



A-580-881; C-580-882
Anti-Circumvention Inquiry
(Vietnam Imports)
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December 13, 2019

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

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

SUBJECT: Issues and Decision Memorandum for Anti-Circumvention
Inquiries on the Antidumping Duty and Countervailing Duty
Orders on Certain Cold-Rolled Steel Flat Products from the
Republic of Korea

I. SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the anti-circumvention inquiries of the antidumping duty (AD) and countervailing duty (CVD) orders on certain cold-rolled steel flat products (CRS) from the Republic of Korea (Korea). As a result of our analysis, we continue to find, consistent with the *Preliminary Determinations*,¹ that CRS produced in the Socialist Republic of Vietnam (Vietnam) using carbon hot-rolled steel (HRS) flat products manufactured in Korea, is circumventing the AD and CVD orders on CRS from Korea.² We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of issues for which we received comments and rebuttal comments from interested parties:

¹ See *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Affirmative Preliminary Determination of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 84 FR 32875 (July 10, 2019) (*Preliminary Determinations*), and accompanying Preliminary Decision Memorandum (PDM).

² See *Certain Cold-Rolled Steel Flat Products from Brazil, India, the Republic of Korea, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Brazil and the United Kingdom and Antidumping Duty Orders*, 81 FR 64432 (September 20, 2016); see also *Certain Cold-Rolled Steel Flat Products from Brazil, India, and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order (the Republic of Korea) and Countervailing Duty Orders (Brazil and India)*, 81 FR 64436 (September 20, 2016) (collectively, *CRS Orders*).



- Comment 1: Whether Companies That Did Not Receive Commerce’s Quantity and Value (Q&V) Questionnaire Should Be Permitted to Participate in the Certification Process
- Comment 2: Whether Commerce Abused Its Discretion in Rejecting the Q&V Questionnaire Responses of Certain Companies
- Comment 3: Whether Commerce Should Not Apply AFA to SSSC
- Comment 4: Whether Commerce Lacks Statutory Authority to Apply AFA Where Respondents Did Not Deprive Commerce of Information Regarding Its Ability to Trace Inputs
- Comment 5: Whether Commerce’s Use of AFA Impermissibly Departs Without Explanation from Its Decision in the China Anti-Circumvention Inquiry
- Comment 6: Whether Precluding Certain Importers and Exporters from Participating in the Certification Process is Inappropriate and Unfairly Punishes Importers
- Comment 7: Whether Commerce Should Allow Additional Time for Completing Certifications for Pre-Preliminary Determination Entries
- Comment 8: Whether a Country-Wide Determination is Justified
- Comment 9: Whether Commerce’s Interpretation of Section 781(b) of the Act Applies to the CRS Production Process in Vietnam and Expands the Scope of the Orders
- Comment 10: Whether Commerce Should Amend the Exporter Certification Language to Prevent Funneling
- Comment 11: Whether to Apply AFA to Certain Vietnamese Producers That Are Affiliated with Those That Are Deemed Non-Responsive
- Comment 12: Whether Commerce Should Preclude Companies that Failed to Cooperate in Both the CRS from China and CRS from Korea Inquiries from Participating in the Certification Regime
- Comment 13: Whether to Apply the Highest of the Petition Rate or Investigation Calculated Rate as the Cash Deposit Rate for Non-Responsive Companies
- Comment 14: Whether POSCO Vietnam’s History Demonstrates that It Cannot Be Viewed as Circumventing
- Comment 15: Whether POSCO Vietnam’s Operations Confirm that the Process of Assembly or Completion Is Not Minor or Insignificant
- Comment 16: Analysis of Patterns of Trade
- Comment 17: Whether the Value Added in Vietnam Is Significant
- Comment 18: Whether Commerce Should Rely on AFA to Value POSCO Vietnam’s Scrap Offset
- Comment 19: Whether Commerce Should Account for POSCO Vietnam’s Failure to Disclose Corporate Affiliations in Its Final Determination

II. BACKGROUND

On July 10, 2019, Commerce published the *Preliminary Determinations* of circumvention of the *CRS Orders*. Pursuant to section 781(e) of the Tariff Act of 1930, as amended (the Act), on September 17, 2019, we notified the U.S. International Trade Commission (ITC) of our affirmative preliminary determinations of circumvention, and informed the ITC of its ability to request consultation with Commerce regarding the possible inclusion of the products in question

within the *CRS Orders* pursuant to section 781(e)(2) of the Act.³ We conducted verifications in Vietnam between July 22, 2019, and August 9, 2019.⁴

In accordance with 19 CFR 351.309, we invited parties to comment on the *Preliminary Determinations* and our verification findings.⁵ On September 10, 2019, Hoa Phat Group Joint Stock Company (Hoa Phat JSC), Hoa Phat Steel Sheet Company Limited (HPSS), and Hoa Phat Steel Pipe Company Limited (HPSP) (collectively, Hoa Phat Group) submitted a case brief.⁶ On September 17, 2019, Southern Steel Sheet Co., Ltd. (SSSC) and Formosa Ha Tinh Steel Corporation (Formosa) submitted case briefs.⁷ On September 18, 2019, we received case briefs from Vina One Steel Manufacturing Corporation (Vina One), Mitsui & Co. (U.S.A.) Inc. (Mitsui), Ton Dong A Corporation (Ton Dong A), Hoa Sen Group (Hoa Sen), VNSteel - Phu My Flat Co., Ltd. (Phu My Flat), POSCO Vietnam Co., Ltd. (POSCO Vietnam), and from Ferrostaal Metals GmbH, Kurt Orban Partners LLC, Macsteel International USA Corp., Stemcor USA Inc., Tata International Metals (Americas) Limited, and Cumic Steel USA, Inc. (collectively, Importer Group).⁸ Also on September 18, 2019, we received a case brief from Nucor Corporation, United States Steel Corporation, and ArcelorMittal USA LLC (the petitioners).⁹ Also on September 18,

³ See Commerce's Letter, "Notification of Affirmative Preliminary Determinations of Circumvention of the Antidumping and Countervailing Duty Order," dated September 17, 2019.

⁴ See Memorandum, "Verification of the Questionnaire Responses of China Steel Sumikin Vietnam Joint Stock Company," dated September 4, 2019; Memorandum, "Verification of the Questionnaire Responses of POSCO Vietnam Co., Ltd., in the Anti-Circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Certain Cold-Rolled Steel Flat Products from the Republic of Korea" dated September 6, 2019 (POSCO Vietnam Verification Report).

⁵ See Memorandum, "Anti-Circumvention Inquiry on Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Briefing Schedule for the Final Determination," dated September 6, 2019; Memorandum, "Certain Cold-Rolled Steel Flat Products from the Republic of Korea; Revised Briefing Schedule," dated September 11, 2019; Memorandum, "Certain Cold-Rolled Steel Flat Products from the Republic of Korea; Due Date for Rebuttal Briefs," dated September 20, 2019.

⁶ See Hoa Phat Group's Case Brief, "Anti-Circumvention Inquiries Involving Corrosion-Resistant Steel {(sic)} – Case Brief of Hoa Phat Group and Its Subsidiaries," dated September 10, 2019 (Hoa Phat Group Case Brief); Hoa Phat Group's Letter, "Entry of Appearance: A-580-881, Cold-Rolled Steel Flat Products from South Korea CIRC – Vietnam Imports," dated July 25, 2019.

⁷ See SSSC's Case Brief, "Certain Cold-Rolled Steel Flat Products from The Republic of Korea, Anti-Circumvention Inquiry," dated September 17, 2019 (SSSC Case Brief); Formosa's Case Brief, "Case Brief of Formosa Ha Tih Steel Corporation," dated September 17, 2019 (Formosa Case Brief).

⁸ See Vina One's Case Brief, "Anti-Dumping Duty Order on Certain Cold-Rolled Steel Flat Products from the Republic of Korea (Anti-Circumvention Inquiry, Vietnam Imports) – Case Brief," dated September 18, 2019 (Vina One Case Brief); Mitsui's Case Brief, "Certain Cold-Rolled Steel Flat Products from Korea: Mitsui's Case Brief," dated September 18, 2019 (Mitsui Case Brief); Ton Dong A's Case Brief, "Certain Cold-Rolled Steel Flat Products from Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-881 and C-580-882: Ton Dong A Corporation Case Brief," dated September 18, 2019 (Ton Dong A Case Brief); Hoa Sen's Case Brief, "Certain Cold-Rolled Steel Flat Products from Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-881 and C-580-882: Hoa Sen Group Case Brief," dated September 18, 2019 (Hoa Sen Case Brief); Phu My Flat's Case Brief, "Certain Cold-Rolled Steel Flat Products from Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-881 and C-580-882: Phu My Flat Steel Co., Ltd. Case Brief," dated September 18, 2019 (Phu My Flat Case Brief); POSCO Vietnam's Case Brief, "Certain Cold-Rolled Steel Flat Products from the Republic of Korea; Anti-Circumvention Inquiries: POSCO Vietnam's Case Brief," dated September 18, 2019 (POSCO Vietnam Case Brief); Importer Group's Case Brief, "Certain Cold-Rolled Steel Flat Products from South Korea—Case Brief," dated September 18, 2019 (Importer Group Case Brief).

⁹ See Petitioners' Case Brief, "Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Petitioners'

2019, we received letters in lieu of case briefs from Duferco Steel Inc. (Duferco) and JFE Shoji Trade America, Inc. (JFE Shoji).¹⁰ On September 27, 2019, we received rebuttal briefs from Hoa Sen, JFE Shoji, Phu My Flat, Ton Dong A, POSCO Vietnam, Mitsui, and the petitioners.¹¹

On October 24, 2019, Commerce held a public hearing for these inquiries.¹²

III. SCOPE OF THE ORDERS

The products covered by these orders are certain cold-rolled (cold-reduced), flat-rolled steel products, whether or not annealed, painted, varnished, or coated with plastics or other non-metallic substances. The products covered do not include those that are clad, plated, or coated with metal. The products covered include coils that have a width or other lateral measurement (“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

Case Brief,” dated September 18, 2019 (Petitioners’ Case Brief).

¹⁰ See Duferco’s Letter, “Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Duferco Steel Inc.’s Letter in Lieu of Case Brief,” dated September 18, 2019 (Duferco Letter); JFE Shoji’s Letter, “Certain Cold-Rolled Steel Flat Products from Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-881, C-580-882: Letter in Lieu of Case Brief,” dated September 18, 2019 (JFE Shoji Letter).

¹¹ See Hoa Sen’s Rebuttal Brief, “Certain Cold-Rolled Steel Flat Products from the Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-881 and C-580-882: Hoa Sen Group Rebuttal Brief, dated September 27, 2019 (Hoa Sen Rebuttal Brief); JFE Shoji’s Rebuttal Brief, “Certain Cold-Rolled Steel Flat Products from the Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-881 and C-580-882: JFE Shoji Trade America, Inc. Rebuttal Brief,” dated September 27, 2019 (JFE Shoji Rebuttal Brief); Phu My Flat’s Rebuttal Brief, “Certain Cold-Rolled Steel Flat Products from the Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-881 and C-580-882: VNSTEEL - Phu My Flat Steel Co., Ltd. Rebuttal Brief,” dated September 27, 2019 (Phu My Flat Rebuttal Brief); Ton Dong A’s Rebuttal Brief, “Certain Cold-Rolled Steel Flat Products from the Republic of Korea; Anti-Circumvention Inquiry; Case Nos. A-580-881 and C-580-882: Ton Dong A Corporation Rebuttal Brief,” dated September 27, 2019 (Ton Dong A Rebuttal Brief); POSCO Vietnam’s Rebuttal Brief, “Certain Cold-Rolled Steel Flat Products from the Republic of Korea; Anti-Circumvention Inquiries: POSCO Vietnam’s Rebuttal Brief,” dated September 27, 2019 (POSCO Vietnam Rebuttal Brief); Mitsui’s Rebuttal Brief, “Certain Cold-Rolled Steel Flat Products from Korea: Mitsui’s Rebuttal Brief,” dated September 27, 2019 (Mitsui Rebuttal Brief); Petitioners’ Rebuttal Brief, “Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Petitioners’ Rebuttal Brief,” dated September 27, 2019 (Petitioners’ Rebuttal Brief).

¹² See Hearing Transcript, dated November 4, 2019.

(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, high strength low alloy (HSLA) steels, motor lamination steels, Advanced High Strength Steels (AHSS), and Ultra High Strength Steels (UHSS). 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. Motor lamination steels contain micro-alloying levels of elements such as silicon and aluminum. AHSS and UHSS are considered high tensile strength and high elongation steels, although AHSS and UHSS are covered whether or not they are high tensile strength or high elongation steels.

Subject merchandise includes cold-rolled 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 these orders if performed in the country of manufacture of the cold-rolled 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:

- Ball bearing steels;¹³
- Tool steels;¹⁴
- Silico-manganese steel;¹⁵
- Grain-oriented electrical steels (GOES) as defined in the final determination of the U.S. Department of Commerce in *Grain-Oriented Electrical Steel from Germany, Japan, and Poland*.¹⁶
- Non-Oriented Electrical Steels (NOES), as defined in the antidumping orders issued by the U.S. Department of Commerce in *Non-Oriented Electrical Steel from the People's Republic of China, Germany, Japan, the Republic of Korea, Sweden, and Taiwan*.¹⁷

The products subject to these orders are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7209.15.0000, 7209.16.0030, 7209.16.0060, 7209.16.0070, 7209.16.0091, 7209.17.0030, 7209.17.0060, 7209.17.0070, 7209.17.0091, 7209.18.1530, 7209.18.1560, 7209.18.2510, 7209.18.2520, 7209.18.2580, 7209.18.6020, 7209.18.6090, 7209.25.0000, 7209.26.0000, 7209.27.0000, 7209.28.0000, 7209.90.0000, 7210.70.3000, 7211.23.1500, 7211.23.2000, 7211.23.3000, 7211.23.4500, 7211.23.6030,

¹³ Ball bearing steels are defined as steels which contain, in addition to iron, each of the following elements by weight in the amount specified: (i) not less than 0.95 nor more than 1.13 percent of carbon; (ii) not less than 0.22 nor more than 0.48 percent of manganese; (iii) none, or not more than 0.03 percent of sulfur; (iv) none, or not more than 0.03 percent of phosphorus; (v) not less than 0.18 nor more than 0.37 percent of silicon; (vi) not less than 1.25 nor more than 1.65 percent of chromium; (vii) none, or not more than 0.28 percent of nickel; (viii) none, or not more than 0.38 percent of copper; and (ix) none, or not more than 0.09 percent of molybdenum.

¹⁴ Tool steels are defined as steels which contain the following combinations of elements in the quantity by weight respectively indicated: (i) more than 1.2 percent carbon and more than 10.5 percent chromium; or (ii) not less than 0.3 percent carbon and 1.25 percent or more but less than 10.5 percent chromium; or (iii) not less than 0.85 percent carbon and 1 percent to 1.8 percent, inclusive, manganese; or (iv) 0.9 percent to 1.2 percent, inclusive, chromium and 0.9 percent to 1.4 percent, inclusive, molybdenum; or (v) not less than 0.5 percent carbon and not less than 3.5 percent molybdenum; or (vi) not less than 0.5 percent carbon and not less than 5.5 percent tungsten.

¹⁵ Silico-manganese steel is defined as steels containing by weight: (i) not more than 0.7 percent of carbon; (ii) 0.5 percent or more but not more than 1.9 percent of manganese, and (iii) 0.6 percent or more but not more than 2.3 percent of silicon.

¹⁶ See *Grain-Oriented Electrical Steel from Germany, Japan, and Poland: Final Determinations of Sales at Less Than Fair Value and Certain Final Affirmative Determination of Critical Circumstances*, 79 FR 42501, 42503 (July 22, 2014). This determination defines grain-oriented electrical steel as “a flat-rolled alloy steel product containing by weight at least 0.6 percent but not more than 6 percent of silicon, not more than 0.08 percent of carbon, not more than 1.0 percent of aluminum, and no other element in an amount that would give the steel the characteristics of another alloy steel, in coils or in straight lengths.”

¹⁷ See *Non-Oriented Electrical Steel from the People's Republic of China, Germany, Japan, the Republic of Korea, Sweden, and Taiwan: Antidumping Duty Orders*, 79 FR 71741, 71741-42 (December 3, 2014). The orders define NOES as “cold-rolled, flat-rolled, alloy steel products, whether or not in coils, regardless of width, having an actual thickness of 0.20 mm or more, in which the core loss is substantially equal in any direction of magnetization in the plane of the material. The term ‘substantially equal’ means that the cross grain direction of core loss is no more than 1.5 times the straight grain direction (*i.e.*, the rolling direction) of core loss. NOES has a magnetic permeability that does not exceed 1.65 Tesla when tested at a field of 800 A/m (equivalent to 10 Oersteds) along (*i.e.*, parallel to) the rolling direction of the sheet (*i.e.*, B800 value). NOES contains by weight more than 1.00 percent of silicon but less than 3.5 percent of silicon, not more than 0.08 percent of carbon, and not more than 1.5 percent of aluminum. NOES has a surface oxide coating, to which an insulation coating may be applied.”

7211.23.6060, 7211.23.6090, 7211.29.2030, 7211.29.2090, 7211.29.4500, 7211.29.6030, 7211.29.6080, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7225.50.6000, 7225.50.8080, 7225.99.0090, 7226.92.5000, 7226.92.7050, and 7226.92.8050.

The products subject to these orders may also enter under the following HTSUS numbers: 7210.90.9000, 7212.50.0000, 7215.10.0010, 7215.10.0080, 7215.50.0016, 7215.50.0018, 7215.50.0020, 7215.50.0061, 7215.50.0063, 7215.50.0065, 7215.50.0090, 7215.90.5000, 7217.10.1000, 7217.10.2000, 7217.10.3000, 7217.10.7000, 7217.90.1000, 7217.90.5030, 7217.90.5060, 7217.90.5090, 7225.19.0000, 7226.19.1000, 7226.19.9000, 7226.99.0180, 7228.50.5015, 7228.50.5040, 7228.50.5070, 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 CRS produced in Vietnam using HRS substrate manufactured in Korea and subsequently exported from Vietnam to the United States (inquiry merchandise). These rulings apply to all shipments of inquiry merchandise on or after the date of the initiation of these inquiries. Importers and exporters of CRS produced in Vietnam using HRS manufactured in Vietnam or third countries who are not ineligible to participate in the certification process may certify that the HRS processed into CRS in Vietnam did not originate in Korea, as provided for in the certifications attached to this *Federal Register* notice. Otherwise, their merchandise may be subject to antidumping and countervailing duties.

V. CHANGES SINCE THE PRELIMINARY DETERMINATIONS

Commerce made no changes to its *Preliminary Determinations* with regard to its analysis under the anti-circumvention factors of section 781(b) of the Act. For a complete description of our analysis, see the *Preliminary Determinations*.

VI. STATUTORY FRAMEWORK

Section 781 of the Act addresses circumvention of AD and/or CVD orders.¹⁸ With respect to merchandise assembled or completed in a third country, section 781(b)(1) of the Act provides that, if (A) the merchandise imported in the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of an AD/CVD order, (B) before importation into the United States, such imported merchandise is completed or assembled in a third country from merchandise which is subject to such an order or is produced in the foreign country with respect to which such order applies, (C) the process of assembly or completion in a third country is minor or insignificant, (D) the value of the merchandise produced in the foreign country to which the AD/CVD order applies is a significant portion of the total value of the merchandise exported to the United States, and (E) Commerce determines that action is

¹⁸ 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.

appropriate to prevent evasion of an order, then Commerce, after taking into account any advice provided by the ITC under section 781(e) of the Act, may include such imported merchandise within the scope of an order at any time an order is in effect.

In determining whether or not the process of assembly or completion in a third country is minor or insignificant under section 781(b)(1)(C) of the Act, section 781(b)(2) of the Act directs Commerce to consider (A) the level of investment in the third country, (B) the level of research and development in the third country, (C) the nature of the production process in the third country, (D) the extent of production facilities in the third country, and (E) whether or not the value of processing performed in the third country represents a small proportion of the value of the merchandise imported into the United States. However, no single factor, by itself, controls Commerce's determination of whether the process of assembly or completion in a third country is minor or insignificant.¹⁹ 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 the particular anti-circumvention inquiry.²⁰

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. STATUTORY ANALYSIS

A. *Is the Merchandise Imported into the United States of the Same Class or Kind as Merchandise that is Subject to the CRS Orders?*

Our analysis of this factor is unchanged from the *Preliminary Determinations*. We continue to find that the finished CRS products produced in Vietnam using Korean HRS substrate and exported to the United States are of the same class or kind as other merchandise that is subject to the *CRS Orders*.²¹

B. *Whether Before Importation into the United States, Such Merchandise Is Completed or Assembled in a Third Country from Merchandise that is Subject to the CRS Orders or Produced in the Foreign Country that is Subject to the CRS Orders*

¹⁹ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994) (SAA) at 893.

