies that imported from them from demonstrating that their CORE imported from Vietnam are not subject to the orders on CORE from Korea.
- The exclusion of certain Vietnamese producers and exporters from the certification process will inevitably result in the imposition of antidumping and countervailing duties on non-subject merchandise. Commerce’s certification scheme will prevent U.S. importers from demonstrating that CORE produced in or exported from Vietnam by an excluded company used non-Korean substrate and, thus, are not subject to the additional duties. As a result, CORE from Vietnam which can be shown to be outside the scope of the orders on Korea will nevertheless be considered subject merchandise.

*Petitioners’ Rebuttal Brief*¹⁴⁶

- 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

¹⁴² *Id.* at 8 citing 19 U.S.C. § 1677e(a)(2) and 19 U.S.C. § 1677e(b).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See U.S. Importers Group’s Case Brief at 6-9, 12-13.

¹⁴⁶ See Petitioners’ Rebuttal Brief at 47-50.

and CRS being processed into CORE.”¹⁴⁷

- 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.¹⁴⁸
- 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.¹⁴⁹
- 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.¹⁵⁰
- 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 administration of affirmative anti-circumvention findings.¹⁵¹
- Commerce’s establishment of a certification process “to administer {this} affirmative finding,” requiring that entries of CORE from Vietnam that are made from substrate sourced from a country other than Korea 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 consistent with Commerce’s obligation to administer the law in a manner that “prevent{s} evasion of the *CORE Orders*” and determinations in *CORE from China* and *CORE for Korea*.¹⁵²

Commerce 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.¹⁵³

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

¹⁴⁷ *Id.* at 47 citing *Initiation Notice*, 83 FR at 37794-95.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 48 citing *Butt-Weld Pipe Fittings China Anti-Circumvention Final* and accompanying IDM at 20; and *Korea CORE Anti-Circumvention Preliminary Determinations*.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 48 citing *Butt-Weld Pipe Fittings China Anti-Circumvention Final* and accompanying IDM at Comment 3; *Garment Hangers China Anti-Circumvention Final*, and accompanying IDM at Comment 4; and *Tissue Paper China ARPP Anti-Circumvention Final*, and accompanying IDM at Comment 2.

¹⁵² *Id.* at 50 citing *Butt-Weld Pipe Fittings China Anti-Circumvention Final*; and *Korea CORE Anti-Circumvention Preliminary Determinations*

¹⁵³ *See, e.g., Garment Hangers China Anti-Circumvention Final*, and accompanying IDM at Comment 4.

to the United States and the origin of any imported HRS and CRS being processed into CORE.”¹⁵⁴ 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.¹⁵⁵ 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 States are of Chinese origin on a transaction-specific basis,” is crucial to administration of affirmative anti-circumvention findings.¹⁵⁶ 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.¹⁵⁷

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,¹⁵⁸ and that the purpose of precluding companies from participating in the certification process is punitive.¹⁵⁹ Similarly, we disagree with Duferco’s argument that Commerce’s decision to preclude uncooperative respondents is capricious and arbitrary.¹⁶⁰ 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. Except where, as in this case, no cooperative producer reported U.S. exports produced from substrate made in the country of the order, Commerce would not need to base significant parts of its country-wide determination on AFA. 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 *CRS Korea Anti-Circumvention Preliminary* and *CORE Taiwan Anti-Circumvention Preliminary*, 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

¹⁵⁴ See *Initiation Notice*, 83 FR at 37790.

¹⁵⁵ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, and accompanying IDM at 21; see also *Korea CORE Anti-Circumvention Preliminary Determinations*; section 781(b)(1)(E) of the Act; and *Tissue Paper China Quijiang Anti-Circumvention Final*.

¹⁵⁶ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, and accompanying IDM at Comment 3; see also *Garment Hangers China Anti-Circumvention Final*, and accompanying IDM at Comment 4; and *Tissue Paper China ARPP Anti-Circumvention Final*, and accompanying IDM at Comment 2.

¹⁵⁷ See *Butt-Weld Pipe Fittings from China Anti-Circumvention Final*; see also *Korea CORE Anti-Circumvention Preliminary Determinations*.

¹⁵⁸ See Ton Dong A’s Case Brief at 17-18; see also Optima Case Brief at 4, 6, and 8; and JFE Shoji Case Brief at 4.

¹⁵⁹ See Ton Dong A’s Case Brief at 18 (citing *Tai Shan*, 58 F. Supp. 3d at 1396); see also Hoa Sen’s Case Brief at 18 (citing *Tai Shan*, 58 F. Supp. 3d at 1396).

¹⁶⁰ See Duferco’s Case Brief at 3.

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.

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."¹⁶¹ 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,¹⁶² that there is not support authorizing Commerce to preclude the use of documentation related to customs clearance or liquidation of customs entries,¹⁶³ 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.¹⁶⁴ Commerce has previously barred uncooperative parties from certification processes in anti-circumvention proceedings, and this practice was previously upheld by the CIT.¹⁶⁵ 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 the *China CORE Anti-Circumvention Final* and *China CRS Anti-Circumvention Final*.

In *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 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.¹⁶⁶ 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.¹⁶⁷ Importantly, Commerce continued to find several other unresponsive companies in the same inquiry to be uncooperative and continued to bar these companies from

¹⁶¹ See Optima Steel's Case Brief at 8-9 citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013).

¹⁶² See Mitsui Case Brief at 7.

¹⁶³ *Id.* at 8.

¹⁶⁴ *Id.* at 8.

¹⁶⁵ *Id.* at 8 citing *Max Fortune*.

¹⁶⁶ See *Butt-Weld Pipe Fittings Anti-Circumvention Preliminary Determination*, and accompanying PDM at 8-10; see also *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 84 FR at 29165.

¹⁶⁶ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 84 FR at 29165.

¹⁶⁷ See *Butt-Weld Pipe Fittings Anti-Circumvention Prelim*, and accompanying PDM at 8-10, unchanged in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 84 FR at 29165.

the certification process.¹⁶⁸ 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 practice of barring uncooperative respondents from a certification process.¹⁶⁹ 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."¹⁷⁰

We also disagree with MISA that Commerce can suspend liquidation only from the date of the *Korea CORE Anti-Circumvention Preliminary Determinations*. 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 the imported HRS or 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.¹⁷¹

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

¹⁶⁸ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 84 FR at 29165.

¹⁶⁹ See *Max Fortune*; see also *Tissue Paper China MFVN Anti-Circumvention Final*; *Tissue Paper China Quijiang Anti-Circumvention Final*; and *Tissue Paper China Sunlake Anti-Circumvention Final*.

¹⁷⁰ See *KYD*, 607 F.3d at 768.

¹⁷¹ See *Initiation Notice*, 83 FR at 37795.

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.

