

August 1, 2011

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative
Determination of Circumvention of the Antidumping Duty Order
on Certain Tissue Paper Products from the People's Republic of
China (PRC)

Summary

We have analyzed the case and rebuttal briefs submitted by the interested parties in the above-referenced inquiry. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this inquiry for which we received comments from the parties.

- Comment 1: Whether the Application of Facts Available (FA)/Adverse Facts Available (AFA) Is Lawful
- Comment 2: Whether the Department's Circumvention Analysis Properly Addressed the Statutory Criteria
- Comment 3: Whether the Department's Use of FA/AFA Is Uncorroborated, Unreasonable, and Punitive
- Comment 4: Whether the Remedy Imposed Is Lawful
- Comment 5: Whether the Assignment of the PRC-Wide Rate as AFA Is Appropriate

Background

On April 6, 2011, the Department of Commerce (the Department) published the preliminary affirmative determination of circumvention of the antidumping duty (AD) order on certain tissue

paper products (tissue paper) from the PRC (PRC Tissue Paper Order).¹ For a complete list of the events that occurred since the Preliminary Determination, see the “Background” section of the Federal Register notice which this memorandum accompanies. We invited interested parties to comment on the Preliminary Determination. Max Fortune (Vietnam) Tissue Paper Products Company Limited (MFVN)² filed a case brief³ on May 20, 2011, and the petitioner⁴ filed a rebuttal brief on May 27, 2011.

Based on our analysis of the comments received in response to the Preliminary Determination, we continue to find that tissue paper products exported to the United States, which were produced by MFVN using Chinese jumbo rolls and/or cut sheets of tissue paper, circumvented the PRC Tissue Paper Order.

Discussion of the Issues

Comment 1: Whether the Application of FA/AFA Is Lawful

MFVN argues that the Department cannot make a determination of circumvention based on FA. MFVN contends that the Department’s Preliminary Determination is arbitrary, unsupported by the statute and the regulations, and is in direct contravention of established Department precedent because it failed to consider virtually all of the statutory criteria for conducting a circumvention analysis under section 781(b)(1) of the Tariff Act of 1930, as amended (the Act). MFVN points out that the Department is required to conduct an analysis of all of the criteria provided in section 781(b)(1) of the Act and the analysis of that criteria cannot be supplanted through the application of FA. In support of its argument that all of the statutory criteria must be

¹ See Certain Tissue Paper Products From the People’s Republic of China: Preliminary Affirmative Determination of Circumvention of the Antidumping Duty Order, 76 FR 19043 (April 6, 2011) (Preliminary Determination).

² MFVN is a company located in Vietnam and is a wholly-owned subsidiary of Max Fortune Industrial Co., Ltd. (MFHK) located in Hong Kong. MFHK was the seller, and therefore, the exporter for AD purposes of the tissue paper produced and shipped by MFVN to the United States during the analysis period of this inquiry.

³ MFVN submitted the same case brief in both this anti-circumvention inquiry and the concurrent administrative review of the PRC Tissue Paper AD order covering the period March 1, 2009 to February 28, 2010. The concurrent administrative review of MFVN has been rescinded because MFVN did not export tissue paper to the United States during the period of review (POR); instead MFHK was the exporter of MFVN’s tissue paper during the POR. See Certain Tissue Paper Products from the People’s Republic of China: Notice of Rescission of the 2009-2010 Antidumping Duty Administrative Review (PRC Tissue Paper 2009-2010 Rescission Notice) (published concurrently with the Federal Register notice which this memorandum accompanies). Accordingly, the Department has addressed the arguments presented in MFVN’s case brief in this anti-circumvention proceeding.

⁴ The petitioner is Seaman Paper Company of Massachusetts, Inc.

met for the Department to find circumvention, MFVN cites to the Department's analysis in Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany and the United Kingdom: Negative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders, 64 FR 40336, 40338 (July 26, 1999) (Lead and Bismuth).

MFVN also asserts that when the Department applies FA in an anti-circumvention inquiry, it is with respect to a single criterion in the context of the circumvention analysis and not to determine the outcome of the analysis itself. In other words, MFVN contends that the Department applied FA to all but a select few of the statutory criteria necessary to determine whether circumvention exists and this practice departs from case precedent. To support its argument, MFVN cites to Steel Wire Rope from Mexico: Affirmative Preliminary Determination of Circumvention of Antidumping Duty Order, 59 FR 29176 (June 3, 1994) (Steel Wire Rope); and Lead and Bismuth.

MFVN alleges that the Department's sole basis for its preliminary circumvention finding was its conclusion that MFVN was unable to provide verifiable data to support its assertion that the tissue paper it exported to the U.S. market after January 1, 2008, was of Vietnamese origin.⁵ MFVN asserts that the Department's determination in this regard was arbitrary, because it is based on the faulty reasoning that MFVN's inability to fully document the country of origin of the jumbo rolls it used to produce tissue paper leads to the conclusion that MFVN engaged in circumvention of the PRC Tissue Paper Order throughout the period 2005 to the present. MFVN contends that nothing in the law, the regulations or the Department's previous practice stands for the proposition that a party can be found to be circumventing an AD order based on the application of FA. MFVN argues that the Department is only authorized to resort to FA if no information was provided in response to a request for information or if the information provided could not be verified by the Department.

The petitioner argues that the Department's application of FA/AFA in this case is statutorily sound. The petitioner contends that the statute explicitly authorizes the Department to use FA when a party provides information but the information cannot be verified, as is exactly the situation in this case. Specifically, the petitioner claims that when certain circumstances are satisfied, the Department is required to use FA in reaching a determination and authorized to resort to AFA under sections 776(a) and (b) of the Act, respectively. Therefore, the petitioner argues that MFVN's contention that the Act does not give the Department the authority to use FA and AFA in an anti-circumvention inquiry is without merit. In this case, the petitioner maintains that the Department was required to resort to FA with respect to MFVN because MFVN refused to provide the requested and necessary information pertaining to the country of origin of the jumbo rolls and/or cut sheets it used to produce tissue paper. The petitioner also notes that the Department was unable to verify MFVN's production records for a critical period of time. Although this information was not "missing" from the record but rather it could not be verified, the petitioner contends that it is still appropriate for the Department to apply FA. The

⁵ In making its argument, MFVN implies that its records after January 1, 2009, were complete and the Department's FA determination did not take this into account.

petitioner claims that MFVN is arguing that, because the company was unable to provide the necessary accounting records at verification (which it is required to maintain by Vietnamese accounting law),⁶ the Department is statutorily precluded from finding that MFVN circumvented the PRC Tissue Paper Order. The petitioner argues that this is an unreasonable interpretation of the law.

The petitioner maintains further that MFVN failed to cooperate with the Department's investigation by refusing to provide the Department with documentation that substantiated its claim that it stopped shipping tissue paper products made from Chinese-origin tissue paper starting in 2008, and by refusing to provide its factors of production (FOP) data for its Vietnamese and PRC production of tissue paper. The petitioner claims these failures impeded the Department's investigation and limited its ability to examine the circumvention criteria of section 781(b) of the Act. Therefore, the petitioner concludes, the Department's application of FA/AFA in this case was appropriate.

Department's Position:

We disagree with MFVN. The overall purpose of an anti-circumvention inquiry is to prevent the evasion of an AD order. One of the ways such evasion can occur is through the completion of subject merchandise in third country markets. There is no statutory or regulatory restriction that prevents the Department from relying on facts otherwise available on the record in its circumvention analysis when the utilization of section 776(a) of the Act is otherwise appropriate. Further, if a company being investigated has failed to act to the best of its ability in providing the Department with the necessary information, the language of section 776(b) of the Act is clear: the Department may apply an adverse inference in its application of FA.

Section 776(a) of the Act, provides that, if (1) necessary information is not available on the record or (2) an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

As explained in the Preliminary Determination at 76 FR 19045-19046, MFVN failed to provide complete accounting and production records for 2008, which MFVN is required to retain (for up to 10 years) under Vietnamese accounting law, to support its claim that it did not continue to use

⁶ For companies doing business in Vietnam, Vietnamese regulations require companies such as MFVN to retain such records for up to 10 years. See Memorandum to the File dated March 31, 2011, which contains the following document, "Decree No. 129/2004/ND-CP of May 31, 2004 Detailing and Guiding the Implementation of a Number of Articles of the Accounting Law, Applicable to Business Activities," issued by the Government of the Socialist Republic of Vietnam on May 31, 2004.

Chinese-origin jumbo rolls and/or cut sheets of tissue paper in its finished tissue paper products exported from Vietnam to the United States after January 1, 2008. Moreover, MFVN failed to provide documentation showing that it did not use Chinese-origin jumbo rolls and/or cut sheets in (1) the tissue paper remaining in its finished goods and/or work-in-progress (WIP) inventory at the end of 2008; (2) the finished tissue paper it later sold in 2009 from that inventory; and/or (3) the tissue paper it pulled out of WIP inventory in 2009 to make finished tissue paper products. Because MFVN did not provide the Department with the requested documentation, MFVN failed to show that the tissue paper exported to the United States from its 2008 inventory during 2009 was not made from Chinese-origin jumbo rolls and/or cut sheets, and for that matter, if exports of tissue paper made from Chinese-origin jumbo rolls and/or cut sheets ever ceased. The Department's analysis was impeded by the absence of this necessary information.

Moreover, the Department verified that up until March 2010, there were Chinese-origin jumbo rolls in MFVN's inventory.⁷ MFVN's records showed that those jumbo rolls were withdrawn from inventory in March 2010, but MFVN could not provide any evidence in its books and records demonstrating how it used the jumbo rolls or the ultimate destination of merchandise produced from these jumbo rolls. Accordingly, although the Department was able to verify certain aspects of MFVN's post-2008 books and records, the Department disagrees with MFVN that those records were verified as complete. Thus, based on all of the missing necessary information, the Department resorted to FA under section 776(a)(2) of the Act as a result of MFVN's failure to provide that essential documentation at verification.

Furthermore, section 776(b) of the Act states that if the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority . . . , the administering authority . . . , in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."⁸ Congress explained in the SAA accompanying the Uruguay Round Agreements Act that the application of an adverse inference is warranted "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."⁹ An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record.¹⁰

⁷ See Memorandum from to the File from Case Analysts entitled "Verification of the Questionnaire Response of Max Fortune (Vietnam) Paper Products Co., Ltd. and Its Affiliates in the Anti-circumvention Inquiry and 2009-2010 Antidumping Duty Administrative Review of Certain Tissue Paper Products from the People's Republic of China," dated March 31, 2011 (MFVN verification report), at pages 2 and 40.

⁸ See also Statement of Administrative Action (SAA), H.Rep. No. 103-316 at 870 (1994).

⁹ See *id.*

¹⁰ See section 776(b) of the Act.

In this case, the Department concluded that MFVN did not act to the best of its ability when it failed to provide accounting and production records (as required by Vietnamese law) to support its claim that: (1) it did not use Chinese-origin jumbo rolls and/or cut sheets of tissue paper to produce finished tissue paper during 2008 for sale to the U.S. market; (2) the tissue paper remaining in finished goods and WIP inventory at the end of December 31, 2008, was not of Chinese origin; and (3) it did not use the tissue paper remaining in finished goods and WIP inventory at the end of December 31, 2008, in tissue paper exported to the U.S. market during 2009 and 2010. Furthermore, although MFVN claimed that it could accurately account for its inventory in the post-2007 period, the Department discovered at verification that MFVN withdrew Chinese-origin jumbo rolls from inventory in March 2010, but could not account for the ultimate destination or usage of those jumbo rolls in its books and records.¹¹ Therefore, the Department's application of AFA with respect to the tissue paper in MFVN's inventory at the end of 2008 (and which was later sold during 2009 and/or carried over into 2010) was warranted and in full accordance with sections 776(a) and (b) of the Act.

Section 776(c) of the Act provides that when the Department selects from among the facts otherwise available and relies on "secondary information," the Department shall, to the extent practicable, corroborate that information from independent sources reasonably at the Department's disposal. The SAA states that "corroborate" means to determine that the information used has probative value.¹² The Department has determined that to have probative value, information must be reliable and relevant.¹³ To be considered corroborated, information must be found to be both reliable and relevant. See Comment 3 below for a full discussion on corroboration of secondary information used in the Department's circumvention analysis.

MFVN argues that the Department is precluded from applying FA in determining whether circumvention of an AD order has occurred. Section 776 of the Act provides that the Department may make determinations on the basis of FA. This provision does not limit the types of determinations in which the Department may use FA, and in no manner does it exclude circumvention determinations. Moreover, section 781(b) of the Act lists the criteria the Department must address to determine whether or not the merchandise at issue is circumventing the AD order. There is nothing in that section that requires the Department to ignore the lack of information on the administrative record or a company's failure to act to the best of its ability. MFVN's interpretation of sections 781(b)(1) and 776(a) of the Act would require the Department to blindly ignore the affirmative evidence of MFVN's circumvention of the PRC Tissue Paper Order before 2008, and the lack of evidence regarding the source of the inventory carried over into 2009 and 2010 from that period. This interpretation of those provisions would

¹¹ See id.

¹² See SAA at 870.

¹³ See Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review, 72 FR 58642 (October 16, 2007), and accompanying Issues and Decision Memorandum at Comment 6.

allow companies to avoid an affirmative finding of circumvention on their merchandise by not providing complete information on the administrative record of an anti-circumvention inquiry. We do not believe the text of the Act, or the legislative history of the Act, support such an interpretation, as Congress explicitly stated that parties should not benefit from their lack of cooperation.¹⁴

Furthermore, with respect to MFVN's argument that the Department did not satisfy all the criteria enumerated under section 781(b)(1) of the Act, we disagree. We analyze in detail in Comment 2 below all of the specified criteria.¹⁵ Accordingly, the application of AFA as part of the Department's circumvention analysis is fully consistent with the requirements of section 781(b) of the Act.

With respect to MFVN's reliance on the Department's analysis in Lead and Bismuth and Steel Wire Rope, this final determination is fully consistent with those decisions. Specifically, in Lead and Bismuth, the Department requested, and the respondent failed to provide, its lead billet consumption rate which the Department deemed necessary for purposes of calculating the value of the processing performed in the United States and addressing the circumvention criteria pursuant to section 781(b)(1) of the Act. As the Department noted in Lead and Bismuth, it made an adverse inference pursuant to section 776(b) of the Act and used the highest average lead billet consumption rate submitted by another interested party in that case to determine whether this criterion was met.¹⁶ Similarly, in Steel Wire Rope, the Department requested, and the respondent failed to provide, data necessary to determine whether the value for the imported component at issue (i.e., the wire strand) represented a valid market price for use in the Department's difference-in-value calculation. Because the respondent in Steel Wire Rope also failed to provide the requested data, the Department relied on the best information available and determined that the quantitative difference between the value of the finished product sold in the United States and the value of the wire strand produced in Mexico was small.¹⁷ In both cases, the Department used the best available information to fill the gap in the record which resulted

¹⁴ See SAA at 870.

¹⁵ In conducting anti-circumvention inquiries under section 781(b)(1) of the Act, the Department relies upon the following criteria: (A) merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is subject to an antidumping duty order; (B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which is subject to the order or produced in the foreign country that is subject to the order; (C) the process of assembly or completion in the foreign country referred to in (B) is minor or insignificant; (D) 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; and (E) the administering authority determines that action is appropriate to prevent evasion of such order.

¹⁶ See Lead and Bismuth, 64 FR at 40338.

¹⁷ See Steel Wire Rope, 59 FR at 29176-29179.

from the respondent's failure to provide necessary information. Likewise, the Department has used AFA in this case where MFVN failed to provide necessary information. See Comment 2 below for a full discussion of the Department's analysis of the statutory criteria relevant to circumvention under section 781(b)(1) of the Act.

Comment 2: Whether the Department's Circumvention Analysis Properly Addressed the Statutory Criteria

MFVN argues that the Department's analysis of the statutory factors relevant to circumvention is not supported by substantial evidence and is incomplete and incorrect. Specifically, MFVN contends that, contrary to the Department's interpretation of the facts in this case, the record evidence shows that, at least since January 2009, MFVN did not circumvent the AD order. Based on this fact, as verified by the Department, MFVN argues that it is not reasonable for the Department to make a preliminary determination which considered all of the tissue paper MFVN produced during the period of analysis to have included Chinese-origin jumbo rolls and/or cut sheets of tissue paper imported into Vietnam for processing.

Furthermore, in instances where the Department attempts to address the circumvention criteria in the Preliminary Determination, MFVN argues that the Department misstates the facts and provides an incorrect analysis. For example, MFVN claims that the Department incorrectly concluded in its analysis of the first of the section 781(b)(2) factors (i.e., level of investment) that its verification findings showed that the level of MFVN's investment in equipment used to convert jumbo rolls and/or cut sheets into finished tissue paper is minor or insignificant, as the record evidence shows that MFVN's Hong Kong-based parent, MFHK, invested in all of the capital equipment located at MFVN's facility in Vietnam, including six large and expensive paper-making machines. Furthermore, MFVN claims that the Department's analysis of the third of the section 781(b)(2) factors (i.e., nature of the production process in Vietnam) is also in error. Specifically, MFVN claims that the Department's finding in the Preliminary Determination that the process of converting Chinese-origin jumbo rolls and/or cut sheets into finished tissue paper is limited and minor when compared to the process of producing jumbo rolls or sheets, presumes circumvention is taking place. MFVN claims that in its response, it describes its process for producing jumbo rolls from paper pulp at its Vietnam facility and converting those jumbo rolls into finished tissue paper, and that process does not involve the use of Chinese-origin jumbo rolls and/or cut sheets. MFVN maintains its process for making jumbo rolls at its Vietnam facility and converting those jumbo rolls into finished tissue paper has been in effect at least since January 2008. Therefore, MFVN contends that its narrative description of the production process for producing jumbo rolls and finished tissue paper at its facility should have compelled the Department to find that the production process at its facility is substantial, rather than minor. Moreover, MFVN claims that the Department incorrectly concluded in its analysis of the last factor identified in section 781(b)(1) of the Act that, in order to prevent evasion of the PRC Tissue Paper Order, it must instruct CBP to suspend liquidation of all entries of MFVN's tissue paper as of the date of initiation of this inquiry, rather than institute a certification program as it has in prior cases under similar circumstances simply because this case represents the third time

the Department has found circumvention of the PRC Tissue Paper Order. (See Comment 4 below for further discussion.)

The petitioner finds meritless MFVN's contention that the Department failed to analyze properly the statutory criteria addressing circumvention. The petitioner maintains that the Department sufficiently addressed each of the factors required under the statute for finding circumvention, and only relied on FA where required and AFA where warranted. To support its contention, the petitioner shows how the Department addressed each of the circumvention criteria under section 781(b) of the Act in the Preliminary Determination.¹⁸

Furthermore, with respect to the level of investment criterion under section 781(b)(2) of the Act and MFVN's assertion that MFVN's parent company's level of investment is very large, the petitioner claims that MFVN incorrectly focuses on the investment in its paper-making operations rather than in its cutting and hand-folding operations required to assemble and/or complete the Chinese-origin tissue paper. The petitioner contends that the Department's analysis with respect to this criterion was properly focused on the level of investment in cutting and/or hand folding and packing, which the Department correctly noted in the Preliminary Determination entails little investment. In support of its argument, the petitioner cites to Certain Tissue Paper Products from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination, 73 FR 21580, 21582-21585 (April 22, 2008) (Quijiang Prelim). Therefore, the petitioner maintains that the Department's analysis of the investment criterion is fully supported by the record evidence and supports finding that MFVN's investment in its conversion and packing operations is minor or insignificant relative to its overall investment in its paper-making operations.

With respect to the nature of the production process in Vietnam, the petitioner claims that MFVN misunderstood the Department's analysis and the intent of this criterion. Specifically, the petitioner contends that the Department's analysis of this criterion correctly focused on MFVN's converting and packing operations (which involve a limited number of inputs handled by relatively unskilled manual labor) rather than its paper-making operations, and points out that the Department has conducted this same analysis in prior circumvention investigations. In support of this claim, the petitioner again cites to the Quijiang Prelim. Moreover, the petitioner notes that, because MFVN failed to demonstrate that it was not still converting Chinese-origin jumbo rolls at its facility, the fact that MFVN also invested in equipment and started to produce jumbo rolls in Vietnam does not invalidate the conclusion that MFVN continues to circumvent the PRC Tissue Paper Order by assembling or completing tissue paper products in Vietnam from Chinese-origin jumbo rolls. Furthermore, the petitioner points out that MFVN's analysis of these criteria is incomplete as it ignores any analysis which considers whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States.

¹⁸ See the petitioner's rebuttal brief, dated May 27, 2011, at pages 7-18.

Finally with respect to MFVN's argument regarding the suspension of liquidation of all entries of MFVN's tissue paper without the use of "non-subject merchandise" certifications, the petitioner maintains that the Department's determination in this regard was appropriate in order to prevent further evasion of the PRC Tissue Paper Order. (See Comment 4 below for further discussion.)

In conclusion, the petitioner maintains that the Department's Preliminary Determination is supported by substantial evidence and reflects an appropriate and lawful application of FA and AFA.

Department's Position:

We disagree with MFVN. Contrary to MFVN's claim, in the Preliminary Determination at 76 FR 19045-19048, the Department fully addressed each of the circumvention criteria outlined in section 781(b)(1) and (2) of the Act in order to determine whether tissue paper products produced by MFVN from Chinese-origin jumbo rolls and/or cut sheets were circumventing the PRC Tissue Paper Order. In addressing these criteria, we relied upon the information provided by MFVN in its questionnaire responses and applied FA where MFVN failed to provide the necessary and verifiable information. For purposes of the final determination in this case, we reiterate below our preliminary analysis and provide further analysis in response to the parties' comments, as appropriate.

Section 781(b) of the Act provides that the Department may find circumvention of an antidumping duty order when merchandise of the same class or kind subject to the order is completed or assembled in a foreign country other than the country to which the order applies. In conducting anti-circumvention inquiries under section 781(b)(1) of the Act, the Department relies upon the following criteria: (A) merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is subject to an antidumping duty order; (B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which is subject to the order or produced in the foreign country that is subject to the order; (C) the process of assembly or completion in the foreign country referred to in (B) is minor or insignificant; (D) 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; and (E) the administering authority determines that action is appropriate to prevent evasion of such order.

Regarding section 781(b)(1)(A) of the Act, data in MFVN's June 28, 2010, response to the Department's April 23, 2010, anti-circumvention questionnaire (June 28 Response) and our verification findings indicate that the tissue paper produced by MFVN and exported to the U.S.

market is of the same class or kind of merchandise as the tissue paper subject to the PRC Tissue Paper Order.¹⁹

Regarding section 781(b)(1)(B) of the Act, our verification findings indicate that MFVN failed to provide critical documentation showing that it stopped using Chinese-origin jumbo rolls and/or cut sheets of tissue paper in its production of finished tissue paper exported to the United States after January 1, 2008, and failed to show the source of production for the tissue paper produced by MFVN from inventory carried over from 2008 and exported to the United States during 2009.²⁰ At the beginning of 2010, MFVN continued to have in its inventory tissue paper produced during 2008 for which it similarly failed to show the source of its production.²¹ Moreover, MFVN failed to account for the withdrawal from its raw materials inventory of a specific quantity of Chinese-origin jumbo rolls reflected in its accounting records for March 2010 despite requests from the Department for that information.²² As explained in Comment 1 above, because MFVN did not provide the requested necessary information, we are applying facts available as provided for in section 776(a)(2) of the Act. We further find that MFVN did not cooperate to the best of its ability in not providing that information which it was required to keep under Vietnamese accounting law, thus warranting the application of an adverse inference under section 776(b) of the Act. See Comment 1 for further discussion. Therefore, in applying an adverse inference, we conclude that MFVN continued to complete tissue paper products exported to the United States after January 1, 2008, using Chinese-origin jumbo rolls and/or sheets.

Section 781(b)(2) of the Act provides the criteria the Department shall take into account in determining whether the process of assembly or completion in the foreign country is minor or insignificant in accordance with section 781(b)(1)(C) of the Act. These criteria are: (A) the level of investment in the foreign country; (B) the level of research and development (R&D) in the foreign country; (C) the nature of the production process in the foreign country; (D) the extent of the production facilities in the foreign country; and (E) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States. In analyzing these criteria, we focused on MFVN's operations relevant to the processing of Chinese-origin jumbo rolls and/or cut sheets into finished tissue paper products, rather than its overall paper-making operations as suggested by MFVN, because the purpose of our inquiry is to determine whether the tissue paper products produced by MFVN using Chinese-origin jumbo rolls and/or cut sheets is circumventing the

¹⁹ See MFVN's June 28 Response at Exhibit 6, MFVN verification report at page 17, and Preliminary Determination, 76 FR at 19045.

²⁰ See MFVN verification report at pages 2 and 37-38.

²¹ See MFVN verification report at pages 37-38 and Exhibits 10U-4 and 10U-5.

²² See MFVN verification report at pages 40-41 and Exhibits 10U-3 and 10U-6.

PRC Tissue Paper Order. This analysis is similar to that conducted in a prior anti-circumvention inquiry involving the PRC Tissue Paper Order.²³

With respect to section 781(b)(2)(A) of the Act, data on the record indicate that with respect to the processing (e.g., cutting and/or folding) and packing stages of finished tissue paper production, MFVN and MFHK's investment in machinery is minimal when compared to their investment in machinery used for other stages of tissue paper production.²⁴ MFVN incorrectly asserts that the Department's focus in addressing this criterion should be the level of MFVN/MFHK's investment in overall paper-making equipment. Instead, the appropriate focus of this analysis is MFVN/MFHK's level of investment in cutting and/or packing equipment rather than paper-making equipment because we are trying to determine whether MFVN is circumventing the AD order by completing Chinese-origin tissue paper in Vietnam for export to the United States. As indicated above, the Department conducted a similar analysis in the Quijiang Prelim.²⁵

With respect to section 781(b)(2)(B) of the Act, MFVN states in its response that its level of R&D in Vietnam for producing tissue paper is not a significant factor in its operations and that it has not undertaken any R&D initiatives and expenditures involved in the production of jumbo rolls and/or the conversion of jumbo rolls to tissue paper products.²⁶ Hence, data on the record indicate that MFVN's level of R&D in Vietnam is not a significant factor in its processing operations.

With respect to section 781(b)(2)(C) of the Act, MFVN provided a detailed description of the six-stage production process for making tissue paper in which it noted that the process of converting jumbo rolls to finished tissue paper products is limited to the use of cutting machinery and manual packing labor.²⁷ Thus, the information provided by MFVN demonstrates that the production process used by MFVN in completing the Chinese-origin jumbo rolls and/or sheets into finished tissue paper products in Vietnam is limited and minor (in terms of materials and equipment used) when compared to the production process of the jumbo rolls and/or sheets. Again, contrary to MFVN's claim and for the reason stated above, the appropriate focus of the analysis of this criterion is MFVN's completion process, rather than its overall paper-making process as suggested by MFVN.

²³ See Quijiang Prelim, 73 FR at 21582 (unchanged in 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) (Quijiang Final)).

²⁴ See MFVN verification report at page 6.

²⁵ See Quijiang Prelim, 73 FR at 21582 (unchanged in Quijiang Final).

²⁶ See MFVN's June 28 Response at pages 12-13.

²⁷ See MFVN's June 28 Response at pages 13-14.

With respect to section 781(b)(2)(D) of the Act, we note that while our verification findings did confirm that MFVN has tissue paper production facilities in Vietnam, MFVN did not demonstrate that before January 1, 2009, it used the full capacity of its production facility to manufacture tissue paper. In other words, MFVN provided information showing that it purchased the equipment necessary to produce tissue paper from pulp (rather than from jumbo rolls imported from the PRC),²⁸ but it did not demonstrate that it used this equipment to its fullest capacity (*i.e.*, to produce jumbo rolls in Vietnam) during this period. The mere fact that MFVN currently has a full tissue paper production facility in Vietnam did not, and does not, remove its ability to also complete tissue paper products in Vietnam using Chinese jumbo rolls and/or sheets for export to the United States.

With respect to section 781(b)(2)(E) of the Act, MFVN failed to provide the necessary FOP data for purposes of determining the value of the processing of Chinese-origin jumbo rolls and/or cut sheets into finished tissue paper products relative to the value of finished tissue paper products imported into the United States, despite requests from the Department for that information.²⁹ MFVN refused to submit this FOP information because it stated it could demonstrate through its accounting records that as of January 1, 2008, it did not use Chinese-origin jumbo rolls and/or cut sheets in its production of tissue paper for export to the United States. However, as explained above, MFVN was unable to substantiate this claim at verification. Accordingly, because MFVN did not provide the requested necessary information, we are applying facts available as provided for in section 776(a)(2) of the Act and are relying on information provided in the petitioner's February 19, 2010, submission (February 19 submission) to analyze this provision of the Act. We further find that MFVN did not cooperate to the best of its ability in not providing that information which would normally be reflected in accounting records required to be kept under Vietnamese accounting law, thus warranting the application of an adverse inference under section 776(b) of the Act. In the SAA, Congress noted that section 781(b)(2)(E) "requires Commerce to determine whether the value of the processing performed (in the third country) represents a small proportion of the value of the finished product."³⁰ Congress also stated that this provision did not "establish (a) rigid numerical standard for determining ... the significance of the value" of the processing involved.³¹ As we stated in the Preliminary Determination at 76 FR 19047-19048, the petitioner provided evidence based, in part, on foreign market research, that the conversion by MFVN of jumbo rolls and/or sheets of tissue paper produced in the PRC into finished tissue paper products in Vietnam is a minor or insignificant process, and that the value of the processing performed by MFVN is a small proportion of the

²⁸ See MFVN verification report at page 6 and Exhibit 10M.

²⁹ See MFVN's June 28 Response at pages 14-15.

³⁰ See SAA at 894.

³¹ See also Preamble, Antidumping Duties; Countervailing Duties; Proposed Rules, 61 FR 7307, 7322 (February 27, 1996).

value of the merchandise imported into the United States.³² MFVN did not provide any information on the record of this inquiry to counter this information, and there is no other information on the record to call into question the petitioner's value analysis. Therefore, based on data contained in the petitioner's February 19 submission, the Department continues to find, upon application of AFA, that the value of the processing MFVN performed in Vietnam represents a small proportion of the value of the merchandise imported into the United States.

Taking into consideration all of the factors under section 781(b)(2) of the Act as described above, we conclude that the process of converting the jumbo rolls and/or cut sheets of tissue paper into finished tissue paper products in Vietnam is minor or insignificant pursuant to section 781(b)(1)(C) of the Act. See Comment 3 for discussion of the Department's corroboration of secondary information used as AFA as part of its analysis under section 781(b)(1)(C) of the Act.

Furthermore, with respect to section 781(b)(1)(D) of the Act, we find that the value of the jumbo rolls and/or cut-sheets of tissue paper MFVN used in its production is a significant portion of the value of the merchandise exported to the United States. As in the case of our analysis under section 781(b)(2)(E) of the Act, because MFVN failed to provide the requested data necessary to analyze this criterion, as AFA pursuant to section 776(a)(2) and (b) of the Act, we relied on the data in the petitioner's February 19 submission to make this finding.³³ MFVN did not provide any information on the record of this inquiry to counter this information, and there is no other information on the record to call into question the petitioner's value analysis. See Comment 3 for discussion of the Department's corroboration of this information.

The Department is also required to consider the factors outlined in section 781(b)(3) of the Act in making its circumvention finding. These factors are: (A) the pattern of trade, including sourcing patterns; (B) whether the manufacturer or exporter of the merchandise is affiliated with the person who uses the merchandise to assemble or complete in the foreign country the merchandise that is subsequently imported into the United States; and (C) whether imports into the foreign country of the merchandise have increased after the initiation of the investigation which resulted in the issuance of such order or finding. Our analysis of these factors substantiates our finding of circumvention pursuant to sections 781(b)(1) and 781(b)(2) of the Act.

Regarding section 781(b)(3)(A) of the Act, data in MFVN's June 28 Response³⁴ and our verification findings indicate that since the PRC Tissue Paper Order has been in effect, exports to

³² See the petitioner's February 19 submission at page 34-35 and Exhibit 16.

³³ See the petitioner's February 19 submission at 34-36.

³⁴ See MFVN's June 28 Response at Exhibit 11.

the United States of tissue paper produced by MFVN have increased substantially.³⁵ See also Memorandum to the File from the Team, entitled “An Analysis of Export Data,” dated August 1, 2011.

Regarding section 781(b)(3)(B) of the Act, our verification findings confirm that MFVN is affiliated with a producer of tissue paper in the PRC, namely Max Fortune (FZ) Paper Products Co., Ltd. (MFFZ). Moreover, MFVN, like MFFZ, relies on the same company in Hong Kong, MFHK, to market and sell its merchandise to the United States and other markets.³⁶

Finally, regarding section 781(b)(3)(C) of the Act, while the Vietnamese Customs data placed on the record show that MFVN did not import tissue paper from the PRC from January 1, 2008, through December 12, 2010, no similar data for pre-January 2008 exports was provided to Department officials at verification.³⁷ However, data contained in the petitioner’s February 19 submission show that MFVN’s imports of tissue paper from the PRC increased during the period between the initiation of the less-than-fair-value (LTFV) investigation and January 1, 2008. MFVN did not provide any relevant records for the pre-2008 period and, therefore, there is no information on the record that contradicts the petitioner’s data. Moreover, this information is supported by MFVN’s own admission that “it is possible that MFVN might have made {tissue paper} in Vietnam from jumbo rolls from the PRC during this time period.”³⁸ Therefore, we conclude that MFVN’s imports of tissue paper from the PRC increased after the initiation of the LTFV investigation which resulted in the PRC Tissue Paper Order.

Based on the foregoing analysis, we determine under section 781(b) of the Act that exports to the United States of tissue paper products produced by MFVN from Chinese-origin jumbo rolls and/or cut sheets in Vietnam are circumventing the PRC Tissue Paper Order. Therefore, in accordance with section 781(b)(1)(E) of the Act, we find that action is appropriate to prevent evasion of the order.

Comment 3: Whether the Department’s Use of FA/AFA Is Uncorroborated, Unreasonable and Punitive

³⁵ See MFVN verification report at exhibits 3A and 10J through 10L.

³⁶ See MFVN verification report at pages 7 and 16.

³⁷ See MFVN verification report at pages 23-24.

³⁸ See MFVN’s June 28 Response at pages 3 and 12.

MFVN argues that the FA/AFA applied by the Department in the Preliminary Determination is uncorroborated, unreasonable and punitive. Specifically, MFVN contends that the Department's AFA decision to consider all exports of MFVN's tissue paper products since January 2009 to be of Chinese origin did not take into account the Department's verification findings that MFVN: (1) ceased importing any additional Chinese-origin jumbo rolls and/or cut sheets of tissue paper during the period January 1, 2008 to December 10, 2010; (2) established its substantial usage of paper pulp in its 2009 production records; (3) had alternative third country markets (besides the United States) to which it also exported tissue paper; and (4) engaged in full-scale paper-making as reflected in MFVN's 2009 production records.

MFVN states that in the Preliminary Determination the Department asserted that MFVN circumvented the PRC Tissue Paper Order continuously and without interruption from 2005 to the present, and thus, all Vietnamese exports of tissue paper produced at its facility were completed using Chinese-origin jumbo rolls simply because MFVN was unable to provide all of its accounting records at verification. MFVN claims that the Department's adverse inference that all of its exports of tissue paper were completed using Chinese-origin jumbo rolls is directly refuted by the Department's own verification findings. MFVN also claims that the Department's treatment of all of MFVN's exports of tissue paper as "subject merchandise" fails to meet the standards established by its practice, common sense and judicial precedent. Specifically, MFVN asserts that in making its AFA decision, the Department considered all of its tissue paper to be made from Chinese-origin jumbo rolls even though the Department also recognized at verification that MFVN was now capable of producing all of its tissue paper using self-produced pulp. Moreover, MFVN mentions the fact that during the plant tour Department officials observed large inventories of paper pulp and that the Department's verification report supports the conclusion that MFVN did not import jumbo rolls and/or cut sheets of tissue paper from the PRC as of January 2008. According to MFVN, these facts undermine the Department's basis for resorting to AFA in this case and treating all exports of MFVN's tissue paper as subject merchandise.

MFVN also argues that the Department cannot resort to facts available in circumstances in which it verified large portions of MFVN's submitted information, such as in this case. Specifically, MFVN claims that its verified data shows, at a minimum, there has been no circumvention of the PRC Tissue Paper Order since January 1, 2009. Furthermore, MFVN finds it unreasonable for the Department to resort to AFA in this case given that it submitted, as requested, an extensive amount of information in response to the Department's questionnaires and the Department examined an extensive amount of information provided by MFVN and its three affiliated companies over a 17-day period of verification. Moreover, MFVN argues that while it is correct that it was unable to confirm certain financial data and/or provide adequate documentation to support the origin of all the jumbo rolls it used in its daily production prior to 2009, MFVN contends that significant other elements of the statutory analysis under section 781(b) of the Act, supported by the verification report and the Preliminary Determination, demonstrate that the AD order has not been circumvented since January 2009.

MFVN argues further that the basis on which the Department resorted to AFA (i.e., the beginning finished goods and WIP tissue paper inventory as of January 1, 2009, which the Department determined MFVN was not able to account for in terms of the materials used to produce it) is unreasonable. Specifically, MFVN asserts that the quantity of this inventory is insignificant when compared to the total quantity of tissue paper products it produced at its facility since January 2009. MFVN claims that the quantity at issue is insignificant in that it represents the daily production of only one of its six paper-making machines at its facility. Given that it has not imported any Chinese-origin jumbo rolls or cut sheets of tissue paper since January 2008, and that it was able to provide accounting and production records which support its claim that it is self-producing its tissue paper (at least since January 2009), MFVN argues that it is unreasonable for the Department to conclude that MFVN and its three affiliated companies have the means to export significant quantities of tissue paper produced in Vietnam from Chinese-origin jumbo rolls and/or cut sheets.

If the Department decides to continue to apply AFA in the final determination, then MFVN argues the Department has a statutory obligation to corroborate the information used as AFA pursuant to section 776(c) of the Act. MFVN contends that the Department did not corroborate the information it used as the basis for its Preliminary Determination (except in one instance when it addressed the relative significance of processing performed by MFVN in Vietnam compared to the processing taking place in the PRC). MFVN also takes issue with the data supplied by the petitioner in its anti-circumvention inquiry initiation request which the Department relied upon in making its AFA determination, claiming that the petitioner's information was shown to be inaccurate based on data MFVN presented at verification. Specifically, MFVN points out that the petitioner's information indicating that it obtained PRC-origin tissue paper during the 2008-2009 period was shown to be inaccurate based on the Department's findings at verification. Therefore, MFVN argues that for the Department to fulfill its corroboration requirements under the statute, it must identify independent sources that can corroborate the petitioner's circumvention allegation. The most reasonable information source otherwise at the Department's disposal, according to MFVN, is the data the Department examined at verification which it deemed reliable per its verification findings. To support its argument, MFVN cites to Steel Wire Rope from Mexico.

The petitioner maintains that the Department's use of FA and AFA in the Preliminary Determination is entirely proportionate to MFVN's failure to provide information it was required to maintain under Vietnamese law and/or necessary to support its claims. The petitioner contends that the Department's verification report as a whole reveals that MFVN is circumventing the PRC Tissue Paper Order. The petitioner also argues that MFVN's arguments ignore the most important fact on the administrative record: MFVN's failure to provide its complete accounting and production records for 2008 at verification. The petitioner also claims that MFVN is being selective in claiming that certain portions of the verification report support its claim of not circumventing the PRC Tissue Paper Order.

With respect to MFVN's claim that the Department's AFA decision is unreasonable because the amount of tissue paper (which it was unable to demonstrate was of Vietnamese origin) which

was in inventory as of January 1, 2009, was insignificant, the petitioner notes that the verification report indicates that the Department was unable to verify the degree to which MFVN's tissue paper production was derived from Chinese-origin jumbo rolls. The petitioner contends that the fact that MFVN admitted on the record that the AD order was circumvented from 2005-2007, was unable to provide records supporting its claim that the PRC Tissue Paper Order did not continue to be circumvented during 2008-2009, and its 2009 records showed it still had Chinese-origin jumbo rolls in its raw material inventory as of January 1, 2009, represents a sufficient basis for the Department to apply FA in this instance.

With respect to the information on this record which the Department may use for corroboration, the petitioner refers to the information contained in its inquiry request (which the petitioner notes formed a sufficient basis for the Department to initiate this case). The petitioner claims that the Department corroborated the information contained in its inquiry request prior to initiation and the verification report further substantiates the basis for the allegations submitted in its inquiry request.

Department's Position:

As explained above, the purpose of an anti-circumvention inquiry is to determine if merchandise exported to the United States is evading an AD order. The Department has concluded based on record evidence that MFVN's imports of Chinese-origin jumbo rolls and/or cut sheets of tissue paper in 2005, 2006, and 2007 were used in the production of tissue paper at least until 2008.³⁹ Further, MFVN did not provide verifiable information on its production experience in 2008, nor did it show what was done with all of the merchandise placed in inventory preceding 2008 or during 2008,⁴⁰ even though MFVN is required by Vietnamese law to maintain complete accounting and production records. In addition, MFVN failed to provide documentation showing what it did with and/or how it used the Chinese-origin jumbo rolls it withdrew from inventory during March 2010.⁴¹ Therefore, under these circumstances, the Department concluded, based on AFA, that MFVN's tissue paper inventory as of January 1, 2009, consisted of Chinese product as detailed in Comment 1 above.

Further, at verification, MFVN failed to link its withdrawals of merchandise from inventory in 2009 and 2010 to exports to the United States. We know that there were exports to the United States of MFVN's tissue paper during that period, and that there were also withdrawals from inventory – but beyond that, MFVN provided no further information on the record.⁴² The Department has, therefore,

³⁹ See the petitioner's February 19 submission at Exhibit 13.

⁴⁰ See MFVN verification report at pages 2 and 35-36.

⁴¹ See MFVN verification report at pages 2 and 40-41.

⁴² See MFVN verification report at pages 27, 37, 38, 40-41, and exhibits 10K, 10L, 10U-1, 10U-3 through 10U-6, and 10V.

no means of determining which tissue paper exports in 2009 and 2010 originated from inventory that was produced using Chinese-origin jumbo rolls and which tissue paper exports originated from inventory that was produced from Vietnamese-origin jumbo rolls. Notwithstanding MFVN's failure to provide this critical information, MFVN incorrectly asserts in its brief that the PRC Tissue Paper Order was not circumvented at least since January 1, 2009.

To prevent the circumvention of the PRC Tissue Paper Order, in its Preliminary Determination under this inquiry, the Department directed CBP to suspend liquidation and collect cash deposits on all unliquidated entries of tissue paper produced by MFVN and exported to the United States that were entered on or after the date of initiation of this inquiry.⁴³ However, the Department also indicated that should it conduct a subsequent administrative review and determine that MFVN has not produced for export tissue paper using Chinese-origin jumbo rolls and/or cut sheets, the Department would consider conducting a changed circumstance review pursuant to section 751(b) of the Act to determine if the continued suspension of all tissue paper produced by MFVN is warranted.⁴⁴ Accordingly, this "remedy" for addressing MFVN's circumvention of the PRC Tissue Paper Order is in no way punitive and, in fact, effectively addresses the circumvention of the PRC Tissue Paper Order, while at the same time allowing for adjustment to the remedy if MFVN demonstrates to the Department in a future segment that none of its tissue paper exported to the United States was produced using Chinese-origin jumbo rolls and/or cut sheets.

With respect to MFVN's claim that the amount of tissue paper remaining in inventory as of January 1, 2009, is insignificant (irrespective of origin), we find that the quantity itself is not the dispositive issue in this case. Rather, the ultimate question is whether or not the PRC Tissue Paper Order has been circumvented. As detailed above, the answer to that question is the affirmative. MFVN admitted on the record that merchandise it produced using Chinese jumbo rolls and/or cut sheets may have been exported to the United States prior to 2008. Additionally, because it failed to provide records supporting its claim that it did not use Chinese-origin jumbo rolls and/or cut sheets in its production during 2008, and because its 2009 records showed that it still had Chinese-origin jumbo rolls in its raw material inventory as of January 1, 2009, the Department must conclude that future exports to the United States of the remaining inventory as of January 1, 2009, may circumvent the PRC Tissue Paper Order. See also Comment 4 (explaining that MFVN is unable to distinguish between tissue paper exports withdrawn from inventory and not withdrawn from inventory).

Regarding MFVN's corroboration argument, we note that in our overall circumvention analysis we used secondary information (*i.e.*, data in the petitioner's February 19 submission) in those instances where MFVN did not provide the necessary information we requested. Specifically, in determining that MFVN used Chinese-origin jumbo rolls and/or cut-sheets of tissue paper in its production of tissue paper for export to the United States from January 1, 2005, to December 31,

⁴³ See Preliminary Determination, 76 FR at 19048.

⁴⁴ See Preliminary Determination, 76 FR at 19048.

2007, we relied, as FA, on information provided by the petitioner in its February 19 submission, which showed that during the 2005-2007 period, MFVN obtained a significant quantity of jumbo rolls from the PRC.⁴⁵ MFVN did not provide any relevant records for the pre-2008 period, and therefore there is no information on the record that contradicts this data. In addition, this information is supported by MFVN's own admission that "it is possible that MFVN might have made {tissue paper} in Vietnam from jumbo rolls from the PRC during this time period."⁴⁶ Further, Vietnamese Customs data provided to Department officials at verification covered entries during 2008 and afterward, and do not contradict the petitioner's pre-2008 data or MFVN's admission.⁴⁷ MFVN did not provide pre-2008 Vietnamese Customs data and there is no information on the record that contradicts the petitioner's pre-2008 data.⁴⁸ Thus, we conclude that this information is corroborated to the extent practicable pursuant to section 776(c) of the Act.

The other instances in which we relied on secondary information in the Preliminary Determination specifically addressed sections 781(b)(1)(C) and 781(b)(1)(D) of the Act. With respect to 781(b)(1)(C) of the Act, the determination of whether the processing in Vietnam is minor or insignificant, because MFVN did not provide the Department with sufficient information to reach a conclusion based solely on its data under this provision, we relied, in part, on information contained in the petitioner's February 19 submission.⁴⁹ As stated above, MFVN did not provide any information on the record of this inquiry to contradict this information, and there is no other information on the record that contradicts the petitioner's information. Moreover, the results of a prior circumvention inquiry of the PRC Tissue Paper Order⁵⁰ corroborates the Department's conclusion as AFA that the processing in Vietnam is minor or insignificant, as the same conclusion was reached by the Department in that prior inquiry which also involved allegations of Chinese-origin jumbo rolls being converted to tissue paper products in Vietnam.⁵¹ Furthermore, the Department is unaware of any available independent sources it

⁴⁵ See the petitioner's February 19 submission at Exhibits 1 and 13.

⁴⁶ See MFVN's June 28 Response at pages 3 and 12.

⁴⁷ See MFVN verification report at pages 3, 23-24, and 32-33.

⁴⁸ Likewise, we rejected the transaction-specific data in Exhibit 1 of the petitioner's February 19 submission which allegedly showed Chinese-origin cut sheets of tissue paper obtained by MFVN during the period 2008-2009, because the Vietnamese Customs data and other customs documentation (i.e., PRC export and Vietnamese import declarations) MFVN submitted on the record clearly showed that the transactions at issue did not contain subject merchandise. See MFVN verification report at pages 3, 32-33 and Exhibit 10X-2.

⁴⁹ See the petitioner's February 19 submission at pages 34-35 and Exhibit 16.

⁵⁰ See Quijiang Prelim, 73 FR at 21582-21587 (unchanged in Quijiang Final).

⁵¹ As discussed above, section 781(b)(2) of the Act sets forth the criteria for determining whether the process of assembly or completion is minor or insignificant under section 781(b)(1)(C) of the Act. In the

could use to corroborate this information. Accordingly, we consider the petitioner's information relied upon by the Department as AFA to reach a finding under section 781(b)(1)(C) of the Act corroborated to the extent practicable under section 776(c) of the Act.

Similarly, with respect to section 781(b)(1)(D) of the Act, because MFVN did not provide the Department with sufficient information to determine whether the value of the jumbo rolls and/or cut sheets is a significant portion of the value of MFVN's finished tissue paper products exported to the United States, we relied on the data in the petitioner's February 19 submission⁵² as AFA to make this determination. As stated above, MFVN did not provide any information on the record of this inquiry to contradict this information, and there is no other information on the record to contradict it. Additionally, as in the case of our determination with respect to the Vietnamese processing, pursuant to section 776(c) of the Act, we corroborated to the extent practicable the petitioner's data based on our findings in the above-referenced prior anti-circumvention inquiry of the PRC Tissue Paper Order.⁵³ Furthermore, the Department is unaware of any available independent sources it could use to corroborate this information. Accordingly, we consider the petitioner's information relied upon by the Department as AFA to reach a finding under section 781(b)(1)(D) of the Act corroborated to the extent practicable under section 776(c) of the Act.

For all of the reasons stated above, we disagree with MFVN's argument that the Department's analysis was punitive or unreasonable, and we find that our use of facts available in this final determination is corroborated to the extent practicable, pursuant to section 776(c) of the Act.

Comment 4: Whether the Remedy Imposed Is Lawful

MFVN argues that the remedy imposed by the Department of suspending liquidation of all entries of tissue paper produced by MFVN and requiring a cash deposit rate equal to the PRC-wide rate for those entries, is unlawful and inconsistent with the Department's practice of

Quijiang Prelim, although the Department found one statutory factor under section 781(b)(2) of the Act – subparagraph (e) concerning whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States – to be inconclusive, the Department determined that the other four criteria – subparagraph (a) concerning the level of investment in the foreign country, subparagraph (b) concerning the level of research and development in the foreign country, subparagraph (c) concerning the nature of the production process in the foreign country, and subparagraph (d) concerning the extent of production facilities in the foreign country – were satisfied. On such grounds, the Department concluded that “the processing operation to convert PRC-origin jumbo rolls to cut-to-length tissue paper in Vietnam is minor or insignificant, pursuant to section 781(b)(1)(C) of the Act.” Quijiang Prelim, 73 FR at 21582-21587 (unchanged in Quijiang Final).

⁵² See the petitioner's February 19 submission at pages 34-36.

⁵³ See Quijiang Prelim, 73 FR at 21582-21587 (unchanged in Quijiang Final).

implementing certification procedures in cases such as the instant one where the Department recognizes that some, but not all, of the respondent's merchandise exported to the United States is of the origin of the country subject to the AD order. In support of its argument, MFVN cites to Quijiang Final wherein the Department determined that the respondent Quijiang circumvented the PRC Tissue Paper Order during the analysis period by processing jumbo rolls into finished tissue paper products, and instituted a certification procedure because more recently the respondent had begun full paper-making production in Vietnam.

If the Department has any concerns regarding the potential of MFVN evading the PRC Tissue Paper Order, MFVN contends that the Department should revise the remedy by implementing, instead, a certification program which would require that MFVN certify for each qualifying shipment that the country of origin of the jumbo rolls used to produce the tissue paper exported to the United States is not the PRC. Accordingly, MFVN requests that the Department not require MFVN to make cash deposits if the entry is accompanied by a certification that the tissue paper is not produced from Chinese-origin tissue paper.

The petitioner maintains that the circumstances of this inquiry fully justify a determination not to allow MFVN the use of a certification program, and to require the importer to post cash deposits of estimated duties on all entries of tissue paper produced by MFVN.⁵⁴ Regarding MFVN's claim that the fact pattern in this case is similar to the circumvention case involving Quijiang where the Department implemented certification procedures for its entries, the petitioner notes that the only similarities between MFVN and Quijiang are that: (1) the Department found them both to have circumvented the PRC Tissue Paper Order by converting Chinese-origin jumbo rolls at their Vietnamese facilities; and (2) both have some level of legitimate paper-making and converting operations. The petitioner contends that except for these two similarities, the differences between the two companies are significant such that the fact patterns in both cases are not analogous. For example, the petitioner notes that, unlike the Quijiang case, the Department's preliminary determination in this case states that MFVN did not cooperate to the best of its ability. MFVN's failure to provide critical documents as requested and required by Vietnamese law for purposes of showing that it did not continue to circumvent the AD order after 2007, is, according to the petitioner, a significant difference between the two cases. The petitioner notes that MFVN's failure to provide this critical documentation prevented the Department from verifying its production data, tracing its U.S. export shipments to its production data, and identifying the proportion of its export shipments produced from Chinese-origin tissue paper. The petitioner also asserts that because MFVN could not provide verifiable information demonstrating that its tissue paper products were not produced from Chinese-origin tissue paper and because it attempted to prevent the Department from discovering that it continued to use Chinese-origin tissue paper beyond the 2007 time period MFVN claimed to have stopped circumventing the order, there is no reason to believe that MFVN can or would accurately certify the origin of the tissue paper it is shipping from Vietnam.

⁵⁴ The petitioner claims that as a matter of law and policy, certification programs are inappropriate as the Department's regulations do not allow for certification in lieu of cash deposits.

Furthermore, the petitioner notes that even in the Quijiang circumvention inquiry, the Department did not establish a practice of using certifications in all circumvention cases for purposes of preventing suspension of a company's entries that were not covered by the AD order. Instead, the petitioner notes that the Department explained that it had the authority to determine on a case-by-case basis if a certification program could adequately address the threat of future circumvention or if the suspension of liquidation of all of a company's merchandise was necessary to prevent future evasion of the AD order.

Department's Position:

As noted in the Preliminary Determination at 76 FR 19048, this case represents the third instance in which the Department has found merchandise completed in a third country to have circumvented the PRC Tissue Paper Order.⁵⁵ As we have explained in response to Comment 1 above, the Department has an obligation to administer the law in a manner that prevents evasion of the order.⁵⁶ Further, section 781(b)(1)(E) of the Act directs the Department to take necessary action to "prevent evasion" of antidumping or countervailing duty orders when it concludes that "merchandise has been completed or assembled in other foreign countries" and is circumventing an order.

MFVN is correct to state that in the Quijiang circumvention inquiry the Department implemented a certification procedure whereby the U.S. importer could submit a certification to CBP from Quijiang that the merchandise contained in a given entry was not produced using Chinese-origin tissue paper. Upon receipt of those certifications, CBP would conclude that the entries were not subject to antidumping duties.⁵⁷ The Department extended certification to Quijiang in that case, unlike the instant case, because it was able to establish the date on which Quijiang stopped exporting to the United States tissue paper it produced using Chinese jumbo rolls.⁵⁸

Following the completion of the Quijiang circumvention inquiry, the Department conducted another circumvention inquiry under this order involving a company located in Thailand which the petitioner alleged imported jumbo rolls from the PRC and further processed in Thailand prior

⁵⁵ See also Certain Tissue Paper Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order, 74 FR 29172 (June 19, 2009) (Sunlake); and Quijiang Final.

⁵⁶ See Tung Mung Development v. United States, 219 F. Supp. 2d 1333, 1343 (CIT 2002), affirmed 354 F.3d 1371 (January 15, 2004) (finding that the Department has a responsibility to prevent the evasion of payment of antidumping duties).

⁵⁷ See Quijiang Final, 73 FR at 57594.

⁵⁸ See also Quijiang Final, 73 FR at 57594, and accompanying Issues and Decision Memorandum at Comments 1 and 3.

to export to the U.S. market.⁵⁹ However, in the Sunlake case, unlike the Quijiang case, the Department did not extend certification to Sunlake because Sunlake chose not to participate in the inquiry. Instead, the Department directed CBP to suspend liquidation and collect cash deposits on all entries of tissue paper products produced in and exported from Thailand by Sunlake that entered or were withdrawn from warehouse for consumption as of the initiation date of the circumvention inquiry.⁶⁰ Hence, the determination involving merchandise produced by Sunlake, like the determination before us involving merchandise produced by MFVN, was based on AFA.⁶¹

In this case, MFVN was unable to provide evidence of a date when merchandise it produced using Chinese jumbo rolls and/or cut sheets ceased being exported to the United States.⁶² Indeed, as long as inventory from the 2005-2008 period remains, MFVN continues to withdraw merchandise from that inventory, and MFVN does not link U.S. exports to the source of production, the Department must assume that MFVN's merchandise produced using Chinese jumbo rolls and/or cut sheets continues to be exported to the United States. MFVN argues that because the amount of inventory is relatively small in comparison to MFVN's overall production, the Department has an obligation to implement a process whereby non-subject and subject merchandise can be distinguished through the use of a certification program. However, MFVN itself was unable to distinguish in its own records at verification between tissue paper exports withdrawn from inventory and tissue paper exports not withdrawn from inventory.⁶³ Thus, there is no basis to conclude that in this instance a certification procedure would be a reliable means of addressing circumvention. We find this case more similar to the Sunlake circumvention inquiry than the Quijiang circumvention inquiry because MFVN, like Sunlake, failed to cooperate to the best of its ability in providing the Department with information necessary to the conduct of the inquiry.

We are also concerned that this is the third time in the last five years that the Department has found circumvention occurring under the PRC Tissue Paper Order. This pattern of behavior leads us to conclude that our past efforts to discourage evasion of the payment of AD duties are not sufficient. For all the reasons noted above, the Department has determined that the use of a certification program is neither an appropriate nor effective mechanism for purposes of preventing future evasion of this AD order for companies such as Sunlake and MFVN. The Department is not required by the statute or regulations to implement such a program, and the agency's experience in conducting these inquiries is that such a program has not effectively discouraged tissue paper exporters in other countries from exporting merchandise manufactured from Chinese-origin jumbo rolls. Moreover, as noted in the Quijiang Final and accompanying

⁵⁹ See Sunlake, 74 FR at 29172.

⁶⁰ See Sunlake, 74 FR at 29174.

⁶¹ See Sunlake, 74 FR at 29172.

⁶² See MFVN verification report at pages 2, 35-36, and 40-41.

⁶³ See MFVN verification report at pages 2 and 35-36, and 39-40.

Issues and Decision Memorandum at Comment 3, the Department 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.

Further, we disagree with MFVN's arguments that because the Department verified that some tissue paper produced by MFVN and exported to the United States in 2009 and afterward is not manufactured using PRC jumbo rolls the Department is prohibited from issuing cash deposit instructions that cover all of the tissue paper produced by MFVN. In fact, the Department's determination in this case is fully consistent with the Department's obligations under section 781(b) of the Act. The Department concluded pursuant to Section 781(b) in this case that tissue paper produced by MFVN and exported to the United States is circumventing the PRC Tissue Paper Order, and that the appropriate means of addressing that circumvention is to collect cash deposits on all merchandise meeting that description, particularly as there is no basis to conclude that a certification procedure would be effective.

MFVN is also incorrect in its argument that the Department's analysis in the Preliminary Determination will unquestionably result in the application of AD duties to non-subject merchandise. Any exporter can request an administrative review of its exports which entered the United States for consumption during the relevant POR. In the context of that review, the Department would determine if the merchandise at issue was manufactured using PRC or Vietnamese jumbo rolls. If the Department finds that no Chinese jumbo rolls and/or cut sheets were used to produce the merchandise sold and entered into the United States, the Department will instruct CBP to liquidate without regard to AD duties. On the other hand, if the Department finds that the goods entered were produced using Chinese-origin jumbo rolls and/or cut sheets, the Department will instruct CBP to liquidate those entries in accordance with the rate established in the course of the review.

Accordingly, the Department will continue to instruct CBP to suspend liquidation and collect cash deposits on all unliquidated entries of tissue paper produced by MFVN at the rate applicable to the relevant exporter. See Comment 5 for further discussion of the applicable cash deposit rate.

Comment 5: Whether the Assignment of the PRC-Wide Rate Is Appropriate

MFVN argues that the Department may not assign it the PRC-wide rate of 112.64 percent as AFA, because MFVN is not part of the PRC-wide entity and is entitled to a separate rate as a wholly-owned subsidiary of a foreign-owned company registered in Hong Kong. Moreover, MFVN argues that the Department cannot apply the non-market economy (NME)-wide rate as AFA to a respondent that is entitled to a separate rate simply because the NME-wide rate is the highest rate on the record. In support of its argument, MFVN cites to Gerber Food (Yunnan) Co. v. United States, 491 F. Supp. 2d 1326, 1350-51, 31 CIT 921 (2007) and Gerber Food (Yunnan) Co. v. United States, 387 F. Supp. 2d 1270, 1287-88, 29 CIT 753 (2005). MFVN claims that the Department is only permitted to use, as AFA, the NME-wide rate and assign that rate to a

respondent if that rate approximates the respondent's actual rate. To support its claim, MFVN cites to Qingdao Taifa Group Co. v. United States, 710 Supp. 2d 1352, 1358 (CIT 2010).

The petitioner maintains that the NME-wide rate the Department assigned as AFA to MFVN in the Preliminary Determination is appropriate because it is based on the petition margin (as revised during the LTFV investigation) and has been corroborated and applied to MFVN's corporate parent, MFHK, in the fourth administrative review of the PRC Tissue Paper Order. Regarding MFVN's claim that the Department is not permitted to assign it as AFA the China-wide rate because it is entitled to a separate rate, the petitioner notes that in the case of an uncooperative respondent, the Court of Appeals for the Federal Circuit has ruled that the Department may select adverse facts that will create the proper deterrent to noncooperation with its investigations and assure a reasonable rate. In support of its position, the petitioner cites to F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (De Cecco).

With respect to whether the rate the Department assigned to MFVN in the Preliminary Determination is reasonable per the De Cecco decision, the petitioner emphasizes that the Department assigned that same rate to MFVN's parent company, MFHK, and corroborated it in the fourth administrative review of the PRC Tissue Paper Order. As the record evidence in this case shows that MFHK sources the tissue paper it sells/exports to the United States from its affiliates in both the PRC (MFFZ) and Vietnam (MFVN), MFVN is completely dependent on MFHK to sell its products, and MFVN has been using Chinese-origin jumbo rolls and sheets to produce its tissue paper products, the petitioner contends that the tissue paper MFHK is exporting to the United States from Vietnam and the PRC is essentially the same. Therefore, the petitioner concludes that because the tissue paper MFHK's affiliates are shipping from Vietnam and the PRC are the same and the Department has already corroborated the China-wide rate assigned to MFHK with respect to the tissue paper it exported to the United States from the PRC, the same rate is equally corroborated with respect to MFVN and to the tissue paper MFVN shipped from Vietnam. In conclusion, the petitioner contends that the Department does not have to deny MFVN a separate rate in order to assign it the 112.64 percent margin from the LTFV segment.

Department's Position:

The purpose of this anti-circumvention inquiry is to determine whether tissue paper produced by MFVN in Vietnam using Chinese-origin jumbo rolls and/or sheets is circumventing the PRC Tissue Paper Order. Contrary to MFVN's suggestion, in conducting this inquiry, the Department has not determined a cash deposit rate, conducted a separate rate analysis, or calculated an individual margin of dumping for MFVN, which is done during an administrative review. As a result of making an affirmative circumvention finding, the Department has the authority to include the merchandise at issue in the scope of the order and to order suspension of liquidation and the collection of cash deposits of that merchandise pending the conduct of a subsequent

administrative review.⁶⁴ In NME cases, the cash deposit rate applicable to this merchandise is the rate applicable to the relevant exporter.⁶⁵

In the Preliminary Determination, at 76 FR 19048, we stated that we would direct CBP to suspend liquidation and to require a cash deposit of estimated duties, at the PRC-wide rate of 112.64 percent, on all unliquidated entries of tissue paper produced by MFVN “and/or exported by MFVN” that were entered, or withdrawn from warehouse, for consumption on or after March 29, 2010, the date of initiation of the circumvention inquiry. However, the Department’s concern in a circumvention inquiry is the merchandise at issue, irrespective of the exporter of that merchandise. Therefore, for purposes of this final determination and in accordance with section 735(c) of the Act, we are clarifying our instructions to CBP to suspend liquidation and require cash deposits of estimated duties, at the rate applicable to the exporter at the time of entry, on all unliquidated entries of tissue paper produced by MFVN that were entered, or withdrawn from warehouse, for consumption on or after March 29, 2010, the date of initiation of the circumvention inquiry. Thus, for example, all MFVN-produced tissue paper exported to the United States by MFHK will be subject to MFHK’s current cash deposit rate under the PRC Tissue Paper Order. Any other exports to the United States of tissue paper produced by MFVN will be subject to the rate applicable to that exporter. MFVN has not been reviewed and it currently does not have its own dumping margin. Therefore, if MFVN exports tissue paper to the United States, that merchandise will be subject to the PRC-wide rate consistent with the Department’s standard practice to assign the PRC-wide rate to non-reviewed exporters.⁶⁶ As discussed above, if MFVN wants to be reviewed, it must request a review of its exports. In such a review, the Department would determine, for the first time, MFVN’s dumping margin.⁶⁷

Recommendation

⁶⁴ See section 781(b) of the Act (explaining that if the Department makes an affirmative circumvention determination pursuant to the criteria listed in section 781(b)(1)(A)-(E) of the Act, the Department “may include such imported merchandise within the scope of such order...”); see also 19 CFR 351.225(l)(3).

⁶⁵ See, e.g., Certain Tissue Paper Products From the People’s Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review, 75 FR 63806, 63809 (October 18, 2010) (2008-2009 PRC Tissue Paper).

⁶⁶ See 2008-2009 PRC Tissue Paper, 75 FR at 63809.

⁶⁷ As noted in footnote 3 *supra*, the Department rescinded the concurrent administrative review of MFVN because it had not exported any subject merchandise during the POR. See PRC Tissue Paper 2009-2010 Rescission Notice. The rescission was based on the fact that, as described above, the Department calculates dumping margins for exporters in NME proceedings. If a period exists in which MFVN exports tissue paper to the United States, it would then be possible for MFVN to request an administrative review.

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final affirmative determination of circumvention in the Federal Register.

Agree _____

Disagree _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

(Date)