²⁰ 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 China Quijiang Anti-Circumvention Final*).

²¹ See *Preliminary Determinations* PDM at 14.

Our analysis of this factor is unchanged from the *Preliminary Determinations*. We continue to find that the merchandise subject to these anti-circumvention inquiries was completed or assembled in Vietnam using Korea-origin HRS.²²

C. *Whether the Process of Assembly or Completion in the Third Country Is Minor or Insignificant*

1) *Level of Investment in Vietnam*

Our analysis of this factor is unchanged from the *Preliminary Determinations*. We continue to find that the level of investment in Vietnam by POSCO Vietnam to complete the production of the Korea-origin input into CRS is minor compared to the level of investment required by integrated steel producers in Korea.²³

2) *Level of Research and Development in Vietnam*

Our analysis of this factor is unchanged from the *Preliminary Determinations*. We continue to find that the level of research and development in Vietnam by POSCO Vietnam to complete the production of the Korea-origin input into CRS is minor compared to the level of investment required by integrated steel producers in Korea.²⁴

3) *Nature of Production Process in Vietnam and Extent of the Production Facilities in Vietnam.*

Our analysis of these factors is unchanged from the *Preliminary Determinations*. We continue to find that the CRS manufacturing process occurring in Vietnam represents a relatively minor portion of the overall manufacturing of finished CRS, in terms of the stages and production activities and processes involved, and that the extent of Vietnamese respondents' production facilities is minor relative to the facilities of integrated steel producers.²⁵

4) *Whether the Value of the Processing Performed in Vietnam Represents a Small Proportion of the Value of the Merchandise Imported into the United States*

Our calculation of the value of processing in Vietnam, and its percentage of the value of the merchandise imported into the United States, has not changed since the *Preliminary Determinations*.²⁶

²² *Id.*

²³ See *Preliminary Determinations* PDM at 14-15.

²⁴ *Id.*

²⁵ *Id.* at 16-17.

²⁶ *Id.* at 17-18.

D. *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*

Our analysis of this factor is unchanged from the *Preliminary Determinations*. We continue to find that the value of the Korea-origin HRS constitutes a significant portion of the value of the CR that is exported to the United States.²⁷

E. *Other Factors*

1) *Pattern of Trade and Sourcing*

Our analysis of this factor is unchanged from the *Preliminary Determinations*. As explained in the *Preliminary Determinations*, we analyzed this factor using both POSCO Vietnam company-specific data and Global Trade Atlas (GTA) country-wide data. We conducted the analysis using a comparison period of July 2015 through October 2016, and a base period of November 2016 through February 2018. POSCO Vietnam provided worksheets reporting the total amount of CRS exported to the United States and the total amount of HRS substrate sourced from Korea between July 2015 and June 2018. We obtained country-wide comparable information from the GTA. We found that for both the POSCO Vietnam data and the country-wide data the shipment volume for both types of shipments was lower in the base period than in the comparison period, and therefore that the pattern of trade and sourcing did not provide evidence of circumvention.²⁸ In these final determinations, we continue to find no evidence of circumvention from the pattern of trade and sourcing.²⁹

2) *Affiliation*

Our analysis of this factor is unchanged from the *Preliminary Determinations*. We continue to find that POSCO Vietnam is affiliated with a Korean producer of HRS.³⁰

3) *Increased Imports*

Our analysis of this factor is unchanged from the *Preliminary Determinations*. As explained above, we analyzed this factor using POSCO Vietnam company-specific data and country-wide GTA data. With respect to the POSCO Vietnam company-specific data and the Vietnam-wide GTA data, we find, as explained above, that they show a decreasing amount of shipments between the comparison and base periods.³¹

F. *Conclusion Regarding Statutory Factors*

Pursuant to sections 781(b)(1)(A) and (B) of the Act, we find the CRS sold in the United States that was produced in Vietnam using HRS produced in Korea is the same type of product (*i.e.*,

²⁷ *Id.* at 18.

²⁸ In our *Preliminary Determinations* we treated POSCO Vietnam's data as proprietary. However, POSCO Vietnam has since made it public. See POSCO Vietnam Case Brief at 16-17. Therefore, we are treating it as public here.

²⁹ See *Preliminary Determinations* PDM at 19; see also Comment 16, below.

³⁰ See *Preliminary Determinations* PDM at 19.

³¹ *Id.*

meets the physical description) as merchandise that is subject to the *CRS Orders*, and was completed in Vietnam from merchandise which is produced in Korea, the country to which the *CRS Orders* apply. Additionally, pursuant to section 781(b)(1)(C) of the Act, after analyzing each factor under section 781(b)(2) of the Act, we find the process of completion in Vietnam to be minor and insignificant based on the totality of the evidence. Furthermore, in accordance with section 781(b)(1)(D) of the Act, we find that the value of the merchandise produced in Korea (*i.e.*, HRS) is a significant portion of the total value of the completed merchandise (*i.e.*, CRS) exported to the United States. With respect to 781(b)(3), as we stated in the *Preliminary Determinations*, taken together, we find a mixed result. The manufacturer or exporter of the substrate in Korea is affiliated with the Vietnamese entity that assembles or completes the merchandise exported to the United States (which would support a finding of circumvention), while a lower shipment volume and decrease in shipments in the base period does not provide evidence of circumvention. However, in either case, none of these factors is dispositive as to the issue. Upon review of all of the factors delineated in 781(b)(1)-(3) of the Act, we determine that action is appropriate to prevent evasion of the *CRS Orders* pursuant to section 781(b)(1)(e) of the Act. Consequently, our statutory analysis leads us to find that, in accordance with sections 781(b)(1)-(3) of the Act, there was circumvention of the *CRS Orders* as a result of Korean-origin HRS being completed into CRS in Vietnam and exported to the United States.

VIII. DISCUSSION OF THE ISSUES

Comment 1: Whether Companies That Did Not Receive Commerce’s Q&V Questionnaire Should Be Permitted to Participate in the Certification Process

*Hoa Sen Case Brief, Ton Dong A Case Brief, Formosa Case Brief, Vina One Case Brief, Hoa Phat Group Case Brief, Importer’s Group Case Brief*³²

- 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*³³

- 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.

³² See Hoa Sen Case Brief at 5-7, Ton Dong A Case Brief at 5-7, Formosa Case Brief at 6, Vina One Case Brief at 4, Hoa Phat Group Case Brief at 2, Importer’s Group Case Brief at 1-6.

³³ See Petitioners’ Rebuttal Brief at 46-47.

- 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 CRS to the United States and the origin of the imported HRS being processed into CRS."³⁴ The FedEx delivery confirmations confirm that these companies did not receive the questionnaire.³⁵ 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 (AFA) 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 11, below.

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

Phu My Flat Case Brief.³⁶

- Phu My Flat filed a response to Commerce's Q&V questionnaire on October 19, 2018. On December 14, 2018, Commerce rejected Phu My Flat's questionnaire because of filing deficiencies, and requested that Phu My Flat file a revised version by December 19, 2018. Phu My Flat submitted the revised version on December 28, 2018. Commerce rejected this submission as untimely on March 4, 2019.
- Commerce has the authority to extend any deadline for good cause under 19 CFR 351.302(b) as long as it is not precluded by statute. Here, good cause exists for extending the deadline as Phu My Flat was not represented by counsel at the time it submitted its Q&V responses, and was unaware of the requirements of 19 CFR 351.303 and 19 CFR 351.304. Moreover, despite being *pro se*, it did attempt to respond fully to Commerce's requests for information.

³⁴ See *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Initiation of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 83 FR 37790, 37795 (August 2, 2018) (*Initiation Notice*).

³⁵ 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.

³⁶ See Phu My Flat's Case Brief at 6-9.

- While Commerce has the right to set and enforce deadlines, it must, nonetheless, balance the interests of accuracy and fairness with the burden placed on Commerce and the interest of finality. For example, in *Grobest*, the CIT found Commerce to have abused its discretion when it rejected a respondent's separate rate certification even though the certification was submitted 95 days after the deadline.³⁷ For Commerce to reject the submission because it was late and because Phu My Flat was unaware of all of Commerce's filing requirements is an abuse of discretion.

*Petitioners' Rebuttal Brief*³⁸

- Commerce acted within its discretion when it rejected Phu My Flat's revised Q&V response.
- Phu My Flat provided no explanation for its delay in filing its revised Q&V response.
- The CIT has ruled that "Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits."³⁹ It has also stated that Commerce's "strict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation of its decision."⁴⁰
- Phu My Flat could have sought an extension of time to respond to its questionnaire, but failed to do so.
- Although Commerce may extend any deadline for good cause, Commerce will not consider an untimely filed extension request unless the party demonstrates that an extraordinary circumstance exists. Here, Phu My Flat has made no such showing. Phu My Flat's main argument is that it appeared as a *pro se* respondent in this proceeding. Commerce has consistently rejected such "*pro se*" arguments in the past.⁴¹

Commerce Position:

We agree with the petitioners that we properly rejected Phu My Flat's Q&V response as untimely. As Phu My Flat itself noted, Commerce has the right to set and enforce deadlines. Phu My Flat relies on *Grobest* to argue that Commerce abused its discretion by enforcing the deadline at issue here. We disagree. In *Grobest*, the CIT considered numerous factors in making its determination that Commerce had abused its discretion. For example, in *Grobest*, the respondent filed a separate rate application (SRA) 95 days after the deadline.⁴² However, the fact pattern with respect to the respondent in *Grobest* differs from that present here with respect to Phu My Flat.

³⁷ *Id.* at 8 (citing *Grobest & I-Mei Indus. (Vietnam) Co., Ltd. v. United States*, 815 F. Supp. 2d 1342, 1365 (CIT 2012) (*Grobest*)).

³⁸ See Petitioners' Rebuttal Brief at 63-65.

³⁹ *Id.* at 64 (citing *Yantai Timken Co. v. United States*, 521 F. Supp. 2d 1356, 1370-71 (CIT 2007)).

⁴⁰ *Id.* (citing *Maverick Tube Corp. v. United States*, 107 F. Supp. 3d 1318, 1331 (CIT 2015)).

⁴¹ *Id.* (citing *Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture from the People's Republic of China*, 69 FR 67313 (November 17, 2004), and accompanying Issues and Decision Memorandum (IDM) at Comment 82).

⁴² See *Grobest*, 815 F. Supp. 2d at 1367.

- In *Grobest*, the respondent had been analyzed in prior administrative reviews, and found eligible for a separate rate. Thus, the SRA merely “maintain{ed} the status quo.”⁴³ Maintaining the “status quo” is not the issue here with respect to Phu My Flat’s Q&V response. The Q&V questionnaire responses were used for purposes of respondent selection,⁴⁴ and timely responses from all potential respondents was necessary in order for the respondent selection process to progress in a timely manner.
- In *Grobest*, the respondent submitted its SRA more than seven months before Commerce issued its preliminary results of review.⁴⁵ Here, Commerce issued the Respondent Selection Memorandum just three months after the Q&V responses were due.⁴⁶
- In *Grobest*, it was unnecessary for Commerce to issue any further follow-up questions to any of the separate-rate applicants.⁴⁷ Here, Commerce found that it needed to request additional information from respondents who had submitted Q&V responses.⁴⁸

Furthermore, as the petitioners noted, Commerce has rejected “*pro se*” arguments in the past. For example, in *Stainless Steel Bar India Final*, a respondent argued that Commerce should not have rejected its questionnaire response on grounds of untimeliness, but should, instead, have given it a “second chance” because the company was without legal counsel.⁴⁹ Commerce stated the following in reply:

{Respondent} argues that it is entitled to a “second chance” because it is {Commerce’s} practice to give respondents who represent themselves a “second chance” to meet deadlines for questionnaire responses. {Commerce} disagrees that such a practice exists. While it is true that {Commerce} affords respondents additional assistance (*e.g.* small companies) when they have difficulty meeting reporting requirements, (*see* section 782(c) of the Act) all respondents are required to submit information in a timely manner.⁵⁰

Moreover, while Phu My Flat argues that it is unfamiliar with Commerce’s regulations, we note that this anti-circumvention inquiry is not the first Commerce proceeding in which it has participated. Phu My Flat also participated in the CRS from China AD/CVD anti-circumvention proceedings,⁵¹ and is currently a participant in the companion corrosion-

⁴³ *Id.*

⁴⁴ See Memorandum, “Respondent Selection for the Anti-Circumvention Inquiry of Cold-Rolled Steel Flat Products from the Republic of Korea,” dated March 26, 2019 at 5 (Respondent Selection Memorandum).

⁴⁵ *Id.*

⁴⁶ See Respondent Selection Memorandum.

⁴⁷ See *Grobest*, 815 F. Supp. 2d at 1367.

⁴⁸ See Commerce’s Letter to China Steel Sumikin Vietnam Joint Stock Company, “Cold-Rolled Steel Productions {(sic)} from Korea; Request for Additional Information,” dated February 21, 2019; and Commerce’s Letter to POSCO Vietnam, “Cold-Rolled Steel Productions {(sic)} from Korea; Request for Additional Information,” dated February 21, 2019.

⁴⁹ See *Stainless Steel Bar from India; Final Results of Antidumping Duty Administrative Review*, 68 FR 47543 (August 11, 2003) (*Stainless Steel Bar India Final*), and accompanying IDM at Comment 1.

⁵⁰ *Id.*

⁵¹ See *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), and accompanying IDM at 2, 48 n.161.

resistant steel products (CORE) from Korea AD/CVD anti-circumvention proceedings.⁵² Thus, Phu My Flat clearly has some familiarity with Commerce’s filing procedures.

Furthermore, even after Phu My Flat submitted its late filing (for which it had not requested an extension or provided an explanation for its being late), Phu My Flat also provided no explanation for the late filing after the petitioners’ subsequent request that Commerce reject Phu My Flat’s filing⁵³ or after Commerce rejected it on March 4, 2019.⁵⁴ Indeed, it was not until August 3, 2019, 40 days after Commerce published the *Preliminary Determinations*, that Phu My Flat first provided an explanation for the late filing.⁵⁵ It attributed the late filing to an “unknown transferring error.”⁵⁶ Phu My Flat did not state when it became aware of this error, or why it took nine days to refile the submission.

Commerce’s regulations state:

Before the applicable time limit established under this part expires, a party may request an extension pursuant to paragraph (b) of this section. An untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists.⁵⁷

Here, because Phu My Flat did not submit its extension request until after the submission was due, Phu My Flat must demonstrate an “extraordinary circumstance” existed. Commerce’s regulations state that an “extraordinary circumstance is an unexpected event that: (i) could not have been prevented if reasonable measures had been taken, and (ii) precludes a party or its representative from timely filing an extension request through all reasonable means.”⁵⁸

In its extension request, Phu My Flat failed to explain either the nature of this “unknown transferring error” or why it constituted an extraordinary circumstance. In the absence of such an explanation, we conclude that we acted within our discretion in rejecting Phu My Flat’s late Q&V response, and that Commerce’s interest in finality outweighs any competing interests because Phu My Flat’s submission was untimely, and it did not demonstrate an extraordinary circumstance.

⁵² See *Certain Corrosion-Resistant Steel Products from Republic of Korea: Affirmative Final Determination of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, dated concurrently with this notice (*CORE Korea Anti-Circumvention Final*).

⁵³ See Petitioners’ Letter, “Cold-Rolled Steel Flat Products from South Korea: Request to Reject Submission of VNSTEEL – Phu My Flat Steel Company Limited,” dated February 7, 2019.

⁵⁴ See Commerce Letter, “Anticircumvention Inquiry of the Antidumping Duty Order on Cold-Rolled Steel Products from Korea,” dated March 4, 2019; see also Memorandum, “Removal of Documents,” dated March 4, 2019.

⁵⁵ See Phu My Flat Letter, “Anti-Circumvention Inquiries of the Antidumping and Countervailing Duty Orders of Certain Cold-Rolled Steel Flat Products from the Republic of Korea,” dated August 19, 2019.

⁵⁶ *Id.* at 1.

⁵⁷ See 19 CFR 351.302(c).

⁵⁸ See 19 CFR 351.302(c)(2).

Comment 3: Whether Commerce Should Not Apply AFA to SSSC

*SSSC Case Brief*⁵⁹

- 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, *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.
- SSSC does not manufacture or export CRS, and this is clearly seen in the Q&V response that SSSC submitted. This information can be confirmed from CBP data. Commerce can therefore conclude that SSSC is not circumventing the AD and CVD orders on CRS from Korea. SSSC should therefore be permitted to participate in the certification process.

No party commented on SSSC’s case brief.

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.⁶⁰ We requested the revised 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.⁶¹

Furthermore, Commerce has stated, “{a}s noted in the ACCESS Handbook,” that “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.”⁶²

⁵⁹ See SSSC Case Brief at 5-7.

⁶⁰ See Commerce’s Letter to SSSC, dated December 14, 2018.

⁶¹ See *Honey from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 27633 (May 14, 2015) (*Honey China Final*), and accompanying IDM at Comment 1.

⁶² 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.

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. Commerce generally does not make exceptions for late filings with respect to respondents who are *pro se* or have limited English language knowledge. In *Silica Fabric China Final*, a respondent had filed its Q&V response six days late, and argued that Commerce erred in having rejected it. Commerce responded:

Moreover, we do not find persuasive {respondent'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, {respondent} has pointed to no part of the Q&V questionnaire instructions that could not have been translated had {respondent} 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.⁶³

Furthermore, we cannot confirm from either of the sources to which SSSC cites that SSSC had no shipments of CRS. SSSC's October 23, 2019, Q&V submission was rejected from the record on December 14, 2018.⁶⁴ Therefore, we cannot use it as confirmation that SSSC had no shipments of CRS. In accordance with 19 CFR 351.104(a)(2)(ii), a copy of SSSC's submission has been retained on the record only for purposes of establishing and documenting the basis for rejecting the document. Furthermore, the CBP data on the record to which SSSC cites does not substantiate that SSSC had no shipments of CRS.⁶⁵

Therefore, consistent with our practice, in this final determination we have continued to apply AFA, pursuant to section 776(a) and (b) of the Act, to SSSC for its failure to cooperate to the best of its ability in responding to Commerce's requests for information.

⁶³ 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) (*Silica Fabric China Final*), and accompanying IDM at Comment 6.

⁶⁴ See Memorandum, "Removal of Documents," dated December 14, 2018; Commerce Letter to SSSC, dated December 14, 2018.

⁶⁵ See Memorandum, "Antidumping and Countervailing Duty Anti-Circumvention Inquiries of Cold-Rolled Steel Products from the Republic of Korea: Customs Entry Data," dated October 5, 2018.

Comment 4: Whether Commerce Lacks Statutory Authority to Apply AFA Where Respondents Did Not Deprive Commerce of Information Regarding Its Ability to Trace Inputs

*Phu My Flat Brief, Hoa Sen Brief, Ton Dong A Brief*⁶⁶

- 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.⁶⁷ 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.⁶⁸
- There is no evidence on the record that Phu My Flat, Hoa Sen, and Ton Dong A do not have the ability to trace their exports of CRS to the United States to the HRS substrate used to produce CRS. Thus, Commerce must either re-open the record to request the necessary information, or allow Phu My Flat, Hoa Sen, and Ton Dong A to participate in the certification process.

*Petitioners' Rebuttal Brief*⁶⁹

- Commerce's practice is to permit importers and exporters to participate in a certification process only when they can demonstrate traceability.⁷⁰ Consistent with this practice, in the 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.

⁶⁶ See Phu My Flat Case Brief at 10-13; Hoa Sen Case Brief at 12-15; and Ton Dong A Case Brief at 12-14.

⁶⁷ See Phu My Flat Case Brief at 10; Hoa Sen Case Brief at 12; and Ton Dong A 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 IDM at 8).

⁶⁸ See Phu My Flat Case Brief at 11; Hoa Sen Case Brief at 13; and Ton Dong A Case Brief at 13 (citing *Koyo Seiko Co. v. United States*, 92 F.3d 1162, 1165 (Fed. Cir. 1996)); *Olympic Adhesives, Inc v. United States*, 899 F. 2d 1565, 1572-75 (Fed. Cir. 1990); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, No. 97-08-11344, 1999 WL 1991194 at *12-13 (CIT 1990).

⁶⁹ See Petitioners' Rebuttal Brief at 47-51.

⁷⁰ *Id.* at 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 Preliminary*); 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*)).

- 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 this final determination, we have determined to allow Hoa Sen and Ton Dong A to participate in the certification program, because record evidence shows that these companies did not receive Commerce’s Q&V questionnaire and, thus, did not fail to cooperate in these proceedings.