Comment 5: Whether Commerce Should Allow Additional Time for Completing Certifications for Pre-Preliminary Determination Entries

*Mitsui Case Brief*¹⁷²

- 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 *Korea CORE Anti-Circumvention Preliminary Determinations* 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.
- Commerce recognized in the Chinese circumvention inquiries 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 preliminary circumvention determination. The 30-day deadline imposed in the *Korea CORE Anti-Circumvention Preliminary Determinations* 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 Position: We agree with Mitsui that the Customs instructions relaying the certification requirements did not post until more than 30 days after the *Korea CORE Anti-Circumvention Preliminary Determinations* 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 determinations 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 *Korea CORE Anti-Circumvention Preliminary Determinations* and the accompanying PDM 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.

¹⁷² See Mitsui Case Brief at 13-14.

Comment 6: Whether Country-Wide Determinations Are 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.¹⁷³

Petitioners' Rebuttal Brief

- Commerce's preliminary country-wide findings in the *Korea CORE Anti-Circumvention Preliminary Determinations* 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.¹⁷⁴
- As Commerce explained in *Butt-Weld Pipe Fittings China Anti-Circumvention Prelim* 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. The country-wide determinations are consistent with *Butt-Weld Pipe Fittings China Anti-Circumvention Prelim* and the May 2019 preliminary determination in *Aluminum Extrusions from China*.¹⁷⁵

Commerce 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 China Anti-Circumvention Final*,¹⁷⁶ 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.¹⁷⁷ Furthermore, as explained above under "Country-Wide Determinations, section" the facts in this case warrant issuing a findings on a country-wide basis.

Commerce has taken this approach in other anti-circumvention inquiries, where the facts warrant such a finding.¹⁷⁸ 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.¹⁷⁹ Thus, we continue to hold the view that the

¹⁷³ See Formosa's Case Brief at 5.

¹⁷⁴ See Petitioners' Rebuttal Brief at 8-10.

¹⁷⁵ *Id.*

¹⁷⁶ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.

¹⁷⁷ See *Initiation Notice*, 83 FR at 37790.

¹⁷⁸ See, e.g., *Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 FR 23891 (May 23, 2018) (*China Cold-Rolled Anti-Circumvention Final*), and accompanying IDM at Comment 3.

¹⁷⁹ See *China CORE Anti-Circumvention Final*, and accompanying IDM.

statute confers Commerce with the authority to issue country-wide determinations of circumvention, where appropriate.

Additionally, absent country-wide findings, our concern is that additional unidentified Vietnamese companies could rely on Korea HRS and/or CRS as their substrate in the future. This is, after all, the very nature of these inquiries: Korean 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 7: 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 *KOREA CORE ORDERS*

Hoa Sen’s and Ton Dong A’s Case Briefs

- 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.¹⁸⁰ 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.”¹⁸¹
- Commerce has previously found that CORE is not of the same class or kind as CRS 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.”¹⁸² 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.¹⁸³
- 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.¹⁸⁴ Commerce has been careful in its orders on HRS, CRS, and CORE to include only steel that is substantially transformed into the product and inside the country that is subject to the order.¹⁸⁵

¹⁸⁰ See Hoa Sen’s Case Brief at 22 citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Steel Flat Products from Argentina*, 58 FR 37062 (July 9, 1993) at Appendix I (Scope Issues) (*CRS from Argentina Investigation*); see also Ton Dong A’s Case Brief at 24 citing *CRS from Argentina Investigation* at Appendix I (Scope Issues).

¹⁸¹ See Hoa Sen’s Case Brief at 22 citing *CRS from Argentina Investigation* (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}”) see also Ton Dong A’s Case Brief at 24 citing *CRS from Argentina Investigation*.

¹⁸² See Hoa Sen’s Case Brief at 24; see also Ton Dong A’s Case Brief at 25.

¹⁸³ See Hoa Sen’s Case Brief at 24; see also Ton Dong A’s Case Brief at 25.

¹⁸⁴ See Hoa Sen’s Case Brief at 25; see also Ton Dong A’s Case Brief at 25.

¹⁸⁵ See Hoa Sen’s Case Brief at 26; see also Ton Dong A’s Case Brief at 26-27.

- Thus, Commerce’s prior affirmative finding of circumvention in CORE produced in Vietnam using Chinese 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.¹⁸⁶ Commerce also did not provide justification based on the governing statutory language.¹⁸⁷
- Commerce has turned the meaning of the words “minor” and “insignificant” upside down and exceeded its authority by unlawfully expanding the definition and scope of the circumvention.¹⁸⁸ 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.”¹⁸⁹ There is no court precedent which has found that the substantial transformation standard is inconsistent with the minor or insignificant provision of the statute.
- 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.”¹⁹⁰ This would allow the circumvention statute to be used to expand an order to include merchandise described by the physical characteristics of the order without any consideration as to where it is produced.¹⁹¹
- 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.¹⁹² 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.¹⁹³
- As *SunPower Corp Remand* suggests, the risk of creating overlapping and complicated scopes would lead to situations where, in a more recent anti-circumvention determination involving a substantially transformed merchandise from a third country containing the same physical characteristics enumerated in the order, Commerce would be forced to exclude the merchandise found to be circumventing in an earlier determination.¹⁹⁴ CORE from Vietnam

¹⁸⁶ See Hoa Sen’s Case Brief at 27; see also Ton Dong A’s Case Brief at 28.

¹⁸⁷ See Hoa Sen’s Case Brief at 27; see also Ton Dong A’s Case Brief at 28.

¹⁸⁸ See Hoa Sen’s Case Brief at 28; see also Ton Dong A’s Case Brief at 29.

¹⁸⁹ See Hoa Sen’s Case Brief at 29 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; see also Ton Dong A Case Brief at 29 citing *Stainless Steel Plate from Belgium*, and accompanying IDM at Comment 4.

¹⁹⁰ See Hoa Sen’s Case Brief at 29-30; see also Ton Dong A’s Case Brief at 30 citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (CAFC 1998) (*Wheatland Tube*).

¹⁹¹ See Hoa Sen’s Case Brief at 30; see also Ton Dong A’s Case Brief at 30.

¹⁹² See Hoa Sen’s Case Brief at 30-31 citing *E.I. Du Pont de Nemours & Co. v. United States*, 8 F. Supp. 2d 854, 859 (CIT 1998) (*E.I. Du Pont*); see also Ton Dong A’s Case Brief at 31 citing *E.I. Du Pont*, 8 F. Supp. 2d at 859.

¹⁹³ See Hoa Sen’s Case Brief at 31; see also Ton Dong A’s Case Brief at 31.

¹⁹⁴ See Hoa Sen’s Case Brief at 31; see also Ton Dong A’s Case Brief at 32 both citing *SunPower Corp. v. United States*, Consol. Ct. No. 15-00067, Slip Op. 16-56 (June 18, 2016): Final Results of Redetermination Pursuant to Court Order (October 4, 2016) (*SunPower Remand*) (“A single product cannot be subject to two different antidumping orders that cover merchandise from two different countries.”).

is potentially subject to at least four orders, CORE from China, Korea, Taiwan and possibly in the future, Vietnam.¹⁹⁵ If Commerce were to initiate an investigation on CORE from 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.¹⁹⁶

- The creation of such a complicated scope is akin to the complicated scope that the CIT rejected in *Wheatland Tube*, where the CAFC concluded that Congress did not authorize Commerce to find a “minor alteration” when it resulted in a change in the class or kind of merchandise.¹⁹⁷ Similarly, Congress did not intend to grant Commerce the authority to find “minor or insignificant” processing where it yielded a different class or kind of merchandise.¹⁹⁸
- The scope of the *Korea CORE Orders* clearly excludes HRS and CRS that is not galvanized and would be subject to the orders of either HRS or CRS from Korea, which Commerce has classified as distinct classes or kinds of merchandise.¹⁹⁹ It is contrary to the statutory scheme of the AD and CVD laws to attempt now to include HRS or CRS produced in Korea that is imported to Vietnam and further galvanized in Vietnam within the *Korea CORE Orders*.²⁰⁰

JFE Shoji and Optima Steel’s Case Briefs

- Changes from HRS and CRS to CORE cannot, under any circumstance, be deemed to be minor and insignificant as Commerce found in its *Korea CORE Anti-Circumvention Preliminary Determinations*.²⁰¹ HRS, CRS, and CORE are and have always been separate classes or kinds of merchandise for both Commerce and the ITC. Commerce appears to have ignored the facts or the governing law.²⁰² Commerce’s *Korea CORE Anti-Circumvention Preliminary Determinations* are unlawful.²⁰³

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.²⁰⁴ Commerce lawfully conducted the inquiry by adhering to the statutory framework and applied the facts to make its *Korea CORE Anti-Circumvention Preliminary Determinations*.²⁰⁵ Commerce should, thus, reject parties’ argument that these anti-circumvention proceedings unlawfully expanded the scope of the *Korea CORE Orders*.²⁰⁶

¹⁹⁵ See Hoa Sen’s Case Brief at 31-32; *see also* Ton Dong A’s Case Brief at 32.

¹⁹⁶ See Hoa Sen’s Case Brief at 32; *see also* Ton Dong A’s Case Brief at 32.

¹⁹⁷ See Hoa Sen’s Case Brief at 32; *see also* Ton Dong A’s Case Brief at 32.

¹⁹⁸ See Hoa Sen’s Case Brief at 32 citing *Wheatland Tube*, 161 F.3d at 1371; *see also* Ton Dong A’s Case Brief at 32 citing *Wheatland Tube*, 161 F.3d at 1371.

¹⁹⁹ See Hoa Sen’s Case Brief at 33; *see also* Ton Dong A’s Case Brief at 33-34.

²⁰⁰ See Hoa Sen’s Case Brief at 33; *see also* Ton Dong A’s Case Brief at 33-34.

²⁰¹ See JFE Shoji’s Case Brief at 5; *see also* Optima Steel’s Case Brief at 6.

²⁰² See JFE Shoji’s Case Brief at 6; *see also* Optima Steel’s Case Brief at 6-7.

²⁰³ See JFE Shoji’s Case Brief at 6; *see also* Optima Steel’s Case Brief at 6-7.

²⁰⁴ See Petitioners’ Rebuttal Brief at 14.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

- Analysis of trade patterns, *i.e.*, U.S. imports of CORE from Korea, U.S. imports of CORE from Vietnam, and exports of Korea inputs to Vietnam, suggests shifts in shipping and sourcing patterns following the implementation of the *Korea CORE Orders*.²⁰⁷ 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.²⁰⁸
- In the *Korea CORE Anti-Circumvention Preliminary Determinations*, Commerce provided analyses of the five criteria established in the statute.²⁰⁹ It is unreasonable for certain parties to claim that the “minor or insignificant” processing analyses conducted in the *Korea CORE Anti-Circumvention Preliminary Determinations* were not comprehensive and well supported by record evidence.²¹⁰ Parties cite to no meaningful authority with their argument that Commerce has turned the statutory tests “upside down.”²¹¹²¹²
- Because the merchandise under consideration and the production facilities are identical in the anti-circumvention proceeding of *CORE from China* and this instant proceeding, Commerce’s reliance on facts available in this inquiry actually relied on Hoa Sen and Ton Dong A’s own data.²¹³ Moreover, Hoa Sen and Ton Dong A did not object to Commerce’s findings in *CORE from China*, because they did not pursue appeals of the determination.²¹⁴
- Congress directed Commerce to apply statutory factors to determine whether merchandise subsequently processed in third countries circumvented an AD or CVD order.²¹⁵ None of the enumerated statutory factors include a “substantial transformation” test; rather, they focus on quantitative and qualitative assessment to determine circumvention.²¹⁶ Commerce has already addressed the intersection between its substantial transformation practice and its administration of the statute.²¹⁷ Hoa Sen and Ton Dong A are, thus, incorrect that Commerce has not explained its departure from its practice or deviation from court rulings contrary to the basis being used to make its *Korea CORE Anti-Circumvention Preliminary Determinations*.²¹⁸
- 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.²¹⁹ Congress explicitly provided Commerce directive to apply practical measurements regarding minor alterations even where such alterations to an article technically transform into a different article.²²⁰ Congress’ intent that “minor” changes could result in the production of a different article, whether or not {the finished good is}

²⁰⁷ *Id.* at 15-16.

²⁰⁸ *Id.* at 16-18.

²⁰⁹ *Id.* at 18-21.

²¹⁰ *Id.* at 21.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 22.

²¹⁴ *Id.*

²¹⁵ *Id.* at 23.

²¹⁶ *Id.*

²¹⁷ *Id.* at 23-24 citing *CORE from China*, and accompanying IDM at Comment 1.

²¹⁸ *Id.* at 25.

²¹⁹ *Id.* at 25-26 citing SAA at 844.

²²⁰ *Id.* at 26.

included in the same tariff classification, also manifests itself in the anti-circumvention statute.²²¹

- 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.²²² These factors do not include reference to a substantial transformation test that is used for country of origin or CBP classification purposes.²²³
- Hoa Sen and Ton Dong A's reference to *Wheatland Tube* to argue the risk of creating an overlapping and complicated scopes lack merit because: 1) *Wheatland Tube* concerned a scope inquiry, whereas the circumvention statute requires Commerce to consult with the ITC before reaching a final affirmative circumvention; 2) *Wheatland Tube* considered products explicitly excluded from an order and the absurd result of including within an order products expressly excluded from that order.²²⁴ The facts is not analogous to what was presented in *Wheatland Tube*.²²⁵
- Commerce was not required to seek guidance from the ITC in *Wheatland Tube* where it involved a scope inquiry limited to a discussion of the circumvention addressing minor alterations to merchandise subject to an AD or CVD order.²²⁶ Thus, for this instant proceeding, Congress provided, and Commerce followed, a mechanism to ensure that the ITC's injury determinations would not be undermined by circumvention proceedings that were otherwise intended to protect the injured domestic industry.²²⁷

Commerce 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 *Korea CORE Orders*. As explained in prior anti-circumvention proceedings,²²⁸ 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 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.²²⁹ Thus, Commerce's determination on

²²¹ *Id.*

²²² *Id.* at 27.