With respect to Phu My Flat, we disagree with the argument that we may not bar uncooperative respondents from participating in the certification process. In *Garment Hangers China Anti-Circumvention Final*, to which Phu My Flat cites, we determined that a certification regime was not appropriate for a respondent who was unable to trace its substrate.⁷¹ However, a respondent’s inability to trace its substrate is not the only circumstance under which a certification regime is inappropriate. As explained above in response to Comment 2, Phu My Flat did not submit a timely response to Commerce’s Q&V questionnaire. For this reason, in our preliminary determinations, we included Phu My Flat among the non-cooperative companies.⁷² With respect to these non-responsive companies, Commerce determined to apply AFA and, therefore, precluded them from participation in the Korean certification process.⁷³ As explained further in Comment 6 (below), Commerce applied AFA in order to both ensure that uncooperative parties do not benefit from their lack of cooperation and to encourage their future compliance. As also explained further in Comment 6, barring uncooperative respondents from participation in the certification process is an agency practice that has been affirmed by the Court of International Trade (CIT), where Commerce determines that it is necessary to apply AFA in such a way as to further Commerce’s obligation to administer the law in a manner that prevents evasion of an order.⁷⁴ Therefore, we determine that we have the statutory authority to apply AFA to Phu My Flat, in accordance with sections 776(a) and section 776(b) of the Act.

⁷¹ *Garment Hangers China Anti-Circumvention Final* IDM at 8.

⁷² See *Preliminary Determinations* PDM at 4.

⁷³ *Id.* at 12.

⁷⁴ See, e.g., *Max Fortune Indus. Co. v. United States*, No. 11-340, slip op. 13-52, *28 (CIT Apr. 15, 2013) (*Max Fortune*).

Comment 5: Whether Commerce’s Use of AFA Impermissibly Departs Without Explanation from Its Decision in the China Anti-Circumvention Inquiry

Ton Dong A Case Brief,⁷⁵ *Hoa Sen Case Brief*,⁷⁶ *Phu My Flat Case Brief*⁷⁷

- In its final determination in the anti-circumvention inquiry concerning the *China CRS Orders*,⁷⁸ Commerce permitted non-responsive companies to participate in the certification program. In contrast, Commerce precluded non-responsive companies from the certification process in the *Preliminary Determinations*.⁷⁹
- While Commerce may depart from its prior decisions, it must provide adequate explanation for why it is departing. The law is clear that agencies must either conform themselves to their prior decisions or explain the reasons for their departure. As the 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.”⁸⁰
- In the anti-circumvention inquiry of CRS from China, Commerce did not exclude companies that did not respond to the Q&V questionnaire from the certification process or apply any other AFA findings. Commerce explained “{t}he questionnaire issued to numerous Vietnamese companies at the outset of these inquiries regarding their use of Chinese substrate were not designed to determine which companies were circumventing, but to determine which companies might have the most relevant information needed to apply the criteria of section 871(b) of the Act.”⁸¹
- In the anti-circumvention inquiry of CRS 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.”⁸²
- In the anti-circumvention inquiry of CRS 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 CRS Orders* would be applied to CRS produced from non-Chinese substrate.⁸³

⁷⁵ See *Ton Dong A Case Brief* at 15-17.

⁷⁶ See *Hoa Sen Case Brief* at 16-17.

⁷⁷ See *Phu My Flat Case Brief* at 13-15.

⁷⁸ See *Certain Cold-Rolled Steel Flat Products from the People’s Republic of China: Countervailing Duty Order*, 81 FR 45960 (July 14, 2016); and *Certain Cold-Rolled Steel Flat Products from the People’s Republic of China: Countervailing Duty Order*, 81 FR 45960 (July 14, 2016) (collectively, *China CRS Orders*).

⁷⁹ See *Ton Dong A Case Brief* at 15; and *Hoa Sen Case Brief* at 15 (citing *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) (*CRS China Anti-Circumvention Final*)).

⁸⁰ See *Ton Dong A Case Brief* at 15; and *Hoa Sen Case Brief* at 15 (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)).

⁸¹ See *Ton Dong A Case Brief* at 15; and *Hoa Sen Case Brief* at 16 (citing *CRS China Anti-Circumvention Final IDM* at 24).

⁸² See *Ton Dong A Case Brief* at 15-16; and *Hoa Sen Case Brief* at 16 (citing *CRS China Anti-Circumvention Final IDM* at 25).

⁸³ See *Ton Dong A Case Brief* at 15-16; and *Hoa Sen Case Brief* at 16 (citing *CRS China Anti-Circumvention Final*

- In the *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 inquiry of 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 *Preliminary Determinations* explicitly link the certification regime under the *CORE from Korea Order* to that of the *CORE from China Order*.⁸⁴

*Duferco Letter*⁸⁵

- Commerce’s determination to preclude certain companies from participating in the certification process stands in stark contrast to its determination in *China CRS 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 CRS 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 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*⁸⁶

- 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.⁸⁷
- 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 didn’t respond properly—were permitted to participate in the China certification process.⁸⁸

IDM at 26).

⁸⁴ See Ton Dong A Case Brief at 16-17; and Hoa Sen Case Brief at 16-17 (citing *Preliminary Determinations* PDM at 18-19, and *CRS China Anti-Circumvention Final* IDM at 28-29).

⁸⁵ See Duferco Letter at 2-3.

⁸⁶ See Importer Group’s Case Brief at 11-14.

⁸⁷ See Importer Group’s Case Brief at 9 (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) at Appendix II (*CORE China Anti-Circumvention Preliminary*)).

⁸⁸ *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-

- In the *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.⁸⁹
- 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.⁹⁰
- As the Court of Appeals for the Federal Circuit (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 *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.⁹¹

*Petitioners’ Rebuttal Brief*⁹²

- 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.⁹³
- 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.”⁹⁴

Resistant Steel from the People’s Republic of China: Rejection of Untimely Submission on January 25, 2017,” dated December 12, 2016).

⁸⁹ *Id.* at 12-13.

⁹⁰ *Id.* at 13 and Footnote 39.

⁹¹ *Id.* at 13-14 (citing *Consolidated Bearings Co. v. United States*, 348 F. 3d 997, 1007 (Fed. Cir. 2003), *RHP Bearings v. United States*, 288 F. 3d 1334, 1347 (Fed. Cir. 2002); and *SKF USA Inc. v. United States*, 263 F. 3d 1369, 1382 (Fed. Cir. 2001)).

⁹² See Petitioners’ Rebuttal Brief at 56-62.

⁹³ *Id.* at 56.

⁹⁴ *Id.* at 57 (citing *SeAH Steel Vina Corp. v. United States*, 182 F. Supp. 3d 1316, 1327 (CIT 2016) (*SeAH*); and *Union Steel v. United States*, 755 F. Supp. 2d 1304, 1311 (CIT 2011)).

- Congressional guidance set forth in the Statement of Administrative Action (SAA) is to apply AFA to parties that fail to respond to Commerce’s requests for information.⁹⁵
- In *Tianjin Magnesium Int’l Co. v. United States*, the CIT was “troubled” that not adopting adverse inferences where respondents failed to cooperate would create “an incentive to submit false information {or no information} . . . without fear of negative consequences.”⁹⁶
- 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.”⁹⁷
- 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.⁹⁸
- 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.”⁹⁹
- Consistent with its “duty to both ensure that uncooperative parties do not benefit from their lack of cooperation and to encourage their future compliance,” Commerce’s longstanding practice in conducting anti-circumvention inquiries pursuant to section 781(b) of the Act has been to apply AFA to noncooperative respondents and preclude such entities from participation in certification processes.¹⁰⁰
- Commerce denied an uncooperative respondent, MFVN, the opportunity to participate in a certification process after first allowing a cooperative respondent in a separate anti-circumvention inquiry under the same order, Quijiang, to participate in a certification program and then later barring yet another uncooperative respondent a third anti-circumvention inquiry under the same order, Sunlake, from participating in a certification 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 addressing circumvention” because MFVN failed to participate

⁹⁵ *Id.* at 57-58 (citing *SKF USA Inc. v. United States*, 391 F. Supp. 2d at 1335; and SAA at 870).

⁹⁶ *Id.* at 57 (citing *Tianjin Magnesium Int’l Co. v. United States*, 844 F. Supp. 2d 1342, 1348 (CIT 2012)).

⁹⁷ *Id.* at 57-58 (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 Final*), and the accompanying IDM at Comment 4).

⁹⁸ *Id.* at 58.

⁹⁹ *Id.* (citing *Certain Tissue Paper Products From the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 76 FR 47551 (August 5, 2011) (*Tissue Paper 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 Quijiang Anti-Circumvention Final*)).

¹⁰⁰ *Id.* (citing *Pipe Mexico Final* IDM at Comment 4; *Tissue Paper China MFVN Anti-Circumvention Final* IDM at Comment 4; and *Certain Tissue Paper Products From the People’s Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 74 FR 20915 (May 6, 2009) (*Tissue Paper China Sunlake Anti-Circumvention Preliminary*), 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*)).

and Commerce lacked information with which to evaluate MFVN's ability to trace its inputs.¹⁰¹

- 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 31 quantity and value questionnaires and received responses from only six companies.¹⁰²
- 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 Preliminary*, pre-dated the initiation of the instant anti-circumvention inquiry.¹⁰³
- 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*, 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.”¹⁰⁴
- 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.”¹⁰⁵

Commerce Position:

We agree with the petitioners. The arguments from Ton Dong A, Hoa Sen, Phu My Flat, 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.¹⁰⁶

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

¹⁰¹ *Id.* at 58-60 (citing *Max Fortune*, No. 11-340, slip op. 13-52 (CIT Apr. 15, 2013)).

¹⁰² *Id.* at 60-61 (citing *Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 84 FR 29164 (June 21, 2019) (*Butt-Weld Pipe Fittings China Anti-Circumvention Final*), at Section VIII.D (p. 13)).

¹⁰³ *Id.* at 61.

¹⁰⁴ *Id.* at 62 (citing *Max Fortune*, no. 11-340, slip op. 13-52 (CIT Apr. 15, 2013)).

¹⁰⁵ *Id.* (citing *Shenzhen Xinboda Indus. Co. v. United States*, Slip. Op. 2017-160 (CIT 2017)).

¹⁰⁶ See Ton Dong A Case Brief at 15-17; and Hoa Sen Case Brief at 16-19.

‘consistently followed a contrary practice in similar circumstances and provided no reasonable explanation for the change in practice.’”¹⁰⁷ 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.¹⁰⁸ 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.”¹⁰⁹ Thus, while “an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently,”¹¹⁰ 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,”¹¹¹ or “acted differently {in a particular} case than it has *consistently* acted in similar circumstances without reasonable explanation.”¹¹²

The methodology used in the CORE from China and CRS from China anti-circumvention determinations does not constitute an “established procedure.”¹¹³ 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.”¹¹⁴ 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.¹¹⁵ 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*¹¹⁶ and *Aluminum Extrusions China Anti-Circumvention*

¹⁰⁷ See *SeAH*, and *Consolidated Bearings Co. v. United States*, 348 F. 3d 997, 1007 (Fed. Cir. 2003).

¹⁰⁸ See *Union Steel v. United States*, 755 F. Supp. 2d 1304, 1310-11 (CIT 2011); see also Petitioners’ Rebuttal Brief at 57.

¹⁰⁹ See *SeAH*; *Huvis Corp. v. United States*, 525 F. Supp. 2d 1370, 1378 (CIT 2007); and *Ranchers-Cattlemen Action Legal Found. v. United States*, 74 F. Supp. 2d 1353, 1374 (CIT 1999); see also Petitioners’ Rebuttal Brief at 57.

¹¹⁰ See *SeAH*; *RHP Bearings v. United States*, 288 F. 3d 1334, 1347 (Fed. Cir. 2002); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001); and *Transactive Corp. v. United States*, 91 F. 3d 232, 237 (D.C. Cir. 1996); and *Consolidated Bearings Co. v. United States*, 348 F. 3d 997, 1007 (Fed. Cir. 2003).

¹¹¹ See *Shenzhen Xinboda Indus. Co. v. United States*, No. 16-116, slip. op. 17-160, *11 (CIT Dec. 5, 2017); see also Petitioners’ Rebuttal Brief at 47.

¹¹² See *Consolidated Bearings Co. v. United States*, 348 F. 3d 997, 1007 (Fed. Cir. 2003) (emphasis added); and *RHP Bearings v. United States*, 288 F. 3d 1334, 1347 (Fed. Cir. 2002).

¹¹³ See *SeAH*; *Huvis Corp. v. United States*, 525 F. Supp. 2d 1370, 1378 (CIT 2007); and *Ranchers-Cattlemen Action Legal Found. v. United States*, 74 F. Supp. 2d 1353, 1374 (CIT 1999).

¹¹⁴ See *Pipe Mexico Final* IDM at Comment 4; see also Petitioners’ Rebuttal Brief at 58.

¹¹⁵ See Petitioners’ Rebuttal Brief at 57-58; 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 Final* IDM at Comment 4.

¹¹⁶ *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.

Final.¹¹⁷ In *Max Fortune*, the CIT affirmed Commerce's practice of barring uncooperative respondents from a certification process.¹¹⁸ 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 *CORE China Anti-Circumvention Final*,¹¹⁹ *CRS China Anti-Circumvention Final*, *CORE Korea Anti-Circumvention Final*, and *CORE Taiwan Anti-Circumvention Final*.¹²⁰

However, in *Butt-Weld Pipe Fittings China Anti-Circumvention Preliminary*, Commerce preliminarily barred one respondent, Pantech, and its importers from participating in the certification process because Commerce found that Pantech had failed to cooperate and had failed to establish that it was able to trace the country of origin of its inputs.¹²¹ 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.¹²² 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.¹²³ Thus, rather than the rule, Commerce's decision to allow unresponsive respondents to participate in the certification process in *CORE China Anti-Circumvention Final* and *CRS China Anti-Circumvention Final* are the exceptions to Commerce's practice in several similar country-wide anti-circumvention inquiries, including *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, *Aluminum Extrusions China Anti-Circumvention Final*, *Tissue Paper China MFVN Anti-Circumvention Final*, *Tissue Paper China Quijiang Anti-Circumvention Final*, and *Tissue Paper China Sunlake Anti-Circumvention Final*.

¹¹⁷ 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*).

¹¹⁸ See *Max Fortune*, No. 11-340, slip op. 13-52 (CIT Apr. 15, 2013)); 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*; *Tissue Paper China Sunlake Anti-Circumvention Final*.

¹¹⁹ See *Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 FR 23895 (May 23, 2018) (*CORE China Anti-Circumvention Final*).

¹²⁰ 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*).

¹²¹ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final* ("In the *Preliminary Determinations*, 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).").

¹²² See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.

¹²³ *Id.*

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 extent to which a party may benefit from its own lack of cooperation.”¹²⁴ 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 certification process.”¹²⁵ 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 *CORE China Anti-Circumvention Final* and *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*.¹²⁶ 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.¹²⁷ 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.¹²⁸

Ton Dong A, Hoa Sen, and Phu My Flat point out that, in the *CORE China 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

¹²⁴ See *Preliminary Determinations* 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)).

¹²⁵ See *Preliminary Determinations* PDM at 13.

¹²⁶ See *Preliminary Determinations* PDM at 12-13, 20-23; 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>).

¹²⁷ See Petitioners’ Rebuttal Brief at 58 (citing *Tissue Paper China MFVN Anti-Circumvention Final* IDM at Comment 4; see also *Tissue Paper China Quijiang Anti-Circumvention Final*).

¹²⁸ See, e.g., *Butt-Weld Pipe Fittings China Anti-Circumvention Final*; *Tissue Paper China Sunlake Anti-Circumvention Preliminary*; and *Tissue Paper China MFVN Anti-Circumvention Final*; and *Max Fortune*, No. 11-340, slip op. 13-52 (CIT Apr. 15, 2013)).

interested parties' concerns about extending the relevant order to all Vietnamese producers.¹²⁹ The parties also argue that barring uncooperative unresponsive companies is unnecessary and inappropriate.¹³⁰ 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 CRS exported to the United States as circumventing the *CRS Orders*), and the need to impose certification requirements on all Vietnamese CRS 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 *CRS China Anti-Circumvention Final* are not relevant to the question of whether to bar uncooperative respondents from participating in such a certification process.¹³¹

The Importers Group claim that outside parties were provided no notice of the potential for Commerce to bar uncooperative companies from the certification process.¹³² 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."¹³³ Moreover, Commerce recently decided to bar uncooperative companies in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.¹³⁴ Notably, in the *Butt-Weld Pipe Fittings China Anti-Circumvention Preliminary*, in which uncooperative butt-weld pipe fittings producers were initially barred from a certification process, was completed before Commerce issued quantity and value questionnaires and complete questionnaires to the uncooperative producers. Thus, both *Butt-Weld Pipe Fittings China Anti-Circumvention Preliminary* and Commerce's earlier decisions in *Tissue Paper China Sunlake Anti-Circumvention Preliminary* and in *Tissue Paper China MFVN Anti-Circumvention Final* (as upheld in *Max Fortune*) provided notice that Commerce might bar uncooperative parties from an anti-circumvention certification process.¹³⁵

¹²⁹ See Ton Dong A Case Brief at 15-16; and Hoa Sen Case Brief at 16 (citing *CRS China Anti-Circumvention Final* IDM at 22, 25, and 28).

¹³⁰ See Ton Dong A Case Brief at 15-16; and Hoa Sen Case Brief at 16 (citing *CRS China Anti-Circumvention Final* IDM at 22, 25, and 28).

¹³¹ See *CRS China Anti-Circumvention Final* IDM at 21-29 (compare these statements to Commerce's statements in *Korea CRS Anti-Circumvention Preliminary Determination* PDM at 12-13).

¹³² See Importer Group's Case Brief at 11.

¹³³ See Petitioners' Rebuttal Brief at 35 (citing *Initiation Notice*, 83 FR at 37785-86 and 37790).

¹³⁴ See *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), and accompanying PDM at 8-9 and 12, unchanged in *Butt-Weld Pipe Fittings from China Anti-Circumvention Final*.

¹³⁵ See *Tissue Paper China Sunlake Anti-Circumvention Preliminary*, and *Tissue Paper China MFVN Anti-Circumvention Final* (which was upheld in *Max Fortune*).

The Importer's Group also argues that it is 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 record to incorrectly report type "1" Vietnamese entries as type "3" Korean entries.¹³⁶ However, barring uncooperative companies from participating in the certification process has been shown to be necessary to ensure cooperation in future anti-circumvention inquiries.¹³⁷ Commerce is directed by the SAA to consider whether an uncooperative party could benefit from its failure to cooperate.¹³⁸ 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 6: Whether Precluding Certain Importers and Exporters from Participating in the Certification Process is Inappropriate and Unfairly Punishes Importers

Ton Dong A Case Brief,¹³⁹ *Hoa Sen Case Brief*,¹⁴⁰ *Phu My Flat Case Brief*¹⁴¹

- 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."¹⁴²
- 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."¹⁴³
- 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

¹³⁶ See Importer Group's Case Brief at 11 and Footnote 39.

¹³⁷ See, e.g., *Max Fortune*, No. 11-340, slip op. 13-52; *Tissue Paper China MFVN Anti-Circumvention Final* 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* IDM at 13.

¹³⁸ See SAA at 870.

¹³⁹ See *Ton Dong A Case Brief* at 17-18.

¹⁴⁰ See *Hoa Sen Case Brief* at 17-19.

¹⁴¹ See *Phu My Flat Case Brief* at 15-17.

¹⁴² See *Ton Dong A Case Brief* at 17 (citing *Mukand, Ltd. v. United States*, 767 F. 3d 1300, 1307 (Fed. Cir. 2014) and *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F. 3d 1027, 1032 (Fed. Cir. 2000)); see also *Hoa Sen Case Brief* at 17 (citing *Mukand, Ltd. v. United States*, 767 F. 3d 1300, 1307 (Fed. Cir. 2014) and *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F. 3d 1027, 1032 (Fed. Cir. 2000)).

¹⁴³ *Id.* at 17 (citing *Lifestyle Enterprise, Inc.*, 768 F. Supp. 2d, at 1298); see also *Hoa Sen Case Brief* at 17 (citing *Lifestyle Enterprise, Inc.*, 768 F. Supp. 2d at 1298).

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.¹⁴⁴

- There is no evidence either that all of Ton Dong A's or Hoa Sen's CRS production is sourced from Korea or, alternatively, that Ton Dong A or Hoa Sen are unable to trace the substrate for their exports to the United States.¹⁴⁵
- 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.¹⁴⁶

*JFE Shoji Letter*¹⁴⁷

- Commerce's application of AFA to imports produced by the allegedly non-responsive companies, in particular their preclusion from participation in the certification program established pursuant to the preliminary determinations, is impermissibly punitive not just with respect to the non-responsive companies but also with respect to 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.¹⁴⁸

*Duferco Letter*¹⁴⁹

- 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.

¹⁴⁴ *Id.* at 17-18 (citing *Qingdao Taifa Grp Co. v. United States*, 34 C.I.T. 1435, 1443, n.7 (2010)); *see also* Hoa Sen Case Brief at 17-18 (citing *Qingdao Taifa*, at 1443, n.7).

¹⁴⁵ *Id.* at 16-17; and Hoa Sen Case Brief at 18.