²²³ *Id.*

²²⁴ *Id.* at 27-28.

²²⁵ *Id.*

²²⁶ *Id.* at 29.

²²⁷ *Id.*

²²⁸ See, e.g., *China CORE Circumvention Determination*, and accompanying IDM at Comments 1 and 2; *China CRS Anti-Circumvention Determination*, and accompanying IDM at Comments 1 and 2.

²²⁹ 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 *CRS from Argentina Investigation*.

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.²³⁰ In determining country of origin of a product, Commerce's usual practice has been to conduct a substantial transformation analysis.²³¹ 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"²³² and whether "through that transformation, the new article becomes a product of the country in which it was processed or manufactured."²³³ Commerce may examine a number of factors²³⁴ 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.²³⁵

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.²³⁶ 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 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.²³⁷ As part of this analysis, Commerce also considers additional factors such as: pattern of trade, including sourcing patterns; whether

²³⁰ 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).

²³¹ 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; *Stainless Steel Plate from Belgium*, IDM at Comment 4.

²³² See *Bell Supply Co., LLC v. United States*, 888 F.3d 1222, 1230 (CAFC 2018) (*Bell Supply CAFC*) (internal quotations and citations omitted).

²³³ See *Cold-Rolled Steel from Argentina*, 58 FR at 37065 (quoted in *Ugine and Alz Belgium N.V. v. United States*, 571 F. Supp. 2d 1333, 1337 n.5 (CIT 2007)).

²³⁴ 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; *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.

²³⁵ See *LWS from China*, IDM at Comment 1b.

²³⁶ See *Bell Supply CAFC*, 888 F.3d at 1230 ("Although substantial transformation and circumvention inquiries are similar, they are not identical.").

²³⁷ See sections 781(b)(C)-(E) of the Act.

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.²³⁸ 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 *Korea CORE Anti-Circumvention Preliminary Determinations*, 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.²³⁹ The *Korea CORE Anti-Circumvention Preliminary Determinations* are 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.²⁴⁰

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 Korean substrate has a country of origin of Vietnam and cannot be properly covered by the scope of the *Korea CORE Orders*. 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

²³⁸ See section 781(b)(3) of the Act.

²³⁹ See, e.g., *Cold-Rolled Steel 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.”); *Stainless Steel Plate from Belgium*, and accompanying 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).

²⁴⁰ 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*).

country not covered by the relevant AD or CVD orders.”²⁴¹ 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}he 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.”²⁴² 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.’”²⁴³ 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.”²⁴⁴ 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.²⁴⁵ Similarly, the 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.”²⁴⁶ In sum, it is evident from the above that Congress anticipated that circumvention could result in a situation where, despite the merchandise undergoing some

²⁴¹ See *Bell Supply CAFC*, 888 F.3d at 1229.

²⁴² *Id.*, 888 F.3d at 1231.

²⁴³ *Id.*

²⁴⁴ See H.R. Rep. No. 100-576 at 603 (emphasis added).

²⁴⁵ See SAA at 893.

²⁴⁶ *Id.* at 844 (emphasis added).

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 CAFC'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*."²⁴⁷ The Act "identifies four articles that may fall within the scope of a duty order without unlawfully expanding the order's reach,"²⁴⁸ *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.²⁴⁹ 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}."²⁵⁰

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."²⁵¹ 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*."²⁵²

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 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.²⁵³ As

²⁴⁷ See *Deacero S.A. de C.V. v. United States*, 817 F.3d 1332, 1338 (CAFC 2016) (*Deacero*) (emphasis added).

²⁴⁸ *Id.*

²⁴⁹ 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.

²⁵⁰ See *Bell Supply CAFC*, 888 F.3d at 1230.

²⁵¹ *Id.*, 888 F.3d at 1229.

²⁵² See *Deacero*, 817 F.3d at 1338 (emphasis added).

²⁵³ 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

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 8: Whether Commerce Should Amend the Exporter Certification Requirements to Prevent Funneling

Petitioners' Case Brief

- Commerce should not undermine the efficacy of its circumvention determination and adjust the Korean 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.²⁵⁴
- The current certification scheme does not address situations where an eligible exporter exports CORE produced by producers that are deemed unresponsive, thus ineligible to certify.²⁵⁵ The current language of the exporter certification 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.²⁵⁶
- This 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.²⁵⁷ Specifically, Hoa Phat Steel Sheet Co., Ltd. can export CORE produced by its affiliates, Hoa Phat Joint Stock Company and Hoa Phat Steel Pipe Co., Ltd., as they are currently ineligible to participate.²⁵⁸
- Commerce should close this loophole by requiring exporters to certify that the CORE they export are exporting was not produced by those that are currently ineligible to certify and has not advanced to cooperative statute through successful completion of a future segment of this proceeding.²⁵⁹
- 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.²⁶⁰

Affirmative Preliminary Determinations of Circumvention of the Antidumping Duty and Countervailing Duty Order,” dated September 17, 2019 (ITC Letter).

²⁵⁴ See Petitioners' Case Brief at 6 (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.”); *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 Dev. Co.*), *aff'd* 354 F.3d 1371 (CAFC 2004) (finding that Commerce has a responsibility to prevent the evasion of payment of antidumping duties)).

²⁵⁵ *Id.* at 6-7.

²⁵⁶ *Id.* at 7-8.

²⁵⁷ *Id.* at 8.

²⁵⁸ *Id.* at 8.

²⁵⁹ *Id.* at 7.

²⁶⁰ *Id.* at 8-9.

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 Anticircumvention inquiry.²⁶¹ The best solution to address this concern is to require all companies to participate in the certification process.²⁶²
- 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.²⁶³ Such documentation will confirm the actual producer of CORE produced in Vietnam and the source of the substrate used to produce the product.²⁶⁴

Ton Dong A’s Rebuttal Brief, JFE Shoji’ Rebuttal Brief, and Optima Steel’s Rebuttal Brief

- Certain companies that Commerce has previously identified as “non-responsive” were “non-responsive” solely because they never received the Q&V questionnaire.²⁶⁵ Commerce also issued the Q&V questionnaire to Formosa which only produced HRS substrate in Vietnam.²⁶⁶ Precluding companies such as Formosa that only produce HRS in Vietnam from certifying is contrary to law because none of Formosa’s HRS used to produce CORE in Vietnam is of Korean-origin.²⁶⁷
- The only information Commerce initially sought in the Q&V questionnaire stage is whether the company’s Q&V of CORE exports, not its ability to trace substrate.²⁶⁸ Commerce thus cannot lawfully preclude so-called “non-responsive” from participating in the certification process when they were never asked whether they have the ability to trace the source of their substrate.²⁶⁹
- As argued in the case briefs, there was no basis for an affirmative circumvention finding in the first place.²⁷⁰ However, if Commerce is to establish a certification regime pursuant to a circumvention decision, the proper certification regime would be to allow all companies to certify.²⁷¹ This is what Commerce did in the prior circumvention of CORE from China, and the same procedure should be followed here.²⁷²

²⁶¹ See U.S. Importers Group’s Rebuttal Brief at 5.

²⁶² *Id.*

²⁶³ *Id.* at 6.

²⁶⁴ *Id.*

²⁶⁵ See Ton Dong A’s Rebuttal Brief at 12; JFE Shoji’s Rebuttal Brief at 11-12; *see also* Optima Steel’s Rebuttal Brief at 11-12.

²⁶⁶ See Ton Dong A’s Rebuttal Brief at 12; JFE Shoji’s Rebuttal Brief at 12; *see also* Optima Steel’s Rebuttal Brief at 12.

²⁶⁷ See Ton Dong A’s Rebuttal Brief at 12; JFE Shoji’s Rebuttal Brief at 12; *see also* Optima Steel’s Rebuttal Brief at 12.

²⁶⁸ See Ton Dong A’s Rebuttal Brief at 12-13; JFE Shoji’s Rebuttal Brief at 12; *see also* Optima Steel’s Rebuttal Brief at 12.

²⁶⁹ See Ton Dong A’s Rebuttal Brief at 12-13; JFE Shoji’s Rebuttal Brief at 12; *see also* Optima Steel’s Brief at 12.

²⁷⁰ See Ton Dong A’s Rebuttal Brief at 13; JFE Shoji’s Rebuttal Brief at 12; *see also* Optima Steel’s Rebuttal Brief at 12.

²⁷¹ See Ton Dong A’s Rebuttal Brief at 13; JFE Shoji’s Rebuttal Brief at 12; *see also* Optima Steel’s Rebuttal Brief at 12-13.

²⁷² See Ton Dong A’s Rebuttal Brief at 13; JFE Shoji’s Rebuttal Brief at 12; *see also* Optima Steel’s Rebuttal Brief at 13.

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.²⁷³
- 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.²⁷⁴
- Specifically, *Activated Carbon from China* involved an administrative review where Commerce stated that it is its practice to apply combination rates only in new shipper reviews and administrative reviews on a case-by-case basis.²⁷⁵ Commerce ultimately determined that it is unnecessary to apply combination rates.²⁷⁶
- Moreover, *Tung Mung Dev. Co.* involved a rare "middleman" investigation within the context of an AD investigation and did not address circumvention allegations.²⁷⁷ The petitioners argued against the application of combination rates, and Commerce rejected their argument as "pure speculation."²⁷⁸
- 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.²⁷⁹
- 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.²⁸⁰ 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.²⁸¹

Mitsui's Rebuttal Brief

- The petitioners' request to amend the exporter certification to prevent non-responsive companies from funneling CORE to the United States through cooperative companies is not a funneling issue.²⁸² The potential problem arises because 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.²⁸³
- Commerce has preliminarily determined to penalize the Vietnamese mills that produce CORE and allegedly did not respond to the Q&V questionnaire by precluding them from issuing an exporter certification.²⁸⁴ However, this issue pertains only to allegedly non-

²⁷³ See MISA's Rebuttal Brief at 5.

²⁷⁴ *Id.* at 3.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 3-4.

²⁷⁷ *Id.* at 4 citing *Tung Mung Dev. Co.*, 219 F. Supp. 2d at 1335.

²⁷⁸ *Id.* at 4-5 citing *Tung Mung Dev. Co.*, 219 F. Supp. 2d at 1335.

²⁷⁹ *Id.* at 5.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² See Mitsui Rebuttal Brief at 3.

²⁸³ *Id.*

²⁸⁴ *Id.* at 4.

responsive mills who also serve as exporters.²⁸⁵ Such treatment should not apply to exporters unaffiliated with those mills.²⁸⁶

- As 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.²⁸⁷
- If Commerce had desired that the mill issues the certification, it would have done so.²⁸⁸ Having not done so in the *Korea CORE Anti-Circumvention Preliminary Determinations* 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.²⁸⁹
- 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.²⁹⁰ Mitsui, however, has been a legitimate exporter for a long time, and it is not funneling in any sense of the world.²⁹¹
- The petitioners’ request to amend the exporter certification language goes beyond preventing funneling, it prevents an exporter from certifying that the CORE they export from Vietnam is not produced from Korean substrate.²⁹² Such request expands the application of AFA and must be rejected.²⁹³

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 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 *Korea CORE Anti-Circumvention Preliminary Determinations* 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 above, 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.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 4-5.

²⁹¹ *Id.*

²⁹² *Id.* at 5.

²⁹³ *Id.*

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."²⁹⁴ 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."²⁹⁵ As such, consistent with *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, *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 *Korea CORE Anti-Circumvention Preliminary Determinations* 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 Korea 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 9, we are prohibiting HPSS and Hoa Phat JSC from certifying that CORE was not produced from HRS and/or CRS substrate manufactured in Korea for any shipment of CORE produced by HPSP.

Comment 9: Whether to Apply AFA to Certain Vietnamese Producers That Are Affiliated with Those That Are Deemed Non-Responsive

*Hoa Phat Group's Case Brief*²⁹⁶

- Hoa Phat Group Joint Stock Company (Hoa Phat JSC) and its subsidiaries, Hoa Phat Steel Pipe (HPSP) and Hoa Phat Steel Sheet (HPSS), maintain that:
 - Hoa Phat JSC never received Commerce's Q&V questionnaire in these anti-circumvention inquiries. The FedEx delivery information on the records of these anti-circumvention inquiries confirmed that the Q&V questionnaire was not properly sent to Hoa Phat JSC.²⁹⁷
 - 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.²⁹⁸
 - 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.²⁹⁹
- 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 Korea CORE certification process.³⁰⁰

²⁹⁴ See H.R. Rep. No. 40, 100th Congress, 1st Sess., Part 1 at 135 (1987).

²⁹⁵ See Senate Report No. 71, 100th Congress 1st Sess. (1987) at 100.

²⁹⁶ See Hoa Phat Group's Case Brief at 1-3.

²⁹⁷ *Id.* at 2.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 2-3.

Petitioners' Case Brief

- 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 Korean CORE Certification process.³⁰¹ To address the likelihood of funneling, Commerce should amend the Korea CORE Certification to prevent non-cooperating companies from undermining Commerce's AFA determination by funneling.³⁰²
- 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 Korea CORE Certification process should be denied.³⁰³

Commerce Position: For these final determinations, we are not applying AFA to Vietnamese companies who did not receive our questionnaires. The records of these inquiries 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 or HPSS failed to cooperate to the best of their ability. Thus, in our instructions to CBP following publication of these final determinations, 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 Korean certification process when the CORE they export was produced by HPSP or any other non-responsive company.