¹⁴⁶ *See* Ton Dong A Case Brief at 18 (citing *Tai Shan City Kam Kiu Aluminium Extrusion Co. v. United States*, 58 F. Supp. 3d 1384, 1396 (Ct. Int'l Trade 2015)); *see also* Hoa Sen Case Brief at 18 (citing *Tai Shan*, 58 F. Supp. 3d at 1396).

¹⁴⁷ *See* JFE Shoji Letter at 45.

¹⁴⁸ *See* JFE Shoji Letter at 5 (citing *Archer Daniels Midland Co., v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013)).

¹⁴⁹ *See* Duferco Case Brief at 3-4.

*Mitsui Case Brief*¹⁵⁰

- Commerce initiated the circumvention inquiries to determine whether CRS imported from Vietnam using Korean substrate is circumventing the Korean CRS 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.¹⁵¹
- The statute limits the use of AFA to Commerce's proceeding and not to subsequent import activities which are governed by customs law.¹⁵²
- 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.¹⁵³
- 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.¹⁵⁴
- Commerce may use facts available, and perhaps AFA, where a respondent fails to provide necessary information in response to a questionnaire. However, in the *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.¹⁵⁵

*Importer Group's Case Brief*¹⁵⁶

- 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 CRS from Vietnam are circumventing the orders on CRS 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 CRS imported from Vietnam are not subject to the orders on CRS 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-

¹⁵⁰ See Mitsui Case Brief at 7-8.

¹⁵¹ *Id.* at 7.

¹⁵² *Id.* at 7.

¹⁵³ *Id.* at 8 (citing 19 U.S.C. § 1677e(a)(2) and 19 U.S.C. § 1677e(b)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Importer Group's Case Brief at 6-9, 12-13.

subject merchandise. Commerce's certification scheme will prevent U.S. importers from demonstrating that CRS 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, CRS 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*¹⁵⁷

- 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.”¹⁵⁸
- 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.¹⁵⁹
- 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.¹⁶⁰
- 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.¹⁶¹
- 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.¹⁶²
- Commerce's establishment of a certification process “to administer {this} affirmative finding,” requiring “that entries of CRS from Vietnam that are made from HRS 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 *CRS Orders*” and determinations in *CORE from China* and *CORE for Korea*.¹⁶³

¹⁵⁷ See Petitioners' Rebuttal Brief at 47-50.

¹⁵⁸ *Id.* at 47 (citing *Initiation Notice*, 83 FR at 37794-95).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 48 (citing *Butt-Weld Pipe Fittings China Anti-Circumvention Final IDM* at 20; *Preliminary Determinations PDM* at 18, section 781(b)(E); and *Tissue Paper China Quijiang Anti-Circumvention Final*).

¹⁶¹ *Id.*

¹⁶² *Id.* at 48 (citing *Butt-Weld Pipe Fittings China Anti-Circumvention Final IDM* at Comment 3; *Garment Hangers China Anti-Circumvention Final IDM* at Comment 4; and *Tissue Paper China ARPP Anti-Circumvention Final IDM* at Comment 2).

¹⁶³ *Id.* at 50 (citing *Butt-Weld Pipe Fittings China Anti-Circumvention Final*; and *Preliminary Determinations PDM* at 12-13 and 22).

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.¹⁶⁴

Commerce notified interested parties that it was initiating the anti-circumvention inquiry "on a country-wide basis (*i.e.*, not exclusive to the producers mentioned)" and would be reviewing "information from the Vietnamese producers and exporters concerning their shipments of CORE to the United States and the origin of any imported HRS and CRS being processed into CORE."¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸

Thus, we disagree with the argument submitted by Ton Dong A, Hoa Sen, Phu My Flat, and JFE Shoji that barring uncooperative producers and their importers from the certification process is impermissibly punitive and is not supported by evidence,¹⁶⁹ and that the purpose of precluding

¹⁶⁴ See, e.g., *Garment Hangers China Anti-Circumvention Final* IDM at Comment 4.

¹⁶⁵ See *Initiation Notice*, 83 FR at 37794-5.

¹⁶⁶ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final* IDM at 21; see also *Preliminary Determinations PDM* at 13-18; section 781(b)(1)(E) of the Act; and *Tissue Paper China Quijiang Anti-Circumvention Final*.

¹⁶⁷ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final* and accompanying IDM at Comment 3; *Garment Hangers China Anti-Circumvention Final* IDM at Comment 4; and *Tissue Paper China ARPP Anti-Circumvention Final* IDM at Comment 2.

¹⁶⁸ See *Butt-Weld Pipe Fittings from China Anti-Circumvention Final*; and *Preliminary Determinations PDM* at 12-13, 22.

¹⁶⁹ See *Ton Dong A Case Brief* at 17-18 (citing *Mukand, Ltd. v. United States*, 767 F. 3d 1300, 1307 (Fed. Cir. 2014) (*Mukand*), and *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F. 3d 1027, 1032 (Fed. Cir. 2000) (*F.lli De Cecco*), *Lifestyle Enterprise, Inc.*, 768 F. Supp. 2d at 1298) (*Lifestyle Enterprise*), and *Qingdao Taifa Grp Co. v. United States*, 34 C.I.T. 1435, 1443, n.7 (2010) (*Qingdao Taifa*)); see also *Hoa Sen Case Brief* at 17

companies from participating in the certification process is punitive.¹⁷⁰ Similarly, we disagree with Duferco's argument that Commerce's decision to preclude uncooperative respondents is capricious and arbitrary.¹⁷¹ Commerce's decision to bar uncooperative respondents from participating in the certification process had proven necessary to ensure cooperation and does not go beyond what is minimally necessary and reasonable to ensure cooperation. Therefore, in a case where the affirmative anti-circumvention determination is made entirely on record evidence without an adverse inference, as was the case in *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 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 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."¹⁷² 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,¹⁷³ that there is not support authorizing Commerce to preclude the use of documentation related to customs clearance or liquidation of customs entries,¹⁷⁴ 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.¹⁷⁵ Commerce has previously barred uncooperative parties from certification processes in anti-circumvention proceedings, and this practice was previously upheld by the CIT.¹⁷⁶ 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 *CORE China Anti-Circumvention Final*, *CRS China Anti-Circumvention Final*, the

(citing *Mukand, F.Ili De Cecco; Lifestyle Enterprise*; and *Qingdao Taifa*); Phu My Flat Case Brief at 16-17 (citing *Mukand, F.Ili De Cecco; Lifestyle Enterprise*; and *Qingdao Taifa*); and JFE Shoji Letter at 4.

¹⁷⁰ See Ton Dong A Case Brief at 18 (citing *Tai Shan City Kam Kiu Aluminum Extrusion Co. v. United States*, 58 F. Supp. 3d 1384, 1396 (CIT 2015)) (*Tai Shan*); see also Hoa Sen Case Brief at 18 (citing *Tai Shan*, 58 F. Supp. 3d at 1396); and Phu My Flat Case Brief at 17 (citing *Tai Shan*, 58 F. Supp. 3d at 1396).

¹⁷¹ See Duferco Case Brief at 3.

¹⁷² See JFE Shoji Case Brief at 5 (citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013)).

¹⁷³ See Mitsui Case Brief at 7.

¹⁷⁴ *Id.* at 8 (citing 19 U.S.C. § 1677e(a)(2), and 19 U.S.C. § 1677e(b)).

¹⁷⁵ *Id.* at 8.

¹⁷⁶ *Max Fortune*, no. 11-340, slip op. 13-52.

Preliminary Determinations, CORE Korea Anti-Circumvention Preliminary, and CORE Taiwan Anti-Circumvention Preliminary.

In *Butt-Weld Pipe Fittings China Anti-Circumvention Preliminary*, Commerce preliminarily barred one respondent, Pantech, and its importers from participating in the certification process because Commerce found that Pantech had failed to cooperate and had failed to establish that it was able to trace the country of origin of its inputs.¹⁷⁷ 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.¹⁷⁸ Importantly, Commerce continued to find several other unresponsive companies in the same inquiry to be uncooperative and continued to bar these companies from the certification process.¹⁷⁹ 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.¹⁸⁰ 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.

Comment 7: Whether Commerce Should Allow Additional Time for Completing Certifications for Pre-Preliminary Determination Entries

*Mitsui Case Brief*¹⁸¹

- In the instructions to CBP dated August 13, 2019, Commerce required importers and exporters to complete the Importer and Exporter Certifications within 30 days of publication of the *Preliminary 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

¹⁷⁷ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 84 FR at 29165 ("In the *Preliminary Determination*, Pantech Steel Industries Sdn. Bhd. (Pantech) and its importers were precluded from participating in the certification process. However, because Commerce has verified Pantech's ability to trace the country of origin for its shipments of butt-weld pipe fittings, we will allow Pantech and its importers to participate in the certification process for unliquidated entries of butt-weld pipe fittings from Malaysia that were entered, or withdrawn from warehouse, for consumption on or after August 21, 2017 (the initiation date of this anti-circumvention inquiry).").

¹⁷⁸ See *Butt-Weld Pipe Fittings Anti-Circumvention Preliminary Determination* PDM at 8-10; and *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 84 FR at 29165.

¹⁷⁹ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 84 FR at 29165.

¹⁸⁰ See *Max Fortune*, No. 11-340, slip op. 13-52; see also *Tissue Paper China MFVN Anti-Circumvention Final*, *Tissue Paper China Quijiang Anti-Circumvention Final*, and *Tissue Paper China Sunlake Anti-Circumvention Final*.

¹⁸¹ See *Mitsui Case Brief* at 13-14.

imposed in the FR Notice is unreasonable because the FR Notice and Preliminary Decision Memorandum were conflicting, creating significant confusion regarding the certification process.

- Importers therefore had to await clarification instructions, which Commerce did not provide until after the deadline for preparing the certification. Accordingly, assuming Commerce's present certification requirements were appropriate, Commerce should extend the certification deadline as it did in the China circumvention proceeding.

No other party commented on this issue.

Commerce Position:

We agree with Mitsui that the Customs instructions relaying the certification requirements did not post until more than 30 days after the *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 *Preliminary Determinations* and the Preliminary Decision Memorandum contained conflicting information about the certification process, Mitsui did not elaborate on this point and after reviewing both documents, Commerce was not able to identify the alleged conflict. Accordingly, we cannot address Mitsui's argument further.

Comment 8: Whether a Country-Wide Determination is Justified

*Formosa's Case Brief*¹⁸²

- Commerce made an affirmative anti-circumvention determination 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.

*Petitioners' Rebuttal Briefs*¹⁸³

- Commerce's preliminary country-wide findings in the *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.

¹⁸² See Formosa's Case Brief at 5.

¹⁸³ See Petitioners' Rebuttal Brief at 25-27.

- As Commerce explained in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, 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 prior the anti-circumvention determination in *Butt-Weld Pipe Fittings China Anti-Circumvention Final* and the May 2019 preliminary determination in *Aluminum Extrusions from China*.

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*,¹⁸⁴ 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.¹⁸⁵

Commerce has taken this approach in other anti-circumvention inquiries, where the facts warrant such a finding.¹⁸⁶ Furthermore, Commerce has previously issued affirmative findings of circumvention that applied to all imports of CRS from Vietnam, regardless of manufacturer or producer, unless accompanied by a certification stating that such CRS has not been produced from HRS sourced from China.¹⁸⁷ Thus, we continue to hold the view that the 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 Korean HRS as their substrate in the future. This is, after all, the very nature of these inquiries: Korean HRS 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.

¹⁸⁴ See *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.

¹⁸⁵ See *Initiation Notice*, 83 FR at 37794-95.

¹⁸⁶ See, e.g., *CRS China Anti-Circumvention Final* IDM at Comment 3.

¹⁸⁷ See *CRS China Anti-Circumvention Final* IDM.

Comment 9: Whether Commerce’s Interpretation of Section 781(b) of the Act Applies to the CRS Production Process in Vietnam and Expands the Scope of the Orders

Hoa Sen, Phu My Flat, and Ton Dong A’s Case Briefs

- The anti-circumvention statute only authorizes Commerce to find circumvention of imported merchandise that is completed or assembled in another foreign country before importation into the United States.¹⁸⁸ Dictionary definitions of “assemble” is “to fit together the parts of” and “complete” is defined as making things “whole or perfect.”¹⁸⁹
- For more than 25 years following the investigation of flat-rolled steel products, Commerce has maintained that CRS and HRS are two separate and distinct classes or kinds of merchandise or like products.¹⁹⁰ 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.”¹⁹¹
- The petitioners have also for years purposefully drafted petitions for AD and CVD duty orders to include scope definitions that distinguish between these two distinct classes or kinds of merchandise.¹⁹²
- Contrary to its long-standing practice and prior decisions where Commerce has defined “‘minor processing’ as processing that does not result in substantial transformation or a change in country of origin of the processed product, Commerce only once found circumvention where the third-country processing at issue results in a substantial transformation.¹⁹³ This involved the same product as this instant proceeding, CRS produced in Vietnam.¹⁹⁴ Commerce’s *Preliminary Determinations* ignore years of Commerce precedent without explanation and adequate justification.¹⁹⁵
- Commerce appears to arbitrarily select a large enough figure as a benchmark to find each of the statutory factors laid out in the statute to demonstrate circumvention is minor or insignificant without considering whether the comparison is fair.¹⁹⁶ The term “minor” or “insignificant” applies a very large threshold to find a circumvention; the CRS production process simply does not meet that threshold.¹⁹⁷ By not applying the clear standard of the

¹⁸⁸ See Hoa Sen’s Case Brief at 19; Phu My Flat Steel’s Case Brief at 17; and Ton Dong A’s Case Brief at 19.

¹⁸⁹ See Hoa Sen’s Case Brief at 19; Phu My Flat Steel’s Case Brief at 17; and Ton Dong A’s Case Brief at 19.

¹⁹⁰ See Hoa Sen’s Case Brief at 20; Phu My Flat Steel’s Case Brief at 18; and Ton Dong A’s Case Brief at 20 (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 (*CRS from Argentina LTFV*)).

¹⁹¹ See Hoa Sen’s Case Brief at 20; Phu My Flat Steel’s Case Brief at 18; and Ton Dong A’s Case Brief at 20 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 FR 37065 (July 9, 1993) at Appendix I (*Steel Argentina Final*)).

¹⁹² See Hoa Sen’s Case Brief at 23; Phu My Flat Steel’s Case Brief at 21-22; and Ton Dong A’s Case Brief at 23.

¹⁹³ See Hoa Sen’s Case Brief at 21; Phu My Flat Steel’s Case Brief at 19; and Ton Dong A’s Case Brief at 21.

¹⁹⁴ See Hoa Sen’s Case Brief at 21; Phu My Flat Steel’s Case Brief at 19; and Ton Dong A’s Case Brief at 21.

¹⁹⁵ See Hoa Sen’s Case Brief at 24; Phu My Flat Steel’s Case Brief at 22; and Ton Dong A’s Case Brief at 24.

¹⁹⁶ See Hoa Sen’s Case Brief at 24; Phu My Flat Steel’s Case Brief at 22-23; and Ton Dong A’s Case Brief at 24-25.

¹⁹⁷ See Hoa Sen’s Case Brief at 24-25; Phu My Flat Steel’s Case Brief at 22-23; and Ton Dong A’s Case Brief at 24-25.

anti-circumvention provision, Commerce has vastly expanded the definition and scope of circumvention and this action is unlawful.¹⁹⁸

- Commerce, thus, turned the meaning of the words upside down and exceeded its authority by unlawfully expanding the definition and scope of the circumvention.¹⁹⁹ 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 literal physical description of the scope, let alone those that are “unequivocally excluded from the order in the first place.”²⁰⁰ This would allow the circumvention statute to be used to expand an order to include merchandise that fits the physical characteristics of the order without any regard for where it was produced, disrupting the AD/CVD scheme and complicating Congress’ intent.²⁰¹
- 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” critical. 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 risk complicating scopes and be inconsistent with the ITC’s prior injury determination.²⁰²
- Korean HRS that is further processed and substantially transformed in Vietnam into CRS is subject to neither the Korea HRS AD/CVD orders nor the *CRS Orders*.²⁰³ They are the products of Vietnam, not Korea.²⁰⁴
- In litigation pertaining to a challenge to Commerce’s AD and CVD investigations covering solar panels from China, in its remand order, the CIT expressed its concern that Commerce was attempting to apply new orders to the “same class or kind of merchandise” covered by pre-existing orders.²⁰⁵ Commerce explained on remand that Commerce cannot apply to AD orders or two CVD orders to the same merchandise in the *SunPower Remand*.²⁰⁶ Respondents argue that this suggests that the risk of creating overlapping and complicated scopes would lead to situations where Commerce would be forced to exclude the merchandise found to be circumventing the prior order for a more recent circumvention finding involving substantially transformed merchandise from a third country containing the same physical characteristics enumerated in that order.²⁰⁷ They argue that CRS from Vietnam is now potentially subject to at least three orders: CRS from China, Korea, and possibly Vietnam.²⁰⁸

¹⁹⁸ See Hoa Sen’s Case Brief at 25; Phu My Flat Steel’s Case Brief at 23; and Ton Dong A’s Case Brief at 25.

¹⁹⁹ See Hoa Sen’s Case Brief at 25; Phu My Flat Steel’s Case Brief at 23; and Ton Dong A’s Case Brief at 25.

²⁰⁰ See Hoa Sen’s Case Brief at 26-27; Phu My Flat Steel’s Case Brief at 24; and Ton Dong A’s Case Brief at 26-27.

²⁰¹ See Hoa Sen’s Case Brief at 26-27; Phu My Flat Steel’s Case Brief at 24-25; and Ton Dong A’s Case Brief at 26-27.

²⁰² See Hoa Sen’s Case Brief at 27-28; Phu My Flat Steel’s Case Brief at 25-26; and Ton Dong A’s Case Brief at 27.

²⁰³ See Hoa Sen’s Case Brief at 28; Phu My Flat Steel’s Case Brief at 26-27; and Ton Dong A’s Case Brief at 28.

²⁰⁴ *Id.*

²⁰⁵ See *SunPower Corp. v. United States*, 179 F. Supp. 3d. 1286 (CIT June 8, 2016) (*SunPower*).

²⁰⁶ See Final Results of Redetermination Pursuant to Court Courter (October 4, 2016) (*SunPower Remand*) (“A single product cannot be subject to two different antidumping orders that cover merchandise from two different countries.”).

²⁰⁷ See Hoa Sen’s Case Brief at 29; Phu My Flat Steel’s Case Brief at 27; and Ton Dong A’s Case Brief at 29, citing *SunPower*.

²⁰⁸ See Hoa Sen’s Case Brief at 29; Phu My Flat Steel’s Case Brief at 27; and Ton Dong A’s Case Brief at 29

- The creation of such a complicated scope is akin to the complicated scope that the CIT rejected in *Wheatland Tube* where the Federal Circuit concluded that Congress did not authorize Commerce to find a “minor alteration” when it resulted in a change in the class or kind of merchandise.²⁰⁹ Similarly, Congress did not intend to authorize Commerce to find “minor or insignificant” processing when it yields a different class or kind of merchandise.²¹⁰
- Rather, Congress prohibited Commerce from using the circumvention statute to change orders contrary to their explicit language.²¹¹ The *CRS Orders* explicitly exclude HRS that is not cold-rolled. It is thus contrary to law and Congress’ intent to now include HRS from Korea that is further processed in Vietnam as CRS within the *CRS Orders*.²¹²

JFE Shoji’s Letter

- Changes from HRS to CRS cannot under any circumstance be deemed minor or insignificant, as Commerce found in the *Preliminary Determinations*.²¹³
- HRS and CRS are, and have always been, considered separate classes and kinds of merchandise by both Commerce and the ITC.²¹⁴
- Commerce’s finding is unlawful, and it appears to have either ignored the facts or ignored the governing law.²¹⁵

POSCO Vietnam’s Case Brief

- POSCO Vietnam disagrees with Commerce’s *Preliminary Determinations*, because Commerce has previously determined that “galvanizing constitutes substantial transformation” and given a long history and familiarity with the steel industry, it has consistently held that cold-rolling HRS substrate constitutes a “substantial transformation.”²¹⁶
- The fundamental question in steel cases is where the merchandise is substantially transformed; in this case, the merchandise is substantially transformed in Vietnam.²¹⁷
- Commerce has also previously found that “cold-rolled coils are distinguished from hot-rolled coils by their reduced thickness... which are achieved through cold-rolling,” and that

²⁰⁹ See Hoa Sen’s Case Brief at 29-30; Phu My Flat Steel’s Case Brief at 27-28; and Ton Dong A’s Case Brief at 29-30 (all citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365 (Fed. Cir. 1998) (*Wheatland Tube*)).

²¹⁰ See Hoa Sen’s Case Brief at 30; Phu My Flat Steel’s Case Brief at 28; and Ton Dong A’s Case Brief at 30.