Comment 10: Whether Commerce Should Preclude Certain Companies That Failed to Not Cooperate in Both the CORE from China and CORE from Taiwan Inquiries from Participating in the Certification Regime

*Petitioners' Case Brief*³⁰⁴

- The *Korea CORE Anti-Circumvention Preliminary Determinations* failed to address widespread uncooperativeness among Vietnamese CORE producers in the *China CORE Anti-Circumvention Final*.³⁰⁵
- In these final determinations, Commerce should identify the non-responsive companies from the CORE from China anti-circumvention inquiries and preclude them from

³⁰¹ See Petitioners' Case Brief at 8-9.

³⁰² *Id.*

³⁰³ See Petitioners' Rebuttal Brief at 33.

³⁰⁴ See Petitioners' Case Brief at 9-12.

³⁰⁵ *Id.* at 11.

participation in the Korea CORE certification process.

- In addition, Commerce should also identify which of the non-responsive companies in the *Korea CORE Anti-Circumvention Preliminary Determinations* also failed to cooperate in the *China CORE Anti-Circumvention Final* and preclude them from participating in the China CORE certification process.³⁰⁶
- Commerce should assign serial non-responsive companies the AD and CVD “all-others” rates from the *China CORE Orders*.³⁰⁷
- The suspension of liquidation cash deposit instructions accompanying the *Korea CORE Anti-Circumvention Preliminary Determinations* sow confusion on this issue by stating “the companies listed below are currently not eligible to certify that their CORE is not made from Korean or Taiwanese HRS and/or CRS substrate. These companies *may* be eligible to certify their CORE are not made from Chinese HRS and/or CRS substrate.”³⁰⁸
- Because all three CORE anti-circumvention inquiries and certification processes 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.³⁰⁹
- 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.³¹⁰
- In *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, Commerce held that “non-responsive companies, along with their importers, are not eligible to participate in the certification process at this time.”³¹¹ Although Commerce followed this practice in the *Korea CORE Anti-Circumvention Preliminary Determinations* and in the concurrent CORE from Taiwan and CRS from Korea anti-circumvention inquiries, it had not yet implemented this practice when it issued the *China CORE Anti-Circumvention Final*.³¹²

*The U.S. Importers Group’s Rebuttal Brief*³¹³

- 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 quantity and value questionnaires in the *China CORE Anti-Circumvention Final* for the China CORE certification process. The China CORE 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

³⁰⁶ *Id.* at 10 and 13.

³⁰⁷ *Id.* at 10.

³⁰⁸ *Id.* at 11-12 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>).

³⁰⁹ *Id.* at 12 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>).

³¹⁰ *Id.* at 12.

³¹¹ *Id.* at 12-13 citing *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.

³¹² *Id.* at 13.

³¹³ See U.S. Importers Group’s Rebuttal Brief at 6-7.

revisited.³¹⁴

- The practices adopted in subsequent unrelated proceedings cannot be grafted retroactively onto these earlier and now closed proceedings.³¹⁵
- Commerce never found that specific companies failed to respond to the Q&V questionnaires in the *China CORE Anti-Circumvention Final*. Although Commerce noted, at the time, 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 questionnaires in those proceedings.³¹⁶

Optima Rebuttal Brief,³¹⁷ *Tong Dong A Rebuttal Brief*,³¹⁸ and *JFE Shoji Rebuttal Brief*³¹⁹

- There is no legal authority for revisiting the final determination of an anti-circumvention inquiry from another proceeding as part of an AFA decision in the instant anti-circumvention inquiries.³²⁰
- Thus, Commerce correctly permitted all producers, exporters, and importers to participate in the China CORE certification process.³²¹

*Mitsui Rebuttal Brief*³²²

- The petitioner’s request that Commerce should modify its decision in the China anti-circumvention inquiries in the context of the instant anti-circumvention inquiry is clearly misplaced. Commerce cannot retroactively change its decisions in the *China CORE Anti-Circumvention Final* based on the instant final determinations.³²³
- The petitioners’ request highlights the fact that the *Korea CORE Anti-Circumvention Preliminary Determinations* in the instant anti-circumvention inquiries depart from the findings in the *China CORE Anti-Circumvention Final*. This is why Mitsui has argued that Commerce should not retroactively apply the exporter certification exclusion in the Korean CORE anti-circumvention proceedings. However, Commerce’s practice in the *China CORE Anti-Circumvention Final* is not an issue arising from the instant anti-circumvention inquiries.³²⁴

Commerce Position: We find that there is no legal authority to use the outcome of the instant anti-circumvention rulings as the basis to preclude parties that may have been uncooperative in

³¹⁴ *Id.* at 6-7 citing *China CORE Anti-Circumvention Final*; and *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 (May 23, 2018) (*China CORE Preliminary Determinations*) at 82 FR 58171-58172.

³¹⁵ *Id.* at 7.

³¹⁶ *Id.* at 7 citing Petitioners’ Case Brief at 10-11; *China CORE Anti-Circumvention Final*, and accompanying IDM at 48; and *China CORE Preliminary Determination*, and accompanying PDM at 2-5.

³¹⁷ See *Optima’s Rebuttal Brief* at 13.

³¹⁸ See *Tong Dong A’s Rebuttal Brief* at 13-14.

³¹⁹ See *JFE Shoji’s Rebuttal Brief* at 13.

³²⁰ See *Optima’s Rebuttal Brief* at 13; see also *Tong Dong A’s Rebuttal Brief* at 13-14; and *JFE Shoji’s Rebuttal Brief* at 13 citing Petitioners’ Case Brief at 9-13.

³²¹ See *Optima’s Rebuttal Brief* at 13; see also *Tong Dong A’s Rebuttal Brief* at 13-14; and *JFE Shoji’s Rebuttal Brief* at 13.

³²² See *Mitsui’s Rebuttal Brief* at 5-6.

³²³ *Id.* at 5.

³²⁴ *Id.*

the *China CORE Anti-Circumvention Final* from participating in the Korea 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 China Anti-Circumvention Final* and the companion CORE from Taiwan and CRS from Korea inquiries, we had not implemented this practice when we issued the *China CORE Anti-Circumvention Final*. We note that the petitioners did not provide any statutory basis to retroactively applying the same practice to uncooperative parties in the *China CORE Anti-Circumvention Final*. Moreover, petitioners did not provide any legal authority to support their contention that we should retroactively bar non-responsive companies in the instant anti-circumvention inquiries from participation in the *China CORE* certification process.

We also disagree with the petitioners' contention that the liquidation instructions accompanying the *Korea CORE Anti-Circumvention Preliminary Determinations* somehow "sow{s} confusion" by stating that the companies listed in the PDM are not eligible to certify that their CORE is not made from Korean substrate, but that these companies may be eligible to certify their CORE is not made from Chinese substrate. As the petitioners concede, the *CORE from China Anti-Circumvention Finals* 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 instructions is appropriate.

These Korea CORE anti-circumvention decisions 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 inquiries to bar non-cooperative parties from the Korea CORE certification process should not be extended retroactively to the *China CORE* certification processes that resulted from the *China CORE Anti-Circumvention Final*.

Comment 11: Whether to Apply the Highest Petition Rate or Investigation Calculated Rate as the Cash Deposit Rate for Non-Responsive Companies

*Petitioners' Case Brief*³²⁵

- According to *Korea CORE Anti-Circumvention Preliminary Determinations*, the non-responsive companies are currently subject to the all-others rates applicable to the *Korea CORE Orders*, 8.31 percent and 1.19 percent. As such, the combined "AFA" rate is 9.50 percent. However, the underlying AD and CVD rates reflect the pricing decisions and subsidization of cooperative respondents. Thus, the current combined cash deposit rate applicable to non-responsive entities is not sufficiently adverse.³²⁶
- In the final determinations of these inquiries, therefore, Commerce should apply a

³²⁵ See Petitioners' Case Brief at 3-6.

³²⁶ *Id.* at 3.

combination of the highest AD and CVD rates stated in the petitions or that were calculated in the respective investigations. For the AD component, Commerce should use 86.34 percent, the highest rate from the petition. For the CVD component, Commerce should continue to use 1.19 percent, the highest calculated rate reported in the *CVD Korea CORE Order*. The use of these AFA rates is in accordance with section 776(b) of the Act. The combined cash deposit rate for non-responsive entities allowed to certify with respect to consumption of Chinese origin substrate would be 87.34 percent.³²⁷

*Mitsui's Rebuttal Brief*³²⁸

- The AD and CVD cash deposit rates potentially applied to CORE allegedly produced by non-responsive companies with Korean substrate must be based on the rates from the *Korea CORE Orders*. The cash deposit rates should be that of the substrate producer if known, and if not known then the all-others rate.³²⁹

*JFE Shoji's Rebuttal Brief*³³⁰

- The imposition of the highest rate calculated in the petition for the *AD Korea CORE Order* as the AFA rate would be contrary to law. Use of the highest petition rate as the AFA rate in the instant inquiries is contrary to section 776 of the Act and 19 CFR 351.308(c). The petitioners' argument regarding the application of petition rate, 86.34 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 petitioners argue cannot be corroborated.³³¹
- As the CIT stated in *POSCO v. United States*, if 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 petitioners that is derived wholly from AFA.³³²

*MISA's Rebuttal Brief*³³³

- 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 cash deposits for all CORE exported by the non-responsive Vietnamese producers, Commerce should continue to apply the all-others rate.³³⁴
- The petitioners do not explain why the application of the Korea CORE all-others rates are 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

³²⁷ *Id.* at 3-4.

³²⁸ See Mitsui's Case Brief at 2-3.

³²⁹ *Id.*

³³⁰ See JFE Shoji's Rebuttal Brief at 6-11.

³³¹ *Id.* at 10-11.

³³² *Id.* citing *POSCO v. United States*, 296 F. Supp.3d 1320, 1353 (CIT 2018).

³³³ See MISA's Rebuttal Brief at 5-9.

³³⁴ *Id.* at 5-6.

apply the draconian remedy of setting the AD cash deposit rate based on the petition in the *AD Korea CORE Order*.³³⁵

*U.S. Importers Group's Rebuttal Brief*³³⁶

- Applying a combined AD/CVD rate based on the highest margins alleged in the petitions or calculated in the original investigations would be arbitrary and punitive and unnecessary to ensure cooperation in Commerce's proceedings.³³⁷
- 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.³³⁸
- As was explained in the *China CORE Anti-Circumvention Final*, 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.³³⁹
- 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.³⁴⁰

Commerce Position: We find that the imposition of the highest petition rate in the *AD Korea CORE Order* as the AFA rate would be contrary to section 776 of the Act and 19 CFR 351.308(c). Applying a combined AD/CVD rate based on the highest margins alleged in the petitions 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 of Korean origin, and if the substrate is not of Korean origin, the non-responsive companies are necessarily unable to certify that it is not Korean. 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 rates from the *Korea CORE Orders* 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 Korea). 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

³³⁵ *Id.* at 7-9 citing *BMW of North Am LLC v. United States*, 926 F.3d 1291, 1302 (CAFC 2019).

³³⁶ See U.S. Importers Group's Rebuttal Brief at 3-5.

³³⁷ *Id.* at 3.

³³⁸ *Id.* at 4.

³³⁹ *Id.* at 4-5.

³⁴⁰ *Id.* at 5.

these final determinations, we continue to apply the AD and CVD all-others rates in effect for the *Korea CORE Orders* to non-responsive companies.

Comment 12: Whether Commerce Should Continue to Apply AFA to SSSC

*SSSC's Case Brief*³⁴¹

- SSSC submitted a timely response to the Q&V questionnaire, and received notification from Commerce's ACCESS system that Commerce had received the submission. However, SSSC is a local company in Vietnam, and has limited knowledge of English and of U.S. laws. It was not until after Commerce issued its *Korea CORE Anti-Circumvention Preliminary Determinations*, in which it designated SSSC as a "non-responsive" company, that SSSC found that Commerce had requested additional information from SSSC to which SSSC had accidentally not responded. Nonetheless, SSSC acted to the best of its ability in responding to Commerce's questionnaire.
- That SSSC was not selected as a mandatory respondent shows that its quantity and value of its shipments of CORE to the United States during the period of investigation was small. SSSC could therefore conclude that no action is necessary to prevent circumvention.
- SSSC is willing to cooperate with Commerce to the best of its ability, and the application of AFA to SSSC is unwarranted. Moreover, SSSC is able to trace back to the substrates used to produce the CORE exports to the United States in order to ensure that it did not use the substrates from Korea. It should therefore be permitted to participate in the certification process.
- SSSC did not submit a timely response to Commerce's supplemental questionnaire. However, SSSC is a local company in Vietnam, and has limited knowledge of English and of U.S. laws. It was not until after Commerce issued its *Korea CORE Anti-Circumvention Preliminary Determinations* that SSSC realized that Commerce had requested additional information from SSSC to which it had accidentally not responded. Nonetheless, SSSC acted to the best of its ability in responding to Commerce's initial Q&V questionnaire.
- Pursuant to section 782(d) of the Act, Commerce was required to request the missing information from the SSSC after its failure to respond.³⁴²

*Petitioners' Rebuttal Brief*³⁴³

- Given the court-affirmed practice in the application of AFA for failing to submit responses to Q&V questionnaires, the request by SSSC that Commerce overlook its failure to cooperate and permit it to participate in the accompanying certification process should be denied.³⁴⁴ SSSC does not dispute that it failed to respond to Commerce's questionnaires, and it provides no reasonable basis for Commerce to reverse its lawful application of AFA pursuant to section 776(b) of the Act.

Commerce Position: We disagree with SSSC. The document at issue that we requested from SSSC is a revised version of its timely submitted Q&V response.³⁴⁵ We requested the revised

³⁴¹ See SSSC's Case Brief at 5-7.

³⁴² *Id.* at 5.

³⁴³ See Petitioners' Rebuttal Brief at 33.

³⁴⁴ *Id.* at 31 and 33 citing *Hyosung Corp. v. United States*, Slip Op. 2011-34 (CIT 2011).

³⁴⁵ See Commerce's Letter to SSSC, dated December 19, 2018.

version because SSSC's first version was not filed in proper form in accordance with 19 CFR 351.303 and 304(b). Consistent with its normal practice, Commerce released the request for a revised Q&V response through its electronic filing system, ACCESS, which provides notification of the document release to interested parties. With respect to its electronic notifications to parties, Commerce has stated:

The electronic notification informs parties that {Commerce} has uploaded a document on the record for the interested parties to access, view, respond to, or comment on. The ultimate responsibility of accessing, viewing, and downloading the document remains with the respondent.³⁴⁶

Furthermore, Commerce has stated, "As noted in the ACCESS Handbook, all interested parties on the public service list of a case are sent email digests which constitute official notice to an interested party or its representative that a document is available in ACCESS and that it is a part of the official record of the proceeding."³⁴⁷

SSSC acknowledges that it received the notification that Commerce had issued a request for a revised Q&V response, and has given no reason for its failure to submit the revised Q&V response other than its limited knowledge of English and U.S. laws.

We have also rejected SSSC's request to participate in the certification process. The record shows, and SSSC does not dispute, that it received the questionnaire, but did not respond to it. Therefore, there is no basis for reversing Commerce's lawful application of AFA pursuant to section 776(b) of the Act.

Generally, Commerce does not make exceptions for late filings because of a *pro se* respondent or limitations in using English. In *Silica Fabric China Final*, where a respondent filed its Q&V response six days late, and argued that Commerce erred in having rejected it, Commerce explained:

Moreover, we do not find persuasive New Fire's arguments that the company was *pro se* at the time of the filing or that it was a non-native English speaker. A *pro se* company still must take reasonable measures to comply with deadlines, just like any other interested party. With respect to its non-fluency in English, New Fire has pointed to no part of the Q&V questionnaire instructions that could not have been translated had New Fire hired a translator, which would be a "reasonable measure" to take for a company that ships to an English-speaking country such as the United States."³⁴⁸

³⁴⁶ See *Honey From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 27633 (May 14, 2015), and accompanying IDM at Comment 1.

³⁴⁷ See *Certain Hardwood Plywood Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances, in Part*, 82 FR 53460, (November 16, 2017), and accompanying IDM at Comment 7.

³⁴⁸ See *Antidumping Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China: Final Affirmative Determination of Sales at Less-Than-Fair Value, and Final Affirmative Determination of Critical Circumstances*, 82 FR 8399 (January 25, 2017), and accompanying IDM at Comment 6 (*Silica Fabric China Final*).

With respect to a requirement to notify of a deficiency, SSSC's failure to submit any response to the supplemental Q&V questionnaire precluded Commerce from identifying any potential deficiencies. Section 782(d) does not require Commerce to issue the same questionnaire twice.

Therefore, consistent with our practice, we continue to apply AFA to SSSC in these final determinations.

Comment 13: Whether Commerce Should Apply Section 232 Duties Against the Vietnam CORE products Found Using Korean Substrate

*California and Dynamics' Case Brief*³⁴⁹

- Commerce should advise the President that imports of CORE from Vietnam subject to the *Korea CORE Orders* should be counted against the quotas on those products from Korea, or instruct the CBP to impose the additional 232 duties of 25 percent *ad valorem* on those imports if they are not counted against Korea's 232 quotas.
- Commerce should also provide instructions to CBP that it should continue to impose the 232 duties imposed on imports from Vietnam.

*Mitsui's Rebuttal Brief*³⁵⁰

- The petitioners requested Commerce to preclude the Korean producers from avoiding both 232 quotas and 232 duties on imports allegedly circumventing the *Korea CORE Orders*. However, this request makes sense only if it is Korean substrate being used to produce CORE in Vietnam.
- Only subject merchandise is subject to the anti-circumvention inquiries. Commerce must allow a determination to be made as to whether the imported CORE is or is not made from Korean substrate. Precluding such a determination, Commerce could not even consider counting the imports under the Korean quota.

*U.S. Importers Group's Rebuttal Brief*³⁵¹

- Despite Commerce's *Korea CORE Preliminary Anti-Circumvention Determinations*, CORE from Vietnam made from Korean substrate remains a product of Vietnam and is not subject to the section 232 quotas on CORE from Korea.
- Commerce has long held that converting HRS and CRS products into CORE is a substantial transformation for purposes of the administration of the AD/CVD laws. Thus, for purposes of the AD/CVD laws which govern the current anti-circumvention proceedings, the country of origin of CORE is the country where the galvanizing process takes place – here, that country is Vietnam.

³⁴⁹ See California and Dynamics' Case Brief at 2-7.

³⁵⁰ See Mitsui's Rebuttal Brief at 1-2.

³⁵¹ See U.S. Importers Group's Rebuttal Brief at 2-3.

- CBP has instructed the trade community that “the Section 232 measures are based on the country of origin.”³⁵² Because Vietnam is the country of origin of the CORE in question, imports are governed by the Section 232 measures that apply to Vietnam and not to Korea.

Commerce Position: We are not addressing the petitioners’ arguments concerning application of section 232 duties as they were enacted under the Section 232 of the Trade Expansion Act of 1962, as amended, rather than the Tariff Act of 1930, as amended.³⁵³ Any request for amendment to the application of section 232 duties should, therefore, be addressed to the U.S. Department of Commerce’s Bureau of Industry and Security, CBP, or the Office of the United States Trade Representative, as it is part of national security law, which is separate from the AD/CVD law.

XIV. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. We recommend finding, based on the analysis and findings detailed above and in the *Korea CORE Anti-Circumvention Preliminary Determinations*, that imports into the United States of CORE completed in Vietnam using finished or unfinished HRS and/or CRS sourced from Korea are circumventing the *Korea CORE Orders*. If this recommendation is accepted, we will publish the final determinations in these inquiries in the *Federal Register*.



Agree

Disagree

12/13/2019

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

³⁵² *Id.* at 3 citing *U.S. Customs and Border Protection, Section 232 Tariffs on Aluminum and Steel* (<https://www.cbp.gov/trade/remedies/232-tariffs-aluminum-and-steel>) at 2.

³⁵³ In March 2018, the President exercised his authority under Section 232 of the Trade Expansion Act of 1962, as amended, and issued Proclamation 9705 that mandated, to address national security concerns, the imposition of a global tariff of 25 percent on imports of steel articles in order to reduce imports to a level that the Secretary assessed would enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production. Proclamation 9705 states that it “is necessary and appropriate to adjust imports of steel articles so that such imports will not threaten to impair the national security . . .” See Proclamation 9705, 83 FR at 11627 (emphasis added).