²¹¹ See Hoa Sen’s Case Brief at 30; Phu My Flat Steel’s Case Brief at 28; and Ton Dong A’s Case Brief at 30.

²¹² See Hoa Sen’s Case Brief at 30-31; Phu My Flat Steel’s Case Brief at 29; and Ton Dong A’s Case Brief at 30-31.

²¹³ See JFE Shoji’s Letter at 4.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See POSCO Vietnam’s Case Brief at 7-8 (citing *Certain Cold-Rolled Steel Flat 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 58178 (December 11, 2017), and accompanying PDM (*CRS China Anti-Circumvention Preliminary*), unchanged in *CRS China Anti-Circumvention Final*); see also *Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 FR 27062, 37065 (July 9, 1993) (*CRS from Argentina LTFV*).

²¹⁷ See POSCO Vietnam’s Case Brief at 8.

the first party to cold roll the hot rolled input coils was the manufacturer as it gave the product its fundamental characteristics.²¹⁸

- The petitioners have continued to bring separate AD and CVD cases on cold-rolled and hot-rolled products.²¹⁹ The language established in scopes of the CRS and HRS petitions demonstrates that: 1) cold-rolling is a significant operation that provides key physical characteristics to the steel; and 2) those that go beyond “skin pass, leveling, temper rolling,” *i.e.*, “cold-reducing” are by definition not minor or insignificant.²²⁰
- While the “substantial transformation” analysis in a producer/country of origin context is different from Commerce’s “minor or insignificant” analysis in an anti-circumvention inquiry, they vary only slightly and the factors are similar.²²¹ Commerce’s finding that cold-rolling is a “minor and insignificant” operation is contrary to its numerous proceedings that were based upon Commerce’s keen familiarity with the steel industry.²²²
- Given the extent of manufacturing and processing in the exporting country and in the third country, Commerce should find that the cold-rolling process is not “minor or insignificant.”²²³

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.²²⁴ Commerce lawfully conducted this inquiry by adhering to the statutory framework and applying the facts on the record in finding circumvention.²²⁵ Commerce should thus reject parties’ arguments that these anti-circumvention proceedings unlawfully expanded the scope of the *CRS Orders*.²²⁶
- Analysis of trade patterns, *i.e.*, U.S. imports of CRS from Korea, U.S. imports of CRS from Vietnam, Korean exports of HRS to Vietnam, suggests shifts in shipping and sourcing patterns following the imposition of AD and CVD rates of Korean CRS.²²⁷ In order to address and regulate “new forms of injurious dumping,” Congress granted Commerce “substantial discretion in interpreting {the statutory} terms.”²²⁸ Commerce, thus, properly exercised the “broad discretion” to find circumvention in this proceeding.²²⁹

²¹⁸ *Id.* (citing *Stainless Steel Sheet and Strip in Coils from Taiwan*, 71 FR 7519 (February 13, 2006), and accompanying IDM at Comment 10 (*Stainless Steel Sheet and Strip from Taiwan*); *Stainless Steel Sheet and Strip in Coils from Taiwan*, 70 FR 46137 (August 9, 2005)).

²¹⁹ *Id.* at 9 (citing *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Determination of Sales and Less Than Fair Value*, 81 FR 49953, 49955 (July 29, 2016) (*CRS from Korea Investigation*); *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 81 FR 53419, 53421 (August 12, 2016) (*HRS from Korea Investigation*)).

²²⁰ *Id.* at 9-10.

²²¹ *Id.* at 10.

²²² *Id.*

²²³ *Id.*

²²⁴ See Petitioners’ Rebuttal Brief at 27.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 28-29.

²²⁸ *Id.* at 29-30.

²²⁹ *Id.* at 30-31.

- In the *Preliminary Determinations*, Commerce has provided full analysis of the five statutory criteria established in the statute.²³⁰ It is unreasonable for certain parties to claim that the “minor or insignificant” processing analysis conducted in the *Preliminary Determinations* were not comprehensive and well supported by record evidence.²³¹ Parties cite to no meaningful authority when arguing that Commerce has turned the meaning of the words “upside down.”²³² The dictionary definitions cited by parties in no way undermine Commerce’s determination; converting HRS to CRS is “to make whole or perfect,” in accordance with the statute.²³³
- Certain parties’ contentions that the production of CRS from HRS substrate is significant and complex and constitutes more than mere assembly or completion lack statutory evidence.²³⁴ Similarly, parties’ reference to ITC precedent to argue that the ITC has treated HRS, CRS, and CORE as separate and distinct “like products” also lack merit.²³⁵ Congress enacted the anti-circumvention statute, and none of the statutory factors include a “substantial transformation” test.²³⁶ Rather, it focuses on assessing both quantitative and qualitative factors to determine the CRS processing in Vietnam.²³⁷ Thus, the parties’ contention that Commerce has not explained its departure from its traditional practice or its deviation from court interpretations is incorrect.²³⁸
- 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.²³⁹ Congress explicitly provided Commerce directive to apply practical measurements regarding minor alterations even where such alterations to an article technically transform it into a different article.²⁴⁰ Congress’ intent that “minor” changes could result in the production of a different article, whether or not {the finished good is} included in the same tariff classification, also manifests itself in the anti-circumvention statute.²⁴¹
- 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.²⁴² These factors do not include reference to a substantial transformation test that is used for country of origin or Customs classification purposes.²⁴³

²³⁰ *Id.* at 31-34.

²³¹ *Id.* at 34.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 35.

²³⁵ *Id.* (citing *Certain Flat-Rolled Carbon Steel Products from Argentina, Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, Inv. Nos. 701-TA- 319-332,334,336-342,344, and 347 - 353 and 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619, USITC Pub. 2664 (Aug. 1993) (Final)).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 36-37.

²³⁹ *Id.* at 37-38.

²⁴⁰ *Id.* at 38.

²⁴¹ *Id.* (citing S. Rep. No. 100-71 at 100).

²⁴² *Id.* at 38-39.

²⁴³ *Id.* at 39.

- Parties' contentions that Commerce's circumvention ruling creates overlapping and complicating scopes is incorrect because the statute requires Commerce to consult with the ITC before reaching a final affirmative circumvention determination.²⁴⁴ *Wheatland Tube* concerned a scope inquiry, not a determination involving a third-country completion/assembly; it also concerned products expressly excluded from an order and the absurd result of including within an order products expressly excluded from that order.²⁴⁵ As HRS and CRS were not explicitly excluded from the scope, it would not be inconsistent to include the merchandise in the AD order.²⁴⁶
- Because the circumvention statute contemplates including within an order merchandise that is deemed the same class or kind, which is also linked to the ITC's like product determination, Congress authorized the ITC to advise Commerce if there is an injury problem by including products found to be circumventing the order.²⁴⁷ The precedent in *Wheatland Tube* is not dispositive because Commerce's decision involved a scope inquiry and was limited to a determination of circumvention addressing minor alterations to merchandise subject to an existing AD order.²⁴⁸
- Commerce thus followed Congress' authority to ensure that the ITC's injury determinations would not be undermined by circumvention proceedings that were otherwise intended to provide protection to the injured domestic industry.²⁴⁹

Commerce's Position:

We disagree with certain parties' contentions that our interpretation of section 781(b) of the Act is inappropriate and that we unlawfully expanded the scope of the Taiwan CORE Order. As explained in prior anti-circumvention proceedings,²⁵⁰ 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.²⁵¹ Thus, Commerce's determination on whether merchandise meets these parameters involves two separate inquiries, *i.e.*, whether the

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 39-40.

²⁴⁶ *Id.* at 40 (citing *Initiation Notice* at 37791-72).

²⁴⁷ *Id.* at 40-41 (citing section 781(e) of the Act).

²⁴⁸ *Id.* at 41 (citing *Wheatland Tube*, 161 F. 3d at 1371 (discussing scope injury and the statutory minor alterations provision)).

²⁴⁹ *Id.* at 41.

²⁵⁰ See, e.g., *CORE China Anti-Circumvention Final IDM* at Comments 1 and 2; *CRS China Anti-Circumvention Final IDM* at Comment 1 and 2.

²⁵¹ 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 *Steel Argentina Final*.

product is of the type described in the order, and whether the country of origin of the product is that of the subject country.²⁵² In determining country of origin of a product, Commerce’s usual practice has been to conduct a substantial transformation analysis.²⁵³ 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”²⁵⁴ and whether “{t}hrough that transformation, the new article becomes a product of the country in which it was processed or manufactured.”²⁵⁵ Commerce may examine a number of factors²⁵⁶ 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.²⁵⁷

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.²⁵⁸ 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.²⁵⁹ As part of this analysis, Commerce also considers additional factors such as: pattern of trade, including sourcing patterns; whether

²⁵² 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).

²⁵³ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Glycine from India*, 73 FR 16640 (March 28, 2008), and accompanying IDM at Comment 5; see also *Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 69 FR 74495 (December 14, 2004) (*Plate Belgium Final*), and accompanying IDM at Comment 4.

²⁵⁴ See *Bell Supply Co., LLC v. United States*, 888 F. 3d 1222, 1230 (Fed. Cir. 2018) (*Bell Supply CAFC*) (quotations and citations omitted).

²⁵⁵ *Steel Argentina Final* (quoted in *Ugine and Alz Belgium N.V. v. United States*, 571 F. Supp. 2d 1333, 1337 n.5 (2007)).

²⁵⁶ Specifically, Commerce’s analysis includes factors such as: (1) the class or kind of merchandise; (2) the physical properties and essential component of the product; (3) the nature/sophistication/extent of the processing in the country of exportation; (4) the value added to the product; (5) the level of investment; and (6) ultimate use. See, e.g., *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review*, 76 FR 3086 (January 19, 2011), and accompanying IDM at Comment 6; see also *Laminated Woven Sacks from the People’s Republic of China: Final Results of First Antidumping Duty Administrative Review*, 76 FR 14906 (March 18, 2011) (*Sacks China Final*), 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.

²⁵⁷ See *Sacks China Final* IDM at Comment 1b.

²⁵⁸ See *Bell Supply CAFC*, 888 F.3d at 1230 (“Although substantial transformation and circumvention inquiries are similar, they are not identical.”).

²⁵⁹ 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.²⁶⁰ As such, the purpose of this anti-circumvention inquiry under section 781(b) of the Act is to determine whether merchandise from the country subject to the AD and/or CVD orders that is processed, *i.e.*, completed or assembled into a finished product, in a third country into a merchandise of the type subject to the AD and/or CVD order should be considered within the scope of the AD and/or CVD order at issue.

While certain parties argue that Commerce ignored years of its practice and failed to consider its prior substantial transformation findings in issuing its *Preliminary 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.²⁶¹ Our *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 China Anti-Circumvention Final*, 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.²⁶²

Additionally, we disagree with certain parties' contentions that, because Commerce has found that galvanizing and cold-rolling processes result in substantial transformation, CORE processed in Vietnam from Taiwanese substrate has a country of origin of Vietnam and cannot be properly covered by the scope of the *Taiwan CORE Order*. Although an AD or CVD order would not *normally* cover merchandise that has a country of origin other than the country subject to the order, the statute expressly provides an exception to the general rule in the cases of circumvention because, in general, "{c}ircumvention can only occur if the articles are from a country not covered by the relevant AD or CVD orders."²⁶³ While we recognize our prior determinations involving steel products, *e.g.*, *Steel Argentina Final*, those determinations

²⁶⁰ See section 781(b)(3) of the Act.

²⁶¹ See, *e.g.*, *Steel Argentina Final*, 58 FR 37066 ("{G}alvanizing changes the character and use of the steel sheet, *i.e.*, results in a new and different article."); see also *Plate Belgium Final* 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 Ribbons from France*, 69 FR 10674, 10675 (listing the conversion of CRS to CORE as an example of substantial transformation).

²⁶² 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 China Anti-Circumvention Final*).

²⁶³ See *Bell Supply CAFC*, 888 F. 3d at 1229.

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.”²⁶⁴ 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.’”²⁶⁵ 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.”²⁶⁶ 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.²⁶⁷ 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.”²⁶⁸ In sum, it is evident from the above that Congress anticipated that circumvention could result in a situation where, despite the merchandise undergoing some change that warranted a new country of origin pursuant to a substantial transformation analysis, the merchandise could still be considered to be within the AD or CVD order at issue, if, pursuant to section 781(b) of the Act, Commerce determined the existence of circumvention. As such,

²⁶⁴ See *Bell Supply CAFC*, 888 F. 3d at 1231.

²⁶⁵ *Id.*

²⁶⁶ See H.R. Rep. No. 100-576 at 603 (emphasis added).

²⁶⁷ See SAA at 893.

²⁶⁸ *Id.* at 844 (emphasis added).

Congress has already contemplated that substantial transformation did not preclude a finding of circumvention under the statute.

Moreover, the parties' arguments fail to recognize the Federal Circuit's statement that "{i}n order to effectively combat circumvention of antidumping duty orders, Commerce may determine that certain types of articles are within the scope of a duty order, *even when the articles do not fall within the order's literal scope*."²⁶⁹ The Act "identifies four articles that may fall within the scope of a duty order without unlawfully expanding the order's reach,"²⁷⁰ *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.²⁷¹ 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}."²⁷²

Hoa Sen and Ton Dong A argue that Commerce's previous findings that processing HRS into finished CRS constitutes substantial transformation undermine the finding that the further processing taking place in Vietnam is minor and insignificant for purposes of section 781(b)(1)(C) of the Act. As described extensively above, we note that the parties' contentions ignore the distinct purposes of the two analyses, *i.e.*, the substantial transformation analysis and the factors established in the anti-circumvention statute, and the separate factors considered. In other words, substantial transformation is focused on whether the input product loses its identity and is transformed into a new product having a new name, character and use, and thus a new country of origin. Conversely, section 781(b) of the Act focuses on the extent of processing applied to subject merchandise in a third country and whether such processing is minor or insignificant *in comparison* to the entire production process of the finished subject merchandise.²⁷³ Under section 781(b) of the Act, we also examine whether such further processing in a third country can reasonably be moved across borders, thereby allowing parties to change the country of origin and avoid the discipline of an order. Thus, we find that there is nothing contradictory in finding an input substrate to be substantially transformed into a finished product, in terms of its physical characteristics and uses, while also finding the process of effecting that transformation to be minor vis-à-vis the manufacturing process of producing a finished product. Further, as the Federal Circuit has explained, "even if a product assumed a new identity, the process of 'assembly or completion' may still be minor or insignificant, and undertaken for the purpose of evading an AD or CVD order."²⁷⁴ The SAA illustrates this possibility in its discussion of the anti-circumvention provisions of the Act through its references

²⁶⁹ See *Deacero S.A. de C.V. v. United States*, 817 F. 3d 1332, 1338 (Fed. Cir. 2016) (*Deacero*) (emphasis added).

²⁷⁰ *Id.*

²⁷¹ 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.

²⁷² See *Bell Supply CAFC*, 888 F. 3d at 1230.

²⁷³ See Comment 14 for further analysis on this issue.

²⁷⁴ See *Bell Supply CAFC*, 888 F. 3d at 1230.

to “parts” and finished products.²⁷⁵ It is evident from this discussion that the “parts” and the finished goods assembled are two different products. Nevertheless, the process of assembling such parts into a final product may be minor.²⁷⁶ Furthermore, section 781(b) of the Act requires that we examine other factors, *e.g.*, patterns of trade including sourcing patterns, and whether imports into the third country have increased after initiation of the relevant AD or CVD investigation.

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

Lastly, with regard to certain parties’ contentions that the affirmative determination of this circumvention inquiry will impermissibly expand the scope of the order and complicate administering these orders, we disagree. We reiterate that, although an AD or CVD order would not *normally* cover merchandise that has a country of origin other than the country subject to the order, the statute expressly provides an exception to the general rule in the cases of circumvention because generally “{c}ircumvention can only occur if the articles are from a country not covered by the relevant AD or CVD orders.”²⁷⁷ 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.*”²⁷⁸

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.²⁷⁹ As such, we find that Hoa Sen and Ton Dong A’s reference to *Wheatland* is inapposite because it involved a scope inquiry and not an anti-circumvention proceeding that requires consultation with the ITC.

²⁷⁵ See SAA at 893.

²⁷⁶ *Id.* (“Another serious problem is that the existing statute does not deal adequately with the so-called third country parts problem. In the case of certain products, particularly electronic products that rely on many off the shelf components, it is relatively easy for a foreign exporter to circumvent an antidumping duty order by establishing a screwdriver operation in the United States that purchases as many parts as possible from a third country.”).

²⁷⁷ See *Bell Supply CAFC*, 888 F. 3d at 1229.

²⁷⁸ See *Deacero*, 817 F. 3d at 1338 (emphasis added).

²⁷⁹ See Commerce’s Letter to the ITC, “Anti-Circumvention Inquiries of the Antidumping Duty and Countervailing Duty Orders of Certain Corrosion-Resistant Steel Products and Cold-Rolled Steel Flat Products from the Republic of Korea and the Antidumping Duty Order of Certain Corrosion-Resistant Steel Products from Taiwan: Notification of Affirmative Preliminary Determinations of Circumvention of the Antidumping Duty and Countervailing Duty Order,” dated September 17, 2019 (ITC Letter).

Comment 10: Whether Commerce Should Amend the Exporter Certification Language 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 CRS they produce in Vietnam through cooperating Vietnamese respondents and thereby benefiting from a lower cash deposit rate.²⁸⁰
- The current certification scheme does not address situations where an eligible exporter exports CRS produced by producers that are deemed unresponsive, thus ineligible to certify.²⁸¹ The current language of the export certification does not prohibit cooperative exporters, though they should have direct knowledge of the producer’s identity and location, from exporting CRS from producers who are ineligible to participate in the certification regime.²⁸²
- The prospective of funneling is likely in this proceeding because some non-responsive companies have affiliates that may be allowed to participate in the certification process.²⁸³ Specifically, HPSS can export CRS produced by its affiliates, Hoa Phat JSC and HPSP, as they are currently ineligible to participate in the Korean certification process.²⁸⁴
- Commerce should also close this loophole by requiring eligible exporters to certify that the CRS they are exporting was not produced by those that are currently ineligible to certify and have not advanced to cooperative status through successful completion of a future segment of this proceeding.²⁸⁵
- Commerce should amend the exporter certification established in paragraph 6b of the AD and CVD suspension of liquidation and cash deposit instructions by clarifying that the CRS exported to the United States was not produced by those ineligible to participate in the certification scheme.²⁸⁶

Hoa Sen, Phu My Flat Steel, and Ton Dong A's Rebuttal Briefs and JFE Shoji's Letter

- Certain companies that Commerce has previously identified as “non-responsive” were “non-responsive” solely because they never received the Q&V questionnaire.²⁸⁷ Commerce also issued the Q&V questionnaire to Formosa which only produced HRS substrate in Vietnam.²⁸⁸ Precluding companies such as Formosa from certifying is contrary

²⁸⁰ See Petitioners' Case Brief at 15.

²⁸¹ *Id.*

²⁸² *Id.* at 15-16.

²⁸³ *Id.* at 16.

²⁸⁴ *Id.* at 16-17.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 17.

²⁸⁷ See Hoa Sen's Rebuttal Brief at 14; see also JFE Shoji's Letter at 9; Phu My Flat Steel's Rebuttal Brief at 12; and Ton Dong A's Rebuttal Brief at 14.

²⁸⁸ *Id.*

to law because none of Formosa's HRS used to produce CRS for export to the United States is sourced from Korea.²⁸⁹

- The only information Commerce initially sought during the Q&V questionnaire stage was related to the company's Q&V of CRS exports, not its ability to trace substrate.²⁹⁰ Commerce thus cannot lawfully preclude so-called "non-responsive" companies from participating in the certification process when they were never asked whether they have the ability to trace the source of their substrate.²⁹¹
- As argued in the case briefs, there was no basis for an affirmative circumvention finding in the first place.²⁹² 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.²⁹³ This is what Commerce did in the prior circumvention of *CRS China Anti-Circumvention Final*, and the same procedure should be followed here.²⁹⁴

Mitsui's Rebuttal Brief

- The petitioners' request to amend the exporter certification to prevent non-responsive companies from funneling CRS to the United States through cooperative companies is not a funneling issue.²⁹⁵ Rather, the potential problem arises because Commerce has inappropriately required both importer and exporter certification stating that the Vietnamese CRS is not made from Korean substrate, and not a certification from the Vietnamese mill.²⁹⁶
- Commerce has preliminarily determined to penalize the Vietnamese mills that produce CRS and allegedly did not respond to the Q&V questionnaire by precluding them from issuing an exporter certification.²⁹⁷ However, this issue only pertains to non-responsive mills who also serve as exporters. Such treatment should not apply to exporters unaffiliated with those non-responsive exporters/mills.²⁹⁸ Similarly, the petitioners take issue with Vietnamese companies that have numerous affiliates. Such preclusion should not apply to exporters that are unaffiliated with non-responsive Vietnamese mills.²⁹⁹
- If Commerce had desired that the mill issues the certification, it would have done so.³⁰⁰ Having not done so in the *Preliminary Determinations* and not issued further comment and notice, it would be improper to change this definition in the final determinations.³⁰¹ An

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ See Hoa Sen's Rebuttal Brief at 14-15; see also JFE Shoji's Letter at 9-10; Phu My Flat Steel's Rebuttal Brief at 12-13; and Ton Dong A's Rebuttal Brief at 14-15.

²⁹⁴ *Id.*

²⁹⁵ See Mitsui's Rebuttal Brief at 2.

²⁹⁶ *Id.* at 2-3.

²⁹⁷ *Id.* at 3.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

exporter can provide evidence regarding the origin of the substrate used in the CRS it is exporting produced in Vietnam.³⁰²

- The petitioners note that funneling is “an illegitimate activity” used by firms with high cash deposit rates to shift its exports to firms with low cash deposit rates.³⁰³ Mitsui, however, has been a legitimate exporter for a long time, and it is not funneling in any sense of the word.³⁰⁴
- The petitioners’ request to amend the exporter certification language goes beyond preventing funneling; it prevents an exporter from certifying that the CRS they export from Vietnam is not produced from the Korean substrate.³⁰⁵ Such request not only stops legitimate business trade, but also expands the application of AFA and must be rejected.³⁰⁶

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 CRS 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 China Final*³⁰⁷ and *Tung Mung*³⁰⁸ 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 *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 in Comments 3 and 11, for these final determinations, we continue to preclude certain companies that received, but did not respond to, our Q&V questionnaire from the certification process. We also find that prohibiting non-responsive and thus uncooperative companies from participating in the certification process has been shown to be necessary to ensure cooperation in future anti-circumvention inquiries.

Moreover, the legislative history demonstrates Congress’ intent to address “‘loopholes’ that have seriously undermined the effectiveness of the remedies provided by the antidumping and countervailing proceedings.”³⁰⁹ 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.”³¹⁰ As such, consistent with *Butt-Weld Pipe Fittings China Anti-Circumvention Final*, *Tissue Paper China Sunlake Anti-Circumvention Final*, and *Tissue*

³⁰² *Id.* at 3-4.

³⁰³ *Id.* at 4.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ See Petitioners’ Case Brief at 15 (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 China Final*), and accompanying IDM at Comment 1.

³⁰⁸ *Id.* (citing *Tung Mung Development Co. v. United States*, 219 F. Supp. 2d 1333, 1343 (CIT 2002) (*Tung Mung*).

³⁰⁹ See H.R. Rep. No. 40,100th Congress, 1st Sess., Part 1 at 135 (1987).

³¹⁰ See Senate Report No. 71, 100th Congress 1st Sess. (1987) at 100.

Paper China MFVN Anti-Circumvention Final, we find that it is appropriate to address changes from the *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 CRS they export from Vietnam and to continue to be able to demonstrate the source of the substrate used to produce the CRS they export. In addition, in order to address non-responsive and uncooperative producers in Vietnam, we are prohibiting exporters from certifying that the CRS was not produced from HRS substrate manufactured in Korea for any shipment of CRS produced by non-responsive companies. With regard to Hoa Phat JSC and its affiliates, based on the discussion presented in Comment 11, we are prohibiting HPSS and Hoa Phat JSC from certifying that CRS was not produced from HRS substrate manufactured in Korea for any shipment of CRS produced by HPSP.

Comment 11: Whether to Apply AFA to Certain Vietnamese Producers That Are Affiliated with Those That Are Deemed Non-Responsive

*Hoa Phat Group's Case Brief*³¹¹

- Hoa Phat JSC and its subsidiaries, HPSP and 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.³¹²
 - 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.³¹³
 - 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.³¹⁴
- 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 CRS Certification Process.³¹⁵

Petitioners' Rebuttal 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 CRS through HPSS, who is eligible to participate in the Korean CRS Certification Process.³¹⁶ To address the likelihood of funneling, Commerce

³¹¹ Hoa Phat Group Case Brief at 1-3.

³¹² *Id.* at 2.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 2-3.

³¹⁶ *See* Petitioners' Case Brief at 17.

should amend the Korea CRS certification to prevent non-cooperating companies from undermining Commerce's AFA determination by funneling.³¹⁷

- HPSP did not dispute that it failed to respond to Commerce's questionnaires, 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 of applying AFA for failing to submit responses to Q&V questionnaires, the request by HPSP for Commerce to overlook its failure to cooperate and permit it to participate in the Korea CRS Certification Process, should be denied.³¹⁸

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 not name Hoa Phat JSC and HPSS as companies that are ineligible 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 CRS they export was produced by HPSP or any other non-responsive company. *See also* Comment 10.

Comment 12: Whether Commerce Should Preclude Companies That Failed to Cooperate in both the CRS from China and CRS from Korea Inquiries from Participating in the Certification Regime

*The Petitioners' Case Brief*³¹⁹

- The *Preliminary Determinations* failed to address widespread uncooperativeness among Vietnamese CRS producers in *CRS China Anti-Circumvention Final*.³²⁰
- In these final determinations, Commerce should identify the non-responsive companies from the CRS from China anti-circumvention inquiries and preclude them from participation in the Korea CRS certification process.
- In addition, Commerce should also identify which of the non-responsive companies in *CORE Korea Anti-Circumvention Preliminary* also failed to cooperate in *CORE China Anti-*

³¹⁷ *Id.*

³¹⁸ *See* Petitioners Rebuttal Brief at 45.

³¹⁹ *See* Petitioners' Case Brief at 2-3.

³²⁰ *See* Petitioners' Case Brief at 19.

Circumvention Final and preclude them from participating in the China CORE certification process.³²¹

- Commerce should assign serial non-responsive companies the AD and CVD “all-others” rates from the *CRS Orders*.³²²
- The suspension of liquidation cash deposit instructions accompanying the *Preliminary Determinations* sow confusion on this issue by stating “the companies listed below are currently not eligible to certify that their CRS is not made from Korean HRS substrate. These companies *may* be eligible to certify their CRS is not made from Chinese HRS substrate.”³²³
- Because both CRS anti-circumvention inquiries and certification processes relate to CRS produced in Vietnam, and apply to importers and exporters, there is substantial overlap in the Vietnamese companies which are subject to the associated CRS certification processes.³²⁴
- 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 CRS exported from Vietnam.³²⁵
- 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.”³²⁶ Although Commerce followed this practice in the *Preliminary Determinations* and in the concurrent CORE from Taiwan and CORE from Korea anti-circumvention inquiries, it had not yet implemented this practice when it issued *CRS China Anti-Circumvention Final*.³²⁷

Hoa Sen Rebuttal Brief,³²⁸ *Ton Dong A Rebuttal Brief*,³²⁹ *JFE Shoji Rebuttal Brief*,³³⁰ *Phu My Flat Steel Rebuttal Brief*.³³¹

- There is no legal authority for revisiting the final determination of another anti-circumvention inquiry as part of an AFA decision in the instant anti-circumvention inquiry.³³²
- Thus, Commerce correctly permitted all producers, exporters, and importers to participate in the CRS from China certification process.³³³

³²¹ See Petitioners’ Case Brief at 18 and 21.

³²² *Id.* at 18.

³²³ *Id.* at 20 (citing customs AD/CVD message number 9225305 at paragraph 5a.(ii) and customs AD/CVD message number 9225302 at paragraph 5a.(ii) (available at <https://aceservices.cbp.dhs.gov/adcvdweb>)).

³²⁴ *Id.* (citing CRS from China certification list, and Memorandum, “Public Information on Producers,” dated October 5, 2018 (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>)).

³²⁵ *Id.*

³²⁶ *Id.* at 20-21 (citing *Butt-Weld Pipe Fittings China Anti-Circumvention Final* IDM at 20).

³²⁷ *Id.* at 21.

³²⁸ See *Hoa Sen Rebuttal Brief* at 13.

³²⁹ See *Ton Dong A Rebuttal Brief* at 15.

³³⁰ See *JFE Shoji Rebuttal Brief* at 10.

³³¹ See *Phu My Flat Steel Rebuttal Brief* at 13.

³³² See *Hoa Sen Rebuttal Brief* at 13; *Ton Dong A Rebuttal Brief* at 15; *JFE Shoji Rebuttal Brief* at 10; and *Phu My Flat Steel Rebuttal Brief* at 13 (citing Petitioners’ Case Brief at 17-21).

³³³ *Id.*

- The petitioners’ request that Commerce should modify its decision in the China circumvention inquiries in the context of the instant anti-circumvention inquiry is clearly misplaced. Commerce cannot retroactively change its decisions in *CRS China Anti-Circumvention Final* based on the instant final determinations.³³⁵
- The petitioners’ request highlights the fact that the *Preliminary Determinations* in the instant anti-circumvention inquiries depart from the findings in *CRS China Anti-Circumvention Final*. This is why Mitsui has argued that Commerce should not retroactively apply the exporter certification preclusion in the Korean CRS anti-circumvention proceedings. However, Commerce’s practice in *CRS China Anti-Circumvention Final* is not an issue arising from the instant anti-circumvention inquiries.³³⁶

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 *CRS China Anti-Circumvention Final* from participating in the Korea CRS certification process or the China CRS certification process. Moreover, there is no legal authority to preclude non-responsive companies in the instant anti-circumvention inquiries from participation in the China CRS 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*, *CORE Korea Anti-Circumvention Preliminary*, and *CORE Taiwan Anti-Circumvention Preliminary*, we had not implemented this practice when we issued *CRS China Anti-Circumvention Final*. We note that the petitioners did not provide any statutory basis to retroactively applying the same practice to uncooperative parties in *CRS China 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 *Preliminary Determinations* somehow “sow{s} confusion” by stating that the companies listed in the Preliminary Decision Memorandum are not eligible to certify that their CRS is not made from Korean substrate, but that these companies may be eligible to certify their CRS is not made from Chinese substrate. As the petitioners concede, *CRS China Anti-Circumvention Final* did not preclude uncooperative parties from participating in the China CRS certification process. Therefore, some of the non-responsive companies in the instant anti-circumvention inquiries may remain eligible to certify that their CRS is not made from Chinese substrate, and Commerce’s use of the word “may” in the liquidation instructions is appropriate.

³³⁴ See Mitsui Rebuttal Brief at 4-5.

³³⁵ *Id.*

³³⁶ *Id.* at 5.

These Korea CRS 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 CRS Orders*. Accordingly, we continue to find that Commerce's decisions in the instant inquiries to bar non-cooperative parties from the Korea CRS certification processes should not be extended retroactively to the China CRS certification process that resulted from *CRS China Anti-Circumvention Final*.

Comment 13: Whether to Apply the Highest of the Petition Rate or Investigation Calculated Rate as the Cash Deposit Rate for Non-Responsive Companies

*Petitioners' Case Brief*³³⁷

- According to the *Preliminary Determinations*, the non-responsive companies are currently subject to the all-others rates applicable to the *CRS Orders*, i.e., 20.33 percent and 3.89 percent. As such, the combined “AFA” rate is 24.22 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.³³⁸
- In the final determinations of these inquiries, therefore, Commerce should apply a 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 177.50 percent, the highest rate from the petition. For the CVD component, Commerce should continue to use 42.61 percent, the highest calculated rate reported in the CVD 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 220.11 percent.³³⁹

*Mitsui's Rebuttal Brief*³⁴⁰

- The AD and CVD cash deposit rates potentially applied to CRS allegedly produced by non-responsive companies with Korean substrate must be based on the rates from *CRS Orders*. The deposit rate should be that of the substrate producer if known, and if not known then the “all others rate.”³⁴¹

*JFE Shoji's Rebuttal Brief*³⁴²

- The imposition of the highest rate calculated in the petition for the CRS Korea investigation 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

³³⁷ See Petitioners' Case Brief at 11-15.

³³⁸ *Id.* at 13.

³³⁹ *Id.* at 15.

³⁴⁰ See Mitsui Rebuttal Brief at 1-2.

³⁴¹ *Id.* at 2.

³⁴² See JFE Shoji's Rebuttal Brief at 7-8.

petitioners' argument regarding the application of the petition rate and the AFA rate assigned to POSCO Vietnam is contrary to law because these rates are not actual rates 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.³⁴³

- As the CIT stated in *POSCO*, 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.³⁴⁴

Commerce Position:

We find that the imposition of the highest petition rate in *CRS Orders* 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, AD/CVD duties apply to all exports of merchandise under consideration.

Therefore, we are continuing to apply the all-others rates from the *CRS 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.*, CRS 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 these final determinations, we continue to apply the AD and CVD all-others rates in effect for the *CRS Orders* to non-responsive companies.

Comment 14: Whether POSCO Vietnam's History Demonstrates that It Cannot Be Viewed as Circumventing

*POSCO Vietnam Case Brief*³⁴⁵

- The unique facts and history of POSCO Vietnam's operations and business in Vietnam establish that it is not circumventing within the meaning of 781(b) of the Act. Specifically:
 - POSCO Vietnam began CRS production at its facility in 2009.
 - AD/CVD petitions were filed against CRS from numerous countries in 2015, the *CRS Orders* were issued in 2016, and in 2018 Commerce determined imports of CRS from Vietnam produced from Chinese substrate were circumventing the AD/CVD orders on CRS from China. Throughout this period, POSCO Vietnam's extensive operations

³⁴³ *Id.* at 7.

³⁴⁴ *Id.* at 8 (citing *POSCO v. United States*, 296 F. Supp. 3d 1320 (CIT 2018) (*POSCO*)).

³⁴⁵ See *POSCO Vietnam Case Brief* at 3-7.

remained constant. In fact, its export shipments to the United States and input sourcing from Korea declined.

- Thus, POSCO Vietnam was not established as a result or consequence of the AD/CVD orders, nor did its operations or shipping patterns change since the filing of AD/CVD petitions.
- Under section 781(b)(1)(E) of the Act, which specifies that an affirmative finding of circumvention requires that Commerce determine that the finding “is appropriate...to prevent evasion” of the AD/CVD order, Commerce may not make an affirmative finding of circumvention without making an affirmative determination of intent on the part of POSCO Vietnam. Commerce cannot make such a determination here because, as stated above, POSCO Vietnam has not changed its operations (including its patterns of trade) since the AD/CVD orders were imposed.
- This interpretation of the statute is consistent with the legislative history of the anti-circumvention provision. That history demonstrates that Congress’ concern in section 781(b)(1)(E) of the Act was with changes in behavior and the establishment of new operations in reaction to an AD/CVD order or the initiation of an investigation. In amending the 1994 Uruguay Round Agreements Act, the House Ways and Means Committee report described the purpose of the circumvention provisions to “address the circumvention of antidumping or countervailing duty orders through the establishment of screwdriver assembly operations in the United States or a third country.”³⁴⁶ The provisions were not intended to expand the scope of an AD/CVD order to cover commercial operations in non-subject countries that existed long before the relevant AD/CVD investigation.

*Petitioners’ Rebuttal Brief*³⁴⁷

- Commerce should be mindful of the fact that POSCO Vietnam has already been found to be engaged in behavior designed to aid Chinese producers in their efforts to avoid the payment of AD/CVD duties on CRS processed in Vietnam from HRS substrate produced in China.
- There is no legal support for POSCO Vietnam’s claim that pre-existing facilities cannot be circumventing.
 - Section 781(b)(3) of the Act directs Commerce to consider three factors. While the first and third of those factors do contain a “temporal” component, the focus is on the flow of merchandise used to produce the final product and the final product itself, and not when operations were established.
 - While the House Ways and Means Committee Report uses the term “screwdriver operations,” to describe circumvention, “screwdriver operations” are only an example, and it is clear that it is not the intent of Congress to limit circumvention inquiries to those facilities constructed after the issuance of a trade order.
- Commerce has found that a company may predate a trade order and still be engaging in circumvention.
 - In *Carrier Bags Taiwan Preliminary*, Commerce made an affirmative finding of circumvention against a third-country processor that was in operation at least three years

³⁴⁶ *Id.* at 6 (citing H.R. Rep. No. 826, 103rd Cong. at 101, 1994 U.S.C.C.A.N. 3773, 1994 WL 548728).

³⁴⁷ See Petitioners’ Rebuttal Brief at 8-12.

prior to the issuance of the antidumping duty order, and six years prior to the initiation of the circumvention inquiry.³⁴⁸

- In *Tissue Paper China ARPP Anti-Circumvention Preliminary*, Commerce found that circumvention existed with respect to a company that had imported small quantities of jumbo roll tissue paper in 2011 even though the company had been in existence for several years prior to the importation.³⁴⁹
- While POSCO Vietnam asserts that the term “evasion” implies an element of “intent,” it has cited to no legislative authority or legal precedent that lays out an “intent” requirement in any circumvention finding. Furthermore, while POSCO Vietnam asserts that its interpretation is supported by the legislative history of the anti-circumvention provisions of the statute, it has not cited to any language that actually supports this position.

Commerce Position:

We determine that the points that POSCO Vietnam has made are not germane to the issue of whether or not it is circumventing the *CRS Orders*.

First, we do not dispute POSCO Vietnam’s assertion that POSCO Vietnam was not established as a result or consequence of the *CRS Orders* because POSCO Vietnam was established six years prior to the filing of the CRS AD/CVD petitions. Nevertheless, a new facility is not required in order for circumvention to occur. Commerce has previously found that circumvention can occur in a pre-existing facility. In *Carrier Bags Taiwan Final*, for example, Commerce found circumvention to be occurring even though the importer had been importing the merchandise at issue prior to initiation of the less-than-fair-value investigation.³⁵⁰

Second, we do not agree with POSCO Vietnam that section 781(b)(1)(E) of the Act requires that we make a finding of intent in order to make an affirmative circumvention determination. Although section 781(b)(1)(E) of the Act speaks of “evasion,” Commerce has previously found that intent is not a necessary element of a finding of circumvention. In *Tissue Paper China ARPP Anti-Circumvention Final*, Commerce stated:

With respect to {respondent}’s argument that it did not intend to use the {China}-origin sparkle tissue paper to fill its U.S. sales order once it realized there was an AD order in effect, as we have noted in past anti-circumvention inquiries, {Commerce} is not required to determine intent during a circumvention inquiry.”
Neither section 781(b) of the Act, nor 19 CFR 351.225(h), requires

³⁴⁸ See Petitioners’ Rebuttal Brief at 11 (citing *Polyethylene Retail Carrier Bags from Taiwan: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 79 FR 31302 (June 2, 2014) (*Carrier Bags Taiwan Prelim*), unchanged in *Polyethylene Retail Carrier Bags from Taiwan: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 79 FR 61056 (October 9, 2014) (*Carrier Bags Taiwan Final*)).

³⁴⁹ *Id.* (citing *Certain Tissue Paper Products from the People’s Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 78 FR 14514 (March 6, 2013) (*Tissue Paper China ARPP Anti-Circumvention Preliminary*), unchanged in *Tissue Paper China ARPP Anti-Circumvention Final*).

³⁵⁰ See *Carrier Bags Taiwan Prelim*, unchanged in *Carrier Bags Taiwan Final*.

{Commerce} to evaluate the intentions of the exporter in determining whether or not merchandise is circumventing the AD order.³⁵¹

Finally, we disagree with POSCO Vietnam’s interpretation of the legislative history. While parts of the House Ways and Means Committee report refer to “the establishment” of screwdriver assembly operations after initiation of an AD/CVD investigation,³⁵² POSCO Vietnam has cited to nothing in the report to indicate that it was Congress’ intent to limit the scope of anti-circumvention legislation to *only* third-country operations that commenced after initiation of an AD/CVD investigation.³⁵³ As stated above, Commerce has previously found that circumvention can occur in a pre-existing facility.

Comment 15: Whether POSCO Vietnam’s Operations Confirm that the Process of Assembly or Completion Is Not Minor or Insignificant

*POSCO Vietnam’s Case Brief*³⁵⁴

- POSCO Vietnam began CRS production at its facility in 2009. POSCO Vietnam cannot be circumventing the AD order on CRS from Korea, as its operations began many years before those cases began.³⁵⁵
- POSCO Vietnam’s operations are extensive and sophisticated, required significant investment, and were undertaken well prior to (and not in response to or as a reaction to) Commerce’s investigation into CRS from Korea.³⁵⁶
- Commerce’s comparison of POSCO Vietnam’s investments to the investments in POSCO Korea is not an apples-to-apples comparison because POSCO Korea is an integrated steel manufacturer with four blast furnaces and which produced products other than HRS, primary iron and steel and other intermediate steel inputs.³⁵⁷ Furthermore, it is also not an apples-to-apples comparison because the level of POSCO Korea’s investment in its steel making facility is not indicative of the investment in a cold rolling facility *per se*, but is indicative of the sheer size of the facility that encompasses the entire steel making process.³⁵⁸
- POSCO Vietnam does not engage in significant research and development. However, because cold-rolled steel is a mature product which has undergone years of research and investment, and POSCO Korea engages in research and development and POSCO Vietnam is

³⁵¹ See *Tissue Paper China ARPP Anti-Circumvention Final IDM* at Comment 1; see also *Preliminary Determination of Circumvention of Antidumping Order: Cut-to-Length Carbon Steel Plate from Canada*, 65 FR 64926, 64930 (October 31, 2000), unchanged in *Final Determination of Circumvention of the Antidumping Order: Cut-to-Length Carbon Steel Plate from Canada*, 66 FR 7617 (January 24, 2001).

³⁵² See H.R. Rep. No. 103-826, at 101, reprinted in 1994 U.S.C.C.A.N. 3773.

³⁵³ *Id.*

³⁵⁴ See POSCO Vietnam’s Case Brief at 11-14.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 11-12.

³⁵⁷ *Id.* at 13 (citing the *Preliminary Determinations* PDM at 15).

³⁵⁸ *Id.* at 14-15 (citing POSCO Vietnam Verification Report at 12).

able to use the resulting advances, Commerce should attribute research and development by a parent company to the company's worldwide operations.³⁵⁹

- POSCO Vietnam invested hundreds of millions of dollars in its facilities and equipment, which are vastly more extensive than the types of facilities and operations where Commerce has previously found there to be circumvention of AD/CVD orders.³⁶⁰
- Commerce should rely on a reasonable methodology, such as comparing POSCO Vietnam's operations and investments in its cold rolling facilities to POSCO Korea's operations and investment in cold rolling facilities.³⁶¹
- Commerce has previously found circumvention where the third country operations were limited and relied on unskilled labor, but POSCO Vietnam's operations are sophisticated and rely on skilled labor.³⁶²
- The vast majority of the equipment used in each of POSCO Vietnam's production lines were installed prior to the CRS from Korea AD and CVD proceedings.³⁶³

*Petitioners' Rebuttal Brief*³⁶⁴

- Contrary to its assertions, POSCO Vietnam's operations are minor or insignificant when compared to the operations of those facilities that produce the feedstock used to produce cold rolled steel.³⁶⁵
- Merely commencing operations before the institution of trade remedies proceedings does not render a company immune from a finding of circumvention.³⁶⁶
- POSCO Vietnam has done little to maintain its investment in its facility and POSCO Vietnam's investment values represent a small fraction of the values that exist with respect to other companies.³⁶⁷
- Investment sums of up to \$6.8 billion are needed to design, construct and commission a facility that produces the steel slab and HRS feedstock for ultimate processing into CRS.³⁶⁸
- In its questionnaire responses and case brief POSCO Vietnam concedes that it does not perform any research and development in Vietnam.³⁶⁹

³⁵⁹ *Id.* at 13 (citing *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico*, 77 FR 17422 (March 26, 2012)).

³⁶⁰ *Id.* at 14-15 (citing POSCO Vietnam Verification Report at 12).

³⁶¹ See POSCO Vietnam's Case Brief at 15.

³⁶² *Id.* at 16 (citing *Tissue Paper China ARPP Anti-Circumvention Preliminary IDM*; and POSCO Vietnam Verification Report at 12).

³⁶³ *Id.* at 16 (citing POSCO Vietnam's Letter, "Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Circumvention Inquiry Questionnaire Response," dated April 29, 2019 at Exhibit 17 (POSCO Vietnam April 29, 2019 IQR)).

³⁶⁴ See Petitioners' Rebuttal Brief at 15-23.

³⁶⁵ *Id.* at 16-17.

³⁶⁶ *Id.* at 17.

³⁶⁷ *Id.* at 16 and 17-18.

³⁶⁸ *Id.* at 18-19.

³⁶⁹ *Id.* at 19.

- The cold-rolled conversion process is but one of the steps in the process and is, comparatively speaking, the most minor of the two processes involving the least amount of capital equipment and the least amount of technical skill and manpower.³⁷⁰
- The only meaningful way to compare the levels of investment and operations is on a comparative basis.³⁷¹

Commerce Position:

We agree with the petitioners that the process of assembly or completion in Vietnam is not minor or insignificant. Pursuant to section 781(b)(1)(C) of the Act, Commerce examined whether the “process of assembly or completion in {a third country} is minor or insignificant.” To this end, section 781(b)(2) of the Act directs Commerce to consider, among other things, the level of investment in the third country, the level of research and development in the third country, the nature of the production process in the third country, the extent of production facilities in the third country, and whether the value of the processing performed in the third country represents a small proportion of the value of the merchandise imported into the United States.

Level of Investment:

POSCO Vietnam argues that Commerce’s comparison of POSCO Vietnam’s investments to the investments in POSCO Korea (POSCO Vietnam’s parent company) is not an apples-to-apples comparison because POSCO Korea is an integrated steel manufacturer with four blast furnaces, because POSCO Korea produces products other than HRS, primary iron and steel, and other intermediate steel inputs, and because the level of POSCO Korea’s investment in its steel making facility is indicative of the sheer size of the facility that encompasses the entire steel making process—not just the investment in a cold rolling facility. POSCO further argues that instead of comparing POSCO Vietnam’s level of investment with POSCO Korea’s total level of investment, Commerce should compare POSCO Vietnam’s investment in cold rolling facilities to POSCO Korea’s investment in cold rolling facilities.³⁷² However, for the final determination, we have continued to compare POSCO Vietnam’s level of investment to that of POSCO Korea. The statute does not instruct Commerce to use a particular analysis when evaluating level of investment in the foreign country for purposes of section 781(b)(2)(A) of the Act. Given the statute’s silence on the issue, Commerce may determine an appropriate analysis to apply. As explained below, we find that comparing POSCO Vietnam’s level of investment to POSCO Korea’s level of investment is a proper and relevant analysis methodology for identifying “the level of investment in the third country” under the Act, and that the proposed alternative of Comparing POSCO Vietnam’s level of investment to that of CRS processing facilities in Korea is inappropriate in this instance.

³⁷⁰ *Id.* at 21.

³⁷¹ *Id.* at 21.

³⁷² See POSCO Vietnam’s Case Brief at 13-15 (citing *Preliminary Determinations* PDM at 15; and Memorandum, “Verification of the Questionnaire Responses of POSCO Vietnam Co. Ltd., in the Anti-Circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Certain Cold-Rolled Steel Flat Products from the Republic of Korea,” dated September 6, 2019, at 12 (POSCO Vietnam Verification Report)).

Comparing POSCO Vietnam's level of investment in cold rolling facilities to POSCO Korea's level of investment in cold rolling facilities overlooks the relative requirements of establishing integrated steel production facilities in Korea, as compared with CRS processing facilities in Vietnam. A comparison of the level of investment in Vietnam CRS processing facilities to those of Korean CRS processing facilities, and ignoring the investment in upstream steps in the production process, would dilute the large initial investment required by the larger volumes and more extensive processes of integrated steel production facilities. As explained below, integrated steel manufacturing facilities require much larger initial investments than CRS processing facilities. A comparison between POSCO Vietnam's initial and subsequent investments and those of Korean integrated steel manufacturing facilities, including POSCO Korea's integrated steel production facilities, bears this out. POSCO Vietnam provided information regarding its level of investment, including the initial investment, as well as the value of its fixed assets.³⁷³ POSCO Vietnam has only one factory, established in 2009, producing only CRS, and POSCO Vietnam reported that it has not constructed any additional facilities since the companies' establishment.³⁷⁴ Although many of the details of POSCO Vietnam's investments and assets are proprietary, POSCO Vietnam has explained that initial capital contributions in the company were made between 2006 and 2015. POSCO Vietnam's Financial statements also detail POSCO Vietnam's cash flows related to investing activities.³⁷⁵ In contrast, POSCO Korea was established in 1968 and began manufacturing CRS in 1977.³⁷⁶ In addition to CRS, POSCO Korea also produces HRS, primary iron and steel, and other intermediate steel inputs.³⁷⁷ POSCO Korea has two plants, the Pohang plant, constructed from 1970 to 1983, and the Kwangyang plant, constructed from 1982 to 1992.³⁷⁸ Each has four blast furnaces.³⁷⁹ There have been several additional investments at both the Pohang and Kwangyang plants at the production line level subsequent to the initial construction period.³⁸⁰ Although many of the details of POSCO Korea's investments and assets are also proprietary, POSCO Vietnam provided information indicating that POSCO Korea's investments are significant.³⁸¹ In addition, the petitioners provided information that Hyundai Steel also invested more than \$5 billion in an integrated steel production facility in 2010.³⁸² The petitioners also provided evidence of a Vietnamese cold rolling facility being established for \$70 million, and Commerce

³⁷³ See POSCO Vietnam's April 29, 2019 IQR at 20, 22, and Appendix (POSCO Vietnam Financial Statements (2015-2018), (2015 Financial Statements at 5-6, 2016 Financial Statements at 5-6, 2017 Financial Statements at 5-6, and 2018 Financial Statements, at 5-6)).

³⁷⁴ See POSCO Vietnam April 29, 2019 IQR at 22-23, and 28 at Exhibit 4.

³⁷⁵ *Id.* at 20, 22, and Appendix (POSCO Vietnam Financial Statements (2015-2018) (2015 Financial Statements at 8, 2016 Financial Statements at 8, 2017 Financial Statements at 7-9, and 2018 Financial Statements at 8-9).

³⁷⁶ *Id.* at 28.

³⁷⁷ See POSCO Vietnam June 11, 2019 Supplemental Questionnaire Response (POSCO Vietnam June 11, 2019 SQR) at 12.

³⁷⁸ *Id.* at 11-12.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 12.

³⁸¹ See Memorandum, "Anti-Circumvention Inquiries of the Antidumping and Countervailing Duty Orders on Certain Cold-Rolled Steel Flat Products from the Republic of Korea: POSCO Vietnam Co., Ltd. Preliminary Analysis Memorandum," dated June 28, 2019 (POSCO Vietnam Preliminary Analysis Memorandum), at 3; and POSCO Vietnam June 11, 2019 SQR at 11-12 and Exhibit Q18-1.

³⁸² See Petitioners' Letter, "Certain Cold-Rolled Steel Flat 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), at 12 and Exhibit 9.

pointed to one CRS processing facility being established for only \$28 million in *CRS China Anti-Circumvention Final*.³⁸³ Hyundai Steel's large investment compared to investments in other CRS processing facilities in Vietnam further demonstrate that the investment required for integrated steelmaking facilities in Korea is much more significant than the level of investment required to establish a cold-rolling facility in Vietnam. Accounting for the higher threshold as well as ongoing level of investment in the Korean integrated facilities, therefore, captures the investment in the production process that would otherwise be ignored, or that would otherwise not be fully represented, if we compared POSCO Vietnam's level of investment to that of CRS processing facilities in Korea.

Similarly, comparing investments of producers of CRS in Vietnam to investments of producers of HRS in Korea that do not perform production steps upstream from the production of HRS would lead to an incomplete analysis of the role of investment. We note that section 781(b)(2)(E) of the Act directs Commerce to consider whether the value of processing performed in Vietnam represents a small portion of the value of the merchandise imported into the United States. Similar to our comparison under section 781(b)(2)(E) of the Act, where Commerce is required to consider the value of processing in terms of the total value of the merchandise imported into the United States, Commerce finds that the relevant analysis under sections 781(b)(2)(A), 781(b)(2)(B), 781(b)(2)(C), and 781(b)(2)(D) of the Act is comparing investments (and also research and development, production processes, and production facilities) in Vietnam to the investments (and also research and development, production processes, and production facilities) required for the entire process of producing CRS in Korea, including the production of primary iron and steel inputs from basic materials. Thus, similar to the methodology Commerce used under section 781(b)(2)(E) of the Act, Commerce finds that it is appropriate to consider all of the investments (and also research and development, production processes, and production facilities) required to produce the merchandise imported into the United States, not merely differences in the final finishing stage of the production process between performing this final step in Vietnam rather than in Korea. This reflects our concerns with circumvention being achieved by shifting one or more of the last few minor or insignificant steps of the production process to a third country.

Further, our past practice has been to compare the total investment required (as well as, separately, the research and development, production process, and facilities) from the beginning of the production process in the country subject to an antidumping or countervailing duty order to the investment required (as well as, separately, the research and development, production process, and facilities) to finish the final product in a third country, rather than to compare the investments (as well as, separately, the research and development, production process, and facilities) required to perform the same finishing steps in each country. Of course, as POSCO points out, in the anti-circumvention inquiry concerning the China CRS and CORE orders, Commerce made the same analysis, comparing the investments in POSCO Vietnam's and other CRS and CORE processors in Vietnam to integrated steel production facilities in China.³⁸⁴ But Commerce also made the same analysis in several previous anti-circumvention inquiries

³⁸³ See *CRS China Anti-Circumvention Final* IDM at 32.

³⁸⁴ *Id.* at Comment 5; and *CORE China Anti-Circumvention Final* IDM at Comment 5.

including, most recently, in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.³⁸⁵ This practice seeks to capture the level of investment in the larger production process. In contrast, comparing the investment of producers of the final finished product in the third country to producers of the final finished product in the country of the order, which do not perform production steps upstream from the production of the final finished product, would not capture the complete set of production steps for producing CRS. In sum, anti-circumvention analyses are highly case and evidence specific.³⁸⁶ Thus, comparing POSCO Vietnam's level of investment in its Vietnamese CRS processing facilities to that of POSCO Korea's integrated steel production facilities in Korea is the appropriate comparison.

Research and Development

As explained above, it is appropriate to compare the investment (as well as the research and development, production process, and production facilities) required to finish the final product in the third country to the investment (as well as the research and development, production process, and production facilities) required to produce CRS in Korea. However, POSCO Vietnam reported that in Vietnam it had no research and development relating to CRS production. Unlike POSCO Vietnam, POSCO Korea reported that it engages in research and development to improve product quality, reduce costs, and expand its business. Each year, it spends a percentage of its total sales revenue on research and development.³⁸⁷

However, POSCO Vietnam argues that, instead of comparing the research and development performed by POSCO Korea, Commerce should consider POSCO Korea's research and development expenditures as a proxy for "the level of research and development in the third country" which Commerce is directed to "take into account" under 781(b)(2)(B) of the Act. POSCO Vietnam further argues that CRS is a mature product benefiting from many years of research and development and that all of POSCO Korea's affiliates benefit from the research and development performed by POSCO Korea.³⁸⁸ Finally, POSCO Vietnam argues that that while it made no expenditures on research and development, because CRS is a mature product, POSCO Vietnam takes advantage of POSCO Korea's research and development expenditures, as well as

³⁸⁵ See, e.g., *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination*, 77 FR 33405, 33411 (June 6, 2012) (*SDGEs Preliminary Circumvention Determination*), unchanged in *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 77 FR 47596 (August 9, 2012) (*SDGEs Final Circumvention Determination*); *Polyethylene Retail Carrier Bags from Taiwan: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 79 FR 31302 (June 2, 2014) (*PRCBs Preliminary Circumvention Determination*), and accompanying PDM at 8-12, unchanged in *Polyethylene Retail Carrier Bags from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 79 FR 16292 (March 25, 2014) (*PRCBs Final Circumvention Determination*); *CRS China Anti-Circumvention Final IDM* at Comment 5; *CORE China Anti-Circumvention Final IDM* at Comment 5; and *Butt-Weld Pipe Fittings Anti-Circumvention Preliminary* and accompanying PDM at 14-16, unchanged in *Butt-Weld Pipe Fittings China Anti-Circumvention Final*.

³⁸⁶ See SAA at 893 ("Commerce will evaluate each of {the factors under section 781(b)(2)(A)-(E) of the Act} as they exist either in the United States or a third country, depending on the particular circumvention scenario. No single factor will be controlling.").

³⁸⁷ See POSCO Vietnam April 29, 2019 IQR at 25 and Exhibits 17a, 20, and 21.

³⁸⁸ See POSCO Vietnam's Case Brief at 13.

research and development performed in the past by other steel producers and by its affiliates in other countries.³⁸⁹ However, 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 “take into account . . . the level of research and development in *the foreign country*” in which the allegedly subject merchandise is completed or assembled. Thus, research and development performed in other countries is not relevant to our analysis under section 781(b)(2) of the Act.

Further, research and development performed by POSCO Korea or research and development performed in the past by other steel producers is not indicative of the research and development required for POSCO Vietnam to produce its own CRS products, or for any other Vietnamese CRS producer to produce CRS in Vietnam. Rather, research and development performed by POSCO Korea or other foreign firms indicates that the final steps of the production process performed in Vietnam do not require significant additional research and development.³⁹⁰ Therefore, for the reasons stated above, we continue to find that POSCO Vietnam has not provided evidence of substantial research and development in Vietnam, and that research and development is not a significant factor in POSCO Vietnam’s processing of CRS in Vietnam.

Production Process and Extent of Production Facilities

POSCO Vietnam argues that its operations are extensive and sophisticated, and required significant investment.³⁹¹ POSCO further argues that the level of POSCO Korea’s investment in its steel making facility is not indicative of the investment in a cold rolling facility, but, rather of the sheer size of the facility that encompasses the entire steel making process.³⁹² Citing *Tissue Paper China ARPP Anti-Circumvention Preliminary*, POSCO argues, that Commerce should, instead, compare POSCO Vietnam’s operations and investments in its cold rolling facilities to POSCO Korea’s operations and investment in cold rolling facilities.³⁹³ However, as explained above, a comparison of the steps of the production process completed in Vietnam with those completed in Korea are relevant to the consideration of whether the production processes and the extent of production facilities in the third country are minor or insignificant. This approach is also consistent with our past practice.³⁹⁴

A comparison of the nature of the production processes and facilities of cold-rolling operations in Vietnam to POSCO Korea’s integrated steelmaking production processes and facilities in Korea, demonstrate that the vast majority of the production process necessary to manufacture CRS occurs in Korea. POSCO Vietnam provided a detailed description of the processes it

³⁸⁹ *Id.*

³⁹⁰ See also, e.g., *SDGE Preliminary Circumvention Determination*, 77 FR at 33412, unchanged in *SDGE Final Circumvention Determination*.

³⁹¹ See POSCO Vietnam’s Case Brief at 11-12.

³⁹² *Id.* at 14-15 (citing POSCO Vietnam Verification Report at 12).

³⁹³ *Id.* at 15-16 (citing *Tissue Paper China ARPP Anti-Circumvention Preliminary PDM*, unchanged in *Tissue Paper China ARPP Anti-Circumvention Final*), and POSCO Vietnam April 29, 2019 IQR at Exhibit 17.

³⁹⁴ See, e.g., *SDGE Preliminary Circumvention Determination*, 77 FR at 33412-13, unchanged in *SDGE Final Circumvention Determination*; see also *PRCBs Preliminary Circumvention Determination*, 79 FR at 33505, and accompanying PDM at 10-11, unchanged in *PRCBs Final Circumvention Determination*.

performs and the facilities it uses to transform HRS into CRS for shipment to the United States.³⁹⁵ Likewise, POSCO Korea provided a detailed description of the processes it performs and the facilities it uses in the production of CRS, HRS, primary iron and steel, and other intermediate steel inputs.³⁹⁶ In their Circumvention Ruling Request, the petitioners also describe the production processes and facilities required to produce the HRS substrate used as the primary material input for CRS as well as the final finishing production process and facilities for producing CRS.³⁹⁷ Because of the proprietary and technical nature of these processes, we have summarized descriptions of them in the POSCO Vietnam Preliminary Analysis Memorandum.³⁹⁸ Briefly, POSCO Vietnam summarized the process of producing CRS, including all intermediate steps used to produce HRS inputs and upstream intermediate products into four broad headings: (1) stages of pig iron processing; (2) steel making; (3) hot rolling process; and (4) cold rolling processes. Only the last stage of these is performed by POSCO Vietnam. The ITC describes the HRS production process as similarly consisting of three major steps: (1) melting and refining; (2) casting molten steel into semifinished forms; and (3) hot-rolling semi-finished forms into flat-rolled products.³⁹⁹ The ITC Reports from the investigations of cold-rolled steel from Korea and HRS from Korea provide further information about the production of HRS.⁴⁰⁰ On the whole, record evidence shows that the cold rolling process and the facilities for this process involve significantly fewer steps and that the cold rolling process is much less technologically complex.⁴⁰¹

POSCO Vietnam further argues that it began cold rolling steel in 2009, well before Commerce's trade remedy investigations of cold-rolled steel from Korea, and that the vast majority of the equipment used in each of POSCO Vietnam's production lines were installed prior to the CRS from Korea AD and CVD proceedings.⁴⁰² POSCO argues that this indicates that POSCO Vietnam cannot be circumventing the orders. However, POSCO Vietnam has not demonstrated how the timing of when its operations began impacts an analysis of its level of investment for purposes of these anti-circumvention inquiries. Furthermore, the record shows that during the period, POSCO Vietnam processed Korean substrate into CRS and exported it to the United States. Thus, when its operations began does not prevent its merchandise from circumventing the *CRS Orders*.

³⁹⁵ See POSCO Vietnam April 29, 2019 IQR at 25 and Exhibits 17a, 20, and 21.

³⁹⁶ *Id.* at Exhibit 4; POSCO Vietnam June 11, 2019 SQR at 11-12, 15-16, Exhibit Q18-1, and Exhibit Q24.

³⁹⁷ See Circumvention Ruling Request at 14-19.

³⁹⁸ See POSCO Vietnam Preliminary Analysis Memorandum.

³⁹⁹ *Id.* at 16 (citing *Certain-Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, Inv. Nos. 701-TA-545-547 and 731-TA-1291-1297, USITC Pub. 4570 (Oct. 2015) at I-19 to I-22).

⁴⁰⁰ See POSCO Vietnam Preliminary Analysis Memorandum at 16 (citing Circumvention Ruling Request at 16, *Certain-Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, Inv. Nos. 701-TA-545-547 and 731-TA-1291-1297, USITC Pub. 4570 (October 2015) at I-19 to I-22, and *Cold-Rolled Steel Flat Products from Brazil, China, India, Japan, Korea, Netherlands, Russia and the United Kingdom*, Inv. Nos. 701-TA-540-544 and 731-TA-1283-1290, USITC Pub. 4564 (Sept. 2015) at I-21).

⁴⁰¹ See POSCO Vietnam Preliminary Analysis Memorandum at 4-5 for a complete description of these processes and our analysis.

⁴⁰² See POSCO Vietnam's Case Brief at 11-14 and 16 (citing POSCO Vietnam's April 29, 2019 IQR at Exhibit 17).

In sum, when we compare the level of investment, research and development, production process, and the extent of production facilities in Vietnam compared to Korea, our analysis indicates that the process of assembly or completion in Vietnam was minor compared to that of POSCO Korea's integrated steel mills in Korea.

Comment 16: Analysis of Patterns of Trade

In analyzing the patterns of trade for the *Preliminary Determinations*, Commerce reviewed country-wide data obtained from GTA and company-specific data from POSCO Vietnam.⁴⁰³ Commerce used the period July 2015 through October 2016 as the comparison period, and November 2016 through February 2018 as the base period. Commerce concluded from its analysis that shipments of CRS from Vietnam (both on a country-wide basis and with respect to POSCO Vietnam) declined in the base period as compared to the comparison period.

*Petitioners' Case Brief*⁴⁰⁴

- Commerce should begin the base period with either:
 - August 2015 (the month Commerce initiated the AD/CVD investigation on CRS from Korea),
 - February 2016 (the month during which the signing official signed the preliminary determination in the AD/CVD investigation on CRS from Korea, which published on March 7, 2016) or,
 - September 2016 (the month the petitioners filed their request for an anti-circumvention inquiry on CRS from China).
- Commerce ended the base period with February 2018, but during the period January 2017 through June 2018, there was a period that included a large volume of shipments of CRS to the United States. Commerce should change the last month of the base period to June 2018 to take these shipments into account.

*POSCO Vietnam Case Brief*⁴⁰⁵

- The patterns of trade confirm that POSCO Vietnam is not circumventing the *CRS Orders*.
- POSCO Vietnam's imports from Korea have not increased since Commerce's AD/CVD case on HRS from Korea. In fact, they have declined both in absolute terms and in terms of the percentage of the company's overall HRS inputs.
- POSCO Vietnam's shipments of CRS to the United States produced using Korean HRS have also decreased. Specifically, POSCO Vietnam shipped more CRS produced from Korean HRS in the twelve months from July 2015 to June 2016 than it did in the 24 months from July 2016 to June 2018.

⁴⁰³ See POSCO Vietnam Preliminary Analysis Memorandum.

⁴⁰⁴ See Petitioners' Case Brief at 3-6.

⁴⁰⁵ See POSCO Vietnam Case Brief at 16-17.

*Petitioners' Rebuttal Brief*⁴⁰⁶

- POSCO Vietnam's analysis presents a distorted picture of patterns of trade. Specifically, its analysis is performed on an annual basis for shipments of HRS substrate from Korea to Vietnam, but on a semi-annual basis with respect to shipments of CRS processed in Vietnam to the United States. This distorted methodology is contrary to Commerce's practice. In its preliminary determinations, Commerce correctly used a single base period and a single comparison period.
- Consistent with the petitioners' case brief, Commerce should expand its pattern-of-trade analysis to include periods that predate the filing of the AD/CVD petitions on CRS in the summer of 2015.
- In performing its circumvention analysis, Commerce looks at the totality of the circumstances, which here support an affirmative final determination of circumvention.

POSCO Vietnam Rebuttal Brief

- No matter how Commerce divides the base and comparison periods, POSCO Vietnam's reported shipping patterns confirm a decrease in shipment volumes.

Commerce Position:

With respect to the petitioners' argument that we should modify the base and comparison periods used in the patterns of trade analysis, we note first that in our *Preliminary Determinations*, we chose base and comparison periods that were both 16 months long. As stated above, the starting month we chose for the base period was November 2016, which is the month Commerce initiated the anti-circumvention inquiries on CRS from China. Using this month as the start of the base period is consistent with the petitioners' request for this circumvention inquiry, in which they stated that circumvention of the *CRS Orders* began during the anti-circumvention inquiry of CRS from China.⁴⁰⁷ We believe the two 16-month time periods we chose to perform the comparison are appropriate to analyze macro trends regarding shipment volumes, and we do not believe that the analysis would be improved by shortening the time periods by using any of the months the petitioners have suggested as the start of the base period.

Furthermore, while we have data on the record through June 2018 for POSCO Vietnam, the GTA country-wide data on the record ends with February 2018. Thus, if we changed the time periods for POSCO Vietnam to include data through June 2018 as the petitioners' request, we would have to analyze the country-wide patterns of trade using different time periods from that used for the company-specific POSCO Vietnam analysis. We believe the analysis is more accurate using identical periods for the company-specific and country-wide analysis. Based on these considerations, and because the petitioners have given no compelling reason to change the time periods utilized in the analysis, we have not revised the periods used for analyzing patterns of trade in these final determinations.

⁴⁰⁶ See Petitioners' Rebuttal Brief at 22-23.

⁴⁰⁷ See Circumvention Ruling Request at 2.

With respect to POSCO Vietnam’s argument that the patterns of trade confirm that it is not circumventing the *CRS Orders*, because we have not changed the base or comparison periods used in our analysis, the conclusion regarding the patterns of trade remains unchanged from that described in the *Preliminary Determinations*. Specifically, we continue to find that the “lower shipment volume and decrease in shipments in the base period does not provide evidence of circumvention.”⁴⁰⁸ Nevertheless, we disagree with POSCO Vietnam over the significance of this conclusion. While we find that the patterns of trade do not provide evidence of circumvention, we do not agree with POSCO Vietnam that this finding “confirms” that it is not circumventing. Patterns of trade are only one factor in the circumvention determination. As we stated in the *Preliminary Determinations* with respect to the factors in section 781(b)(3) of the Act (of which patterns of trade is one), “{n}one of these factors is dispositive as to the issue.”⁴⁰⁹ A circumvention determination is based on the totality of the evidence.⁴¹⁰ Here, based upon our analysis of the statutory factors (*see* Section VII, above) we have found the totality of the evidence to indicate that POSCO Vietnam has engaged in circumvention of the *CRS Orders*.

Comment 17: Whether the Value Added in Vietnam Is Significant

POSCO Vietnam Case Brief.⁴¹¹

- Commerce’s surrogate value methodology is not appropriate to measure value added.
- Nevertheless, even using the surrogate value methodology (as Commerce did in the preliminary results), the results of the analysis confirm that the processing performed in Vietnam is neither small nor insignificant. The dollar value of the per metric ton value added accounts for 21 percent of the value of the merchandise imported into the United States. This amount of value added is not a “small proportion” as set forth in section 781(b)(2)(E) of the Act.

Petitioners’ Rebuttal Brief.⁴¹²

- POSCO Vietnam has incorrectly calculated its value added. Commerce should recalculate the degree of value added for the final determination because of POSCO Vietnam’s failure to separately report sales of ferrous scrap and iron oxide that it collects and sells to outside companies.
- A second rebuttal comment made by the petitioners is not susceptible to public summary, and is summarized in a separate memorandum.
- For these reasons, Commerce should reaffirm its determination that the value added in Vietnam is small.

⁴⁰⁸ See Memorandum, “Anti-Circumvention Inquiries of the Antidumping and Countervailing Duty Orders on Certain Cold-Rolled Steel Flat Products from the Republic of Korea: POSCO Vietnam Co., Ltd. Preliminary Analysis Memorandum,” dated June 28, 2019, at 9.

⁴⁰⁹ *Id.*

⁴¹⁰ See *CORE China Anti-Circumvention Final* IDM at Comment 12.

⁴¹¹ See POSCO Vietnam Case Brief at 17-18.

⁴¹² See Petitioners’ Rebuttal Brief at 23-24.

Commerce Position:

We disagree with POSCO Vietnam that our surrogate value methodology is not an appropriate measure of value added. Commerce has consistently used its surrogate value methodology in conducting circumvention proceedings for NME countries,⁴¹³ and POSCO Vietnam has provided no reason why doing so is not appropriate here. Therefore, in this final determination we have again calculated the Vietnamese value added using our standard surrogate value methodology.

As explained below, we disagree with the petitioners that we should revalue POSCO Vietnam's reported scrap. Nevertheless, we also disagree with POSCO Vietnam that 21 percent of the value of the merchandise imported into the United States cannot be considered "small," a term which section 781(b)(2)(E) of the Act does not define. Compared to the total value of the end product, we consider that 21 percent constitutes a relatively small amount of value added.

Finally, we note that our determination of circumvention is not based on any one criterion, but on the totality of the circumstances. In *Tissue Paper China Quijiang Anti-Circumvention Final*, we stated with respect to the criteria of section 781(b)(2) of the Act:

The Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, H. Doc. No. 103-316, at 893 (1994), provides some guidance with respect to these criteria. It explains that no single factor listed in section 781(b)(2) of the Act will be controlling. Accordingly, it is {Commerce's} practice to evaluate each of the factors as they exist in the United States or foreign country depending on the particular circumvention scenario. Therefore, the importance of any one of the factors listed under section 781(b)(2) of the Act can vary from case to case depending on the particular circumstances unique to each circumvention inquiry.⁴¹⁴

Here, for the reasons given in our *Preliminary Determinations*, which have not changed in these final determinations, we determine that the totality of the circumstances supports an affirmative determination of circumvention.

Comment 18: Whether Commerce Should Rely on AFA to Value POSCO Vietnam's Scrap Offset.

*Petitioners' Case Brief*⁴¹⁵

- Commerce asked POSCO Vietnam to report "{i}f any raw material amounts are reduced because of recycled scrap, provide the names of those inputs and the reduction made." Commerce further requested that POSCO Vietnam "{p}rovide a description of the by-product/co-product." POSCO Vietnam simply characterized its product as being "scrap

⁴¹³ See, e.g., *CRS China Anti-Circumvention Final; Steel Wire Garment Hangers from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination*, 76 FR 27007, 27008 (May 10, 2011), unchanged in *Garment Hangers China Anti-Circumvention Final*.

⁴¹⁴ See *Tissue Paper China Quijiang Anti-Circumvention Final*, 73 FR at 57592.

⁴¹⁵ See *Petitioners' Case Brief* at 6-9.

metal” in its narrative response. And simply identified its scrap as a “by-product” in Exhibit FOP-13. However, at verification, Commerce discovered that POSCO Vietnam separately tracked iron oxide (also known as ferric oxide) as a separate and distinct scrap product and recorded sales of iron oxide separately from sales of other ferrous waste and scrap.⁴¹⁶

- While company officials claimed that the total scrap amount is merely a difference in weights between input hot-rolled coils and processed cold-rolled coils, the fact remains that POSCO Vietnam treated the sales of items such as scrap, heads and tails, and iron oxide as distinct and separate classes of scrap.⁴¹⁷
- Previously, Commerce has treated separate classes of ferrous waste as distinct products.⁴¹⁸
- Iron oxide carries a price premium over standard steel scrap which may contain contaminants and residual materials. POSCO Vietnam therefore understated its by-product offset.⁴¹⁹
- Because POSCO Vietnam knew of its iron oxide by-product yet failed to account for this by-product in its questionnaire responses, Commerce should rely on AFA in calculating the by-product offset by assuming that *all* POSCO Vietnam’s scrap offset constitutes iron oxide.⁴²⁰

*POSCO Vietnam’s Rebuttal Brief*⁴²¹

- POSCO Vietnam’s reporting is reasonable and accurate, as the scrap reporting accounted for all yield loss from the hot-rolled to cold-rolled stage (*i.e.*, it accounted for all of the hot-rolled coil input lost) and, therefore, no adjustments are warranted.
- Iron oxide cannot be a significant by-product.⁴²²
- Under 19 U.S.C. § 1677j(b)(1)(D), Commerce’ mandate is to assess the extent of the value added in the third country (*i.e.*, to determine whether “the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States”). Here, the sale of iron oxide (or scrap) does not logically operate as a reduction to the value of the cold-rolled steel sold to the United States; rather, the yield loss is simply merchandise that was not further processed into cold-rolled steel and sold to the United States.⁴²³

Commerce Position:

We agree with POSCO Vietnam that no adjustment is necessary. Record evidence reflects that POSCO Vietnam reported the value of steel scrap production on a temporal basis, but reported the scrap offset based on yield loss, which is a means of calculating the quantity of scrap per

⁴¹⁶ *Id.* at 6-7 (citing POSCO Vietnam’s April 30, 2019 Factors of Production Response at 10 and 12 (POSCO Vietnam April 30, 2019 FOP Response); and POSCO Vietnam Verification Report at 9 and 24).

⁴¹⁷ *Id.* at 7 (citing POSCO Vietnam Verification Report at 9).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 7 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from the People’s Republic of China*, 66 FR 33522 (June 22, 2001), and accompanying IDM at Comment 5).

⁴²⁰ *Id.* at 7-9 (citing 19 U.S.C. § 1677e(a)(2)); 19 U.S.C. § 1677e(b)(1); *Essar Steel Ltd v. United States*, 678 F. 3d 1268, 1276 (Fed. Cir. 2012); *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382-83 (Fed. Cir. 2003); SAA at 870).

⁴²¹ See POSCO Vietnam Rebuttal Brief at 3-4.

⁴²² *Id.* at 4.

⁴²³ *Id.* at 4-5.

metric ton of cold rolled steel produced, based to the differences between the actual input quantity of HRS required to produce CRS, and the CRS output produced. POSCO Vietnam also reported production of steel scrap in Exhibit FOP-7-C and production and sales of steel scrap in Exhibit FOP-13 on a temporal basis. Commerce officials verified that, in addition to steel scrap, oxide, recovered from the pickling process which the steel used in CRS processing undergoes, is also produced and sold and that POSCO Vietnam also records sales of oxide, as well as sales of steel scrap.⁴²⁴ POSCO Vietnam did not report the quantity of iron oxide produced on a temporal or other basis, despite Commerce’s instructions to report and describe by-products.⁴²⁵ However, POSCO Vietnam explained in its FOP response that “POSCO Vietnam has calculated the differences between the actual input and output quantities to calculate the claimed offset.”⁴²⁶ Thus, POSCO Vietnam’s calculation of the scrap offset is calculated directly from the quantity of HRS input actually lost to the production process per metric ton of CRS produced, and is likely more accurate than accounting records based on sales of scrap steel and oxide, which represent temporal differences. Commerce gave POSCO Vietnam no further supplemental instructions to calculate scrap production differently. Thus, POSCO Vietnam’s calculation of scrap produced in its production of CRS based entirely on POSCO Vietnam’s yield loss is the data that Commerce used in the *Preliminary Determinations* and verified. Accordingly, the application of facts available with an adverse inference is not warranted. We further find that the steel scrap surrogate value used in the *Preliminary Determinations* is an appropriate surrogate value to value POSCO Vietnam’s scrap production, and that neither the use of a scrap surrogate value based on POSCO Vietnam’s AUV of market-economy purchases of HRS nor an AUV based on iron oxide would better reflect the value of POSCO Vietnam’s production of scrap and iron oxide by-products.

Comment 19: Whether Commerce Should Account for POSCO Vietnam’s Failure to Disclose Corporate Affiliations in its Final Determination

*Petitioners’ Case Brief*⁴²⁷

- At verification, Commerce discovered that POSCO Vietnam failed to disclose holdings of the convertible bonds of a company for which it is unclear whether POSCO Vietnam would have been required to submit a consolidated questionnaire response.⁴²⁸
- Also at verification, Commerce discovered that POSCO Vietnam did not disclose its stock-holding relationship in a company that “slits and paints ‘full hard’ CRS.”⁴²⁹
- Under normal circumstances, Commerce would have required that POSCO Vietnam report factors of production, purchase data, consumption rates, scrap offset data, and other factors of production data for the company which “slits and paints ‘full hard’ CRS.”⁴³⁰

⁴²⁴ See POSCO Vietnam Verification Report at 9 and 24.

⁴²⁵ See, e.g., POSCO Vietnam April 30, 2019 FOP Response at 10 and 12.

⁴²⁶ See POSCO Vietnam April 30, 2019 FOP Response at page 13.

⁴²⁷ See Petitioners’ Case Brief at 9-11.

⁴²⁸ *Id.* at 9-10.

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 11.

- Commerce should consider POSCO Vietnam’s evasive and deficient reporting with respect to corporate affiliations for purposes of its final determination.⁴³¹

*POSCO Vietnam’s Rebuttal Brief*⁴³²

- The petitioners claim that POSCO Vietnam did not disclose an “asset holding interest” (of convertible bonds) in a company. However, the companies are not affiliated and there is no obligation for POSCO Vietnam to have identified this unaffiliated company anywhere in its questionnaire response.⁴³³
- Commerce verified these facts, recording that “Company officials explained that POSCO Vietnam never realized ownership in or ever exercised any conversion rights in {the company}” and that “Company officials explained that {the company} was never affiliated or related to any POSCO Korea or POSCO Vietnam affiliated company by any standard.”⁴³⁴
- With respect to the company which slits and paints “full hard” CRS, POSCO Vietnam explained, this company was always identified as an affiliated party, but was inadvertently omitted from an exhibit identifying affiliated parties with whom POSCO Vietnam had business transactions.⁴³⁵
- Further, the company is not involved in the production of CRS but, rather, purchases steel from POSCO for its own production of its own products.⁴³⁶

Commerce Position:

We determine that POSCO was cooperative with respect to reporting its affiliations. With respect to the company whose convertible bonds POSCO Vietnam owned, Commerce verified that POSCO was not affiliated with the company. Section 771(33) of the Act specifies the following:

The following persons shall be considered to be “affiliated” or “affiliated persons”:

- (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
- (B) Any officer or director of an organization and such organization.
- (C) Partners.
- (D) Employer and employee.
- (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
- (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
- (G) Any person who controls any other person and such other person.”

With respect to section 771(33)(G) of the Act, 19 CFR 351.102(b)(3) specifies the following:

⁴³¹ *Id.*

⁴³² *See* POSCO Vietnam Rebuttal Brief at 5-7.

⁴³³ *Id.* at 5.

⁴³⁴ *Id.* at 5-6 (citing POSCO Vietnam Verification Report at 3).

⁴³⁵ *Id.* at 6.

⁴³⁶ *Id.* at 7.

“In determining whether control over another person exists, within the meaning of section 771(33) of the Act, the Secretary will consider the following factors, among others: Corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.”

The record reflects and Commerce has verified that POSCO Vietnam never realized ownership in or ever exercised any conversion rights in the company and that the company was never affiliated with POSCO Vietnam in any other way.⁴³⁷ Thus, the ownership of these convertible bonds do not represent ownership of any kind, and in accordance with section 771(33) of the Act and 19 CFR 351.102(b)(3), do not, in and of themselves, represent affiliation. Accordingly, POSCO Vietnam had no obligation to report this company as an affiliate.

With respect to the company which slits and paints “full hard” CRS, Commerce verified that the company was not involved in the production of CRS but, rather, purchased CRS and produced steel band as packing materials, some of which it sold to POSCO Vietnam.⁴³⁸ Accordingly, there is no basis to conclude that information about this company that Commerce required is missing from the record, or that POSCO Vietnam failed to cooperate by hiding or obfuscating relevant information. Accordingly, we have not applied AFA with respect to POSCO Vietnam’s affiliations with these companies.

IX. 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 *Preliminary Determinations*, that CRS produced in Vietnam using HRS manufactured in Korea is circumventing the *CRS Orders*. We further recommend continuing to apply this finding to all CRS produced in Vietnam using HRS manufactured in Korea that is exported from Vietnam to the United States, except for shipments complying with the certification requirements described in the *Federal Register* notice.

⁴³⁷ See POSCO Vietnam Verification Report at 3.

⁴³⁸ *Id.* at 2 and Exhibit 10.

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



Agree



Disagree

X 

Signed by: JEFFREY KESSLER
Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance