

MILE Thesis

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Anti-Circumvention Practices: Balanced Approach to Address Loopholes in Anti-Dumping Agreement

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Declaration

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Abstract

The thesis gives a fresh perspective of how the circumvention practices could be effectively reduced upon implementation of the “pre-emptive anti-circumvention mechanism” at the stage of initial anti-dumping investigation.

First, it offers a list of adjustments to the current anti-dumping questionnaire templates to ensure the detection and prevention of possible means of exporters to circumvent at the stage of initial anti-dumping investigation.

Second, it discusses the application of the voluntary price undertakings and the public interest inquiry as conceivable means to reduce the occurrence of circumvention practices.

Last but not least, the thesis proposes interaction framework between the competent authorities and general public and submits how such interaction could be established or extended.

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This thesis is dedicated to my constant source of inspiration and loving-kindness, to my family.

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Abbreviations and Acronyms

ABF - Australian Border Force

AC - Anti-circumvention

AD - Anti-dumping

EC - the European Commission

UCC - the Union Customs Code

the Act - 19 U.S. Code Title 19

the Directorate - the Directorate of Anti-Dumping & Allied Duties

the Commerce - the United States Department of Commerce

the Court - European Court of Justice

the Court of Appeal - the Court of Appeals for the Federal Circuit

the Regulation - Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016

List of Annexes

Annex 1 “Data on the EU and the USA anti-circumvention investigations initiated or concluded (with and/or without the extension of duty) during the period 1 January - 21 August 2019 (chronological by date of publication)”

Annex 2 “Suggested changes to the anti-dumping questionnaire template”

Annex 3 “List of Questions to the Domestic Industry Template”

Annex 4 “Anti-circumvention “Red Flags” Template”

INTRODUCTION

Despite various efforts WTO Members have been undertaken to agree on multilateral rules governing application of anti-circumvention (hereinafter referred to as “AC”) practices, they are unable to reach a satisfactory outcome. Yet, what we have today is an array of unilateral rules implemented by WTO Members, as a part of their national legislation.

According to the data available, circumvention activities are commonplace nowadays. In the EU and the USA alone during the period from 2016 to 21.09.2019 50 anti-circumvention proceedings have been initiated.

The key message these figures convey is that anti-dumping (hereinafter referred to as “AD”) systems of the most jurisdictions are not strong enough, if they give exporters so many opportunities and incentives to effectively resort to circumvention practices.

Drawing a parallel with the taxation setting, the many loopholes in the taxation legislation could be considered as an “enabling framework” for tax evasion and “aggressive tax planning”. According to the OECD Report as of June 2019 the number of detected illegal schemes to avoid tax burden has rocketed during the last several years¹.

That was a harbinger that unless decisive and effective steps to combat those practices would be taken, the anticipated functioning of the taxation system would be under threat.

Eventually, OECD Members took a lead and agreed on the comprehensive rules known as Base Erosion and Profit Shifting (BEPS) project². As a result, after the commencement of the implementation of the project in 2015, the number of allegedly illegal circumvention practices significantly decreased, and revenues raised by jurisdictions implementing the recommended measures have increased substantially. The EU alone has benefited from the extra revenue of

¹ See OECD (2019), OECD Secretary-General Report G20 Finance Ministers and Central Bank Governors – June 2019, OECD, Paris, available at: www.oecd.org/tax/oecd-secretary-general-tax-report-g20-finance-ministers-june-2019.pdf, (accessed 07.10.2019).

² See OECD/G20 Inclusive Framework on BEPS, available at: <https://www.oecd.org/tax/beps/about/>, (accessed 07.10.2019).

10.2 billion EUR for the first three years and this is only with regard to the services and intangibles delivered over the internet that were escaping VAT in the EU³.

This example triggers an assumption that it was not accidental that OECD Members decided to eradicate the root of the problem – inability of Double taxation Conventions (DTCs)⁴ as well as national legislation to eliminate tax evasion. In the same vein, this thesis argues that circumvention of anti-dumping duties in anti-dumping should be a target of anti-dumping legislation governing the conduct of AD investigations.

To this end, the thesis provides suggestions how anti-dumping laws could be adjusted to address the problem of circumvention more effectively. Specifically, it explores how a “preemptive mechanism”⁵ incorporated in and taken as a part of the initial AD investigation could contribute to lessen the chances of the relevant exporters to circumvent.

The thesis in Chapter 1 gives a brief summary of the concept of circumvention (including historical background) as well as types of circumvention activities that are considered actionable in the EU and the USA⁶. It further provides a detailed analysis of the forces that lie behind the decision of exporters to circumvent. This chapter concludes with suggestions to the investigating authorities with regard to factors that should be considered while conducting AD investigation, including more frequent resort to the “public interest” aspect. Additionally, the thesis discusses advantages and disadvantages of voluntary price undertakings as an instrument of preventing circumvention practices based on the practice of the EU and the USA.

³ See OECD/G20 Inclusive Framework on BEPS, Progress report July 2018-May 2019, available at: <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-progress-report-july-2018-may-2019.pdf>, (accessed 07.10.2019).

⁴ Double taxation Conventions should be understood as the agreements that reduce double taxation and thus also help overcome the obstacles for cross-border economic transactions. In addition, they govern administrative assistance in tax matters - <https://www.efd.admin.ch/efd/en/home/themen/wirtschaft--waehrung--finanzplatz/finanzmarktpolitik/avoidance-of-international-double-taxation--dtas-.html>.

⁵ “Pre-emptive mechanism” in this thesis means various tools suggested for implementation and/or improvement during the initial anti-dumping investigation, which is claimed to be the most effective way to reduce circumvention practices.

⁶ The thesis describes the modalities of anti-circumvention mechanism using the examples of the USA and the EU, which probably have the most elaborate legal framework and practice in this matter. However, selected examples of other countries are also mentioned.

Chapter 2 of the thesis starts with an analysis of procedural rules that apply in AC inquiries of the selected jurisdictions. It further provides for recommendations concerning complementing the existing AD questionnaire templates⁷. The thesis argues that the modification of the current templates might allow detection of existing possibilities of the exporters to circumvent AD measures at the stage of the original AD investigation.

Chapter 3 of the thesis contains key proposals of how a pre-emptive AC mechanism might be established. To this end, it provides a framework for closer collaboration between customs, investigating authorities and the private sector to ensure minimization of incentives of exporters to resort to circumvention activities.

CHAPTER 1. THE CONCEPT OF CIRCUMVENTION IN ANTI-DUMPING

1.1. History of Anti-Circumvention

Distinguishing between “legitimate” response to the imposition of AD duties and “illegitimate” efforts to circumvent their payment has long been a challenge for WTO Members. Once-hidden debates were brought out into the open in 1987⁸, became a big buzz topic when the Marrakech Ministerial Meeting decided to refer this question to the WTO Committee on AD practices and are still ongoing. To date, a great divergence remains as to “[w]hat constitutes circumvention and when AC measures may be applied”⁹.

To understand the nature of the controversy, the thesis in this section briefly summarizes the efforts WTO Member States undertook to formulate multilateral norms concerning circumvention of AD duties.

⁷ Based on the questionnaires used by the USA and the EU.

⁸ With the enactment by the European Economic Community of the legislation specifically addressing circumvention of AD measures.

⁹ See WTO document TN/RL/W/238.

To begin with, it is worth pondering why the vigorous debate regarding AC legislation arose in the Uruguay Round's negotiations on AD at the first place.

Thus, according to Jesse Kreier, Seref Coskun and Hiromi Yano¹⁰ the main trigger to commence heated negotiations on the circumvention question was “[t]he emergence of legislation authorizing the use of anti-circumvention measures” in the EU and the USA as well as the subsequent “dispute settlement regarding the GATT-consistency of such legislation”.

Starting from 1987 when the active negotiations on this topic began, there were both stalwart supporters (such as the USA and the EU) as well as staunch adversaries (among which were Japan and Korea) of the AC rules. The question, although, was not as simple as choosing between black and white. Indeed, it has always been ambiguous and multifaceted. A lot of countries submitted their proposals pertaining to AC in order to facilitate the respective discussion. Although, those negotiations did not lead to the desired outcome and only further exposed the existing divisions.

First, there was no agreement on fundamental questions, such as whether the term “like product” should be interpreted in a way so that to allow inclusion of parts and components¹¹. Similarly, the very same concern was expressed as to the newly developed products and their status¹². It was of the particular importance given the AC legislation adopted by the EC (at that time the European Economic Community)¹³, that allowed to take actions against “assembly operations” and led to the initiation of five investigations against Japanese companies¹⁴.

¹⁰ See Kreier J., Seref Coskun S. and Yano H., *Anti-Circumvention in the Multilateral System: Plus ça Change*, Global Trade and Customs Law, 2016 Kluwer Law International BV, The Netherlands, Volume 11, Issue 11-12, p. 461.

¹¹ See GATT, Negotiating Group on MTN Agreements and Arrangements, Communication from the Republic of Korea, MTN.GNG/NG8/W/3, 20 May 1987.

¹² See GATT, Negotiating Group on MTN Agreements and Arrangements, Communication from Japan, MTN.GNG/NG8/W/11, 17 Sept. 1987.

¹³ See Council Regulation (EEC) No. 1761/87 of 22 June 1987, amending Regulation (ECC) No. 2176/84, on protection against dumped or subsidized imports from countries not members of the European Economic Community, Official Journal of the European Communities, L Series, No. 167/9 (26 June 1987).

¹⁴ See ECC – Regulation on Imports of Parts and Components, Recourse to Art. XXIII:2 from Japan, Communication from Japan, L/6410, 7 Oct. 1988.

While the Panel treated such measures as inconsistent with Article III:2 of the GATT, and unjustifiable under Article XX(d), it did not rule whether those measures could be justified on the basis of Article VI¹⁵, leaving this question unresolved.

Second, neither of six drafts of the text of the AD agreement, was able to reconcile existing differences between the two “prevailing camps”. Even “the most comprehensive draft text” of the AD agreement known as the Dunkel Draft, failed to satisfy either side¹⁶.

From the United States’ perspective, the suggested text of article on circumvention “fell far short of what was required”¹⁷. However, instead of continuing work on revision of the “anti-circumvention article”, the Final Act, 1994¹⁸ of the existing ADA contained no provisions on this matter. Rather it referred to inability to agree on a specific text dealing with the problem of circumvention but at the same time, recognized the desire to “elaborate on the uniform AC rules as soon as possible”¹⁹.

Several rounds of informal consultations were held by the AD Committee. It mainly focused “[o]n the course the informal consultations should take and the major topics that should be considered”²⁰. Finally, the following three main topics were agreed to be included in the agenda: “(1) “What constitutes circumvention?” (2) “What is being done by Members confronted with what they consider to be circumvention?”, and (3) “To what extent can circumvention be dealt with under the relevant WTO rules?”, “To what extent can it not?” and “What other options may be deemed necessary?”²¹.

¹⁵ See GATT Panel Report, EEC – Regulation on Imports of Parts and Components, L/6657-37S/132, 16 May 1990.

¹⁶ See Kreier J., Seref Coskun S. and Yano H., *Anti-Circumvention in the Multilateral System: Plus ça Change*, Global Trade and Customs Law, 2016 Kluwer Law International BV, The Netherlands, Volume 11, Issue 11-12, p. 464).

¹⁷ See *Ibid.*

¹⁸ The Ministerial Decision on Anti-Circumvention.

¹⁹ See Uruguay Round Agreement, Decision on Anti-Circumvention, adopted on 15 Dec. 1993.

²⁰ See WTO, Committee on Anti-Dumping Practices, Annual Report of the Committee on Anti-Dumping practices (1996), G/L/123, 29 Oct. 1996.

²¹ See WTO, Committee on Anti-Dumping Practices, Annual Report of the Committee on Anti-Dumping Practices (2001), G/L/495, 31 Oct. 2001.

As of May 2016, twenty-one papers were submitted on the first topic, eighteen papers on the second topic, and eight papers on the third topic²².

Despite the efforts to reach a consensus on the AC issue, no progress was made towards convergence and the main dividing line was between those frequently using AD measures and those having significant export interests.

The most acute were differences in identification of the threshold issue of “what constitutes circumvention?” and if there was actually a need for specific rules dealing with circumvention.

As regards the necessity of AC laws, both the EU and the US (the most active supporters of AC rules) were of the view that “without meaningful rules dealing with circumvention, anti-dumping orders would frequently be made meaningless”²³, whereas the opponents²⁴ of the uniform rules on AC claimed that those would be superfluous since circumvention might be dealt with under the existing ADA. The idea behind such a conclusion was that “[a]nti-circumvention case is essentially an anti-dumping case... [which] should be treated as a separate dumping case for which a new investigation of dumping and injury determination should be conducted”²⁵.

Moreover, the suggested list of possible types of circumvention practices²⁶ contained in the respective proposals of the EU and the USA²⁷ was vigorously criticized by the opposing camp.

²²All the documents submitted before 2009 also included papers for discussion. See Kreier J., Seref Coskun S. and Yano H., *Anti-Circumvention in the Multilateral System: Plus ça Change*, Global Trade and Customs Law, 2016 Kluwer Law International BV, The Netherlands, Volume 11, Issue 11-12, p. 465.

²³ See WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, Topic 1 – What Constitutes Circumvention?, Paper by the United States, G/ADP/IG/W/7 (22 April 1998), at 1; also see WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, Topic 1 – Toward a Common Understanding on What Constitutes Circumvention?, Paper by the European Community, G/ADP/IG/W/6 (22 April 1998).

²⁴ Such as Japan, Hong Kong, New Zealand, Korea, and Egypt.

²⁵ See WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, Topic 1 – What Constitutes Circumvention? Paper by Korea, G/ADP/IG/W/17 (28 May 1999), supra n. 27.

²⁶ Including, inter alia, minor modification or alteration; assembly operations; trans-shipment; fraudulent customs declaration.

²⁷ See WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, Topic 1 – What Constitutes Circumvention?, Paper by the European Community, G/ADP/IG/W/1 (3 October 1997); WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, Topic 1 – What Constitutes Circumvention?, Paper by the United States, G/ADP/IG/W/2 (8 October 1997).

Thus, for example, Japan was of the view that “most of the activities are legitimate business activities”²⁸ and “expanding the scope of the Anti-Dumping Agreement to restrict normal commercial activities is against the general trend towards increased market access and increased globalization of production and trade”²⁹.

Canada shared the position of the EU and the USA, however, attempted to introduce additional “qualifying factors” into its AC framework³⁰. More specifically, Canada submitted that a change in the pattern of trade as well as a proper assessment of injury is required when making decision whether circumvention is actually taking place³¹.

Some of the WTO Members suggested that there is no need in introducing a separate set of rules to deal with circumvention, when domestic legislation or existing international rules effectively cope with this task. That was the position of New Zealand, that claimed that circumvention activities could be dealt with by “[u]sing Customs legislations and rules of origin ... and initiating new antidumping investigations against the other circumvention”³².

Meanwhile, the problem of circumvention of AD duties was raised during the Doha Round negotiations in the Negotiating Group on Rules. The resulted Draft Consolidated text as of 30 November 2007³³ suggested to introduce the Article 9bis dealing with circumvention.

According to the paragraph 1 of this Article:

“ The authorities may extend the scope of application of an existing definitive anti-dumping duty to imports of a product that is not within the product under consideration from the country

²⁸ See WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, Topic 1 – What Constitutes Circumvention? Paper by Japan, G/ADP/IG/W/9 (30 April 1998), supra n. 25.

²⁹ See Ibid, supra n. 26.

³⁰ See WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, Topic 1 – An Approach to the Definition of Circumvention, Paper by Canada, G/ADP/IG/W/3 (23 October 1997).

³¹ See Ibid.

³² See WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, Topic 2 – What is Being Done by Members Confronted by What They Consider to be Circumvention? Paper by New Zealand, G/ADP/IG/W/25 (22 September 2000); G/ADP/IG/W/35 (17 April 2001); G/ADP/IG/W/47 (19 September 2002).

³³ See WTO document TN/RL/W/213, pp. 22-24.

*subject to that duty if the authorities determine that such imports take place in circumstances that constitute circumvention of the existing anti-dumping duty*³⁴.

To further find the existence of circumvention within the meaning of the above cited paragraph the respective competent authorities were to demonstrate, inter alia, that the principal cause of the change of the pattern of trade was imposition of the AD duty and that the remedial effect of such a duty was undermined as a result of the “imports that have supplanted the imports of the product under consideration from the country subject to the existing AD duty”³⁵.

As regards to the type of imports that may “supplant the imports subject to the duty”, para. 2 of the Article 9bis provided three options, being: (i) imports of “parts or unfinished forms of a product for assembly or completion into a product that is the same as the product under consideration”; (ii) imports of a “product that is the same as the product under consideration and that has been assembled or completed in a third country from parts or unfinished forms of a product imported from the country subject to the existing anti-dumping duty”; or (iii) imports of a “[s]lightly modified product from the country subject to the existing anti-dumping duty”³⁶.

Despite the fact that the initiative to introduce generally accepted approach to address circumvention of AD duties was broadly appreciated, the reactions of the delegations to the Draft Consolidated text were contrasting. As it was commented by the Chair of the Negotiating Group on Rules “[t]he Group was sharply divided on whether or not specific rules on anti-circumvention should be included in the text, and on the adequacy of the proposed rules”³⁷.

The Draft Consolidated Chair text of the WTO ADA highlights the most contentious and controversial questions that have divided the parties for decades³⁸:

“Delegations disagree as to whether there should be specific rules on anti-circumvention. Some delegations consider that the only appropriate reaction to the perceived circumvention is to seek initiation of the new investigation, while the other delegations consider that anti-circumvention is a reality and that rules on anti-circumvention are necessary to achieve some degree of harmonization among the procedures used by different Members. To the extent the

³⁴ See Ibid.

³⁵ See Ibid. Para. 2 of the Article 9bis to the Draft Consolidated text.

³⁶ See Ibid.

³⁷ See WTO document TN/RL/W/232, pp. A-88 and A-89.

³⁸ See WTO document TN/RL/W/238, p. 21.

*rules are included, delegations disagree, inter alia, whether numerical thresholds are desirable, whether findings of dumping, injury and causation should be required and whether anti-circumvention measures should be company-specific or country-wide*³⁹.

It remains to be seen whether there could be some progress in agreeing on the multilateral set of rules dealing with AC of AD duties. However, the thesis, suggests that there is a very high probability that it may never happen. This is mostly because of the fundamental nature of the disagreement on whether and if so how to address the circumvention problem. Disentangling of this complicated knot requires not merely a tradeoff between the parties but rather a complete abandoning of the position by one of the “camps”. Given the fact that such an outcome is highly unlikely, the thesis argues that WTO Members will continue to deal with this problem unilaterally by setting their own “rules of the game”.

Apart from the work of the Negotiating Group on Rules, circumvention of AD duties was subject to discussion of the WTO Committee on Rules of Origin. The relevance of the rules of origin in addressing circumvention of AD duties is undoubtful inasmuch as products covered by AD measures remain subject to the origin rules of the country imposing such duties⁴⁰.

Therefore, AD and questions related to it became an important part of the discussion in the Harmonization Work Programme in the Committee on rules of Origin as well as in the General Council. However, neither the discussions in 2004, nor in 2007 facilitated parties to reach a consensus. “The possible application of harmonized rules of origin to anti-circumvention was dividing Members into two opposite positions, one suggesting that a simple operation should confer origin upon a good, and another suggesting that only a very substantial operation should confer origin”⁴¹. Since that time this question has not been addressed again.

It is also worth mentioning that irrespective of the fact that circumvention issue was an unknown universe, GATT contracting parties and later on WTO Members were bringing AC cases before the DSB. Out of three known disputes, only the one, however, was advanced to

³⁹ See Ibid.

⁴⁰ According to the Article 1.2. of the Agreement on rules of Origin “[r]ules of origin... shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of anti-dumping and countervailing duties under Article VI of GATT 1994...”

⁴¹ See WT/GC/M/87, 4 Oct. 2004, para. 70.

the panel stage, which is EEC – Regulation on Imports of Parts and Components⁴². The other two, Korea – TVs and South Africa – Blanketing were terminated at the stage of consultations⁴³. Meaning that, as of today there is almost no DSB practice dealing with the problem of circumvention of AD duties. One possible explanation might be the absence of multilateral rules on circumvention and unwillingness of the respective parties to open Pandora’s box.

In practice, the lack of multilateral rules was conducive for the proliferation of unilateral AC frameworks. Following the lead of the EU and the USA, many countries introduced AC legislation, including inter alia, Canada, Mexico, Brazil, South Africa, India, Australia. Asian countries that have generally been against the implementation of the AC framework and the use of AC measures, do not have such system in force⁴⁴.

However, since resort to AC measures has become a commonplace nowadays in the other jurisdictions, it is quite possible that Asian countries may either introduce AC framework similar to the existing ones or would create alternative mechanisms to avoid the abuse of AD measures.

Unfortunately, neither multilateral negotiations, nor a Ministerial Decision were able to shed light on circumvention problem. While, certainly, all WTO Members want to figure out a way to address circumvention, the gaps which exist between such Members on the most crucial matters have to date proved unbridgeable. Indeed, the absence of multilateral rules on circumvention may allegedly have strategic uses by giving considerable flexibility to the WTO Members to set their own AC rules. While not negating or diminishing the right of the countries

⁴² See GATT Panel Report, EEC – Regulation on Imports of Parts and Components, L/6657-37S/132, 16 May 1990.

⁴³ See United States – Imposition of Anti-Dumping Duties on Imports of Colour Television Receivers from Korea, Korea’s withdrawal of the request for the establishment of a panel, WT/DS89/8, 15 Jan. 1998; and Republic of South Africa, International Trade Administration Commission, Report No.25, Withdrawal of the Anti-Circumvention Duty on Acrylic Fabric Originating in or Imported from the People’s Republic of China and Turkey: Final Determination, available at: www.itac.org.za/upload/document_files/20141027102709_Report-25.pdf (accessed 07.10.2019).

⁴⁴ See Puccio L., “20 Years after Marrakesh: Reconsidering the Effects of Preferential Rules of Origin and Anti-Circumvention Rules on Trade in Inputs and Global Production Networks”, in Christoph Herrmann et al. (ed), *European Yearbook of International Economic Law 2014* (Berlin: Springer, 2013), p. 181.

to do so, the thesis argues that circumvention might be dealt with more effectively by improving the existing AD frameworks. To this end, it suggests introducing the pre-emptive AC mechanism at the stage of initial AD investigation and offers various facilitating tools in the respective sections.

1.2. Definition of circumvention and types of circumvention activities based on the practice of the EU and the USA

As it has been already discussed by the previous section, circumvention in AD has always been one of the most contentious topics: starting from the Uruguay Round, elaborating during the Doha Round and with no clear and comprehensive vision of the potential outcome even today.

Despite the acute disagreement on whether AC legislation is required, there was no doubt that circumvention is looming large.

Literally circumvention means “the action of ... overreaching, outwitting, or getting the better of any one by craft or artifice”⁴⁵. Legal definition of circumvention, though, does not share this optimistic characterization.

In the USA circumvention is not defined explicitly. In practice, investigating authorities, while conducting AC inquiries, based on 19 U.S.C. para 1677 (hereinafter referred to as “**the Act**”) and 19 C.F.R. para 351.225 have the authority to determine whether conduct under consideration could allegedly fall under one or more activities that constitute circumvention.

The European Union, on the contrary, in its Regulation 2016/1036 (hereinafter referred to as “**the Regulation**”⁴⁶) defines circumvention as “the change in the pattern of trade between third countries and the EU or individual companies in the country subject to the measures in the EU, which stems from the practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty and where there is evidence of injury or that the remedial effect of the duty is being undermined in terms of prices and/or

⁴⁵ See Oxford English Dictionary, available at: <https://www.oed.com/view/Entry/33405?redirectedFrom=circumvention+#eid>, (accessed 07.10.2019).

⁴⁶ See Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 21–54.

quantities of the like product⁴⁷, and where there is evidence of dumping in relation to the normal values previously established for the like product...”⁴⁸.

To understand the very essence of circumvention activities, the thesis provides for a snapshot of all types of such activities as regulated by the EU and the USA.

The statutory framework of the USA that addresses circumvention of AD orders implies 4 scenarios in which anti-circumvention measures could be adopted, which are completion or assembly of the merchandise in the USA and/or the third country, minor alterations of the subject merchandise and later-developed merchandise.

As a general remark, it should be mentioned that until recently, transshipment which is recognized as a circumvention practice in most jurisdictions, was not targeted as such in the USA, unless there is no allegation of the further processing in the third country⁴⁹.

However, the US-China trade tensions, which resulted in a new era of tariffs, begets and “popularize” transshipment practices. Therefore, it could not be guaranteed that the United States Department of Commerce (hereinafter referred to as “**the Commerce**”) could come back to its traditional approach and would “review transshipments in the course of scope inquiries”⁵⁰.

As it was mentioned before, AC provisions in the USA are governed by the Act and regulation implementing the former. Both legal instruments contemplate scenarios which are considered as circumvention practices and provide for the steps to identify and successfully halt such practices.

First scenario is a situation when merchandise that is subject to the AD order is completed or assembled in the USA. It is covered by Section 781(a) of the Act and 19 CFR 351.225(g) and provides that Commerce in conducting such anti-circumvention inquiries, relies upon the following criteria: (A) “merchandise sold in the United States is of the same class or kind as other merchandise that is subject to the AD order”; (B) “such merchandise sold in the United

⁴⁷ In this thesis, terms “merchandise”, “product(s)” and “good(s)” are used interchangeably.

⁴⁸ See Art. 13 of the Regulation.

⁴⁹ See Silicon Metal from the People’s Republic of China, 73 Fed. Reg. 46,587 (11 Aug. 2008) and accompanying Issues and Decision Memorandum. This is because transshipment with no further processing is seen as customs fraud and does not caught by AD legislation.

⁵⁰See Spicer M., Clarke P. and Horlick G., *Anti-Circumvention of Anti-Dumping Measures: Law and Practice of the United States*, Global Trade and Customs Law, 2016 Kluwer Law International BV, The Netherlands, Volume 11, Issue 11-12, p. 541.

States is completed or assembled in the United States from parts or components produced in the foreign country with respect to which the AD order applies”; (C) “the process of assembly or completion in the United States is minor or insignificant”; and (D) “the value of the parts or components is a significant portion of the total value of the merchandise”.

Second scenario refers to merchandise assembled or completed in a third country. Thus, section 781(b)(1) of the Act provides for the same “check boxes” as they apply to the first scenario, whereas slightly adjusts the last test. Hence, in case of assembly or completion of the goods in the third country the value of the merchandise produced in the foreign country to which the AD order applies should be a significant portion of the total value of the merchandise exported to the United States.

The most contentious part of the analysis under the first two scenarios is to determine whether the process of assembly or completion in the USA or in a third country is “minor or insignificant”. While conducting such analysis the Act directs the Commerce to consider, inter alia, the following: the level of investment, research and development, the nature of the production process and extent of production facilities, the value of processing performed in the USA or a third country as well as the pattern of trade and affiliation between parties involved. However, “[n]o single factor, by itself, controls Commerce’s determination of whether the process of assembly or completion is minor or insignificant. The decision is based on the totality of the circumstances of the particular anti-circumvention inquiry”⁵¹.

At the same time, the application of AC inquiry under section 781(a) and (b) of the Act, does not preclude Commerce from applying a “substantial transformation analysis” in tandem with the “minor or insignificant processing”. This is because the two analyses are distinct and have different purposes⁵².

While section 781 (a) and (b) of the Act focuses on “the extent of processing applied to subject merchandise”; substantial transformation is focused on whether the “product loses its

⁵¹ See A-570-026 C-570-027 Anti-Circumvention Inquiry (from Vietnam).

⁵² See Bell Supply CAFC, Slip. Op. at 10; id., Slip Op. at 13: “Although substantial transformation and circumvention inquiries are similar, they are not identical.”

identity and is transformed into a new product having a different name, character and use”⁵³, and thus “[a] new country-of-origin”⁵⁴.

Indeed, “substantial transformation analysis” is a well-established practice of the USA⁵⁵. In conducting its substantial transformation analysis, the Commerce may examine a number of factors. The weight of any one factor varies case by case and depends on the particular characteristics of the products at issue⁵⁶. Thus, the Commerce’s analysis might include such factors as: “(1) the class or kind of product; (2) the physical properties and essential components 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”⁵⁷.

Regardless of their express statutory connection, relationships between the two analyses (i.e. “substantial transformation” and “minor or insignificant processing”) are to some extent contradictory.

As a matter of example, one of the recent AC cases, Vietnam-CORE, shows that despite the fact that “galvanizing and cold-rolling have been historically recognized to constitute substantial transformation that creates a new and different kind of merchandise and confers a new country of origin...”, “the process of assembly or completion may still be minor or insignificant, and undertaken for the purpose of evading an AD order”⁵⁸.

⁵³ See Cold-Rolled from Argentina, 58 FR at 37065 (quoted in *Ugine and Alz Belgium N.V. v. United States*, 517 F. Supp. 2d 1333, 1337 n.5 (2007)).

⁵⁴ See *Sunpower*, 179 F. Supp. 3d at 1298; 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).

⁵⁵ See Cold-Rolled from Argentina, 58 FR at 37065 (quoted in *Ugine and Alz Belgium N.V. v. United States*, 517 F. Supp. 2d 1333, 1337 n.5 (2007)).

⁵⁶ See *LWS from China and accompanying IDM* at Comment 1b.

⁵⁷ See e.g., *Laminated Woven Sacks from the People’s Republic of China: Final Results of First Antidumping Duty Administrative Review*, 76 FR 14906 (March 18, 2011) (*LWS from China*), and accompanying Issues and Decision Memorandum at Comment 1b; *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 Issues and Decision Memorandum at Comment 6; *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 Issues and Decision Memorandum at Comment 1.

⁵⁸ See *Bell Supply CAFC*, Slip. Op. at 13-14.

Therefore, existence of both tests simultaneously gives Commerce considerable leeway and allows for additional possibilities to reach a positive determination of circumvention.

Third type of circumvention encompasses merchandise subject to minor alterations (section 781(c) of the Act.

In determining what alterations could be properly considered as minor, the Commerce examines “such criteria as the overall characteristics of the merchandise, the expectation of ultimate users, the use of the merchandise, the channels of marketing, and the cost of any modification relative to the total value of the imported product”⁵⁹. However, although not specified in the Statute, the Commerce could still include additional factors in its analysis “such as the circumstances under which the products at issue entered the United States and the timing and quantity of said entries during the circumvention review period”⁶⁰.

Based on the above, minor alterations are to be understood as a modification of a subject merchandise’s overall physical characteristics, the use, expectations of the ultimate users and channels of marketing of which are essentially the same as of the covered merchandise. Last, but not least, the relative cost of such modification is supposed to be “negligible”. Thus, in *Certain Uncoated Paper*⁶¹, it was established that “with the exception of brightness, the overall physical characteristics of 83 Bright paper and other uncoated paper cover by the Orders are the same”, the product “was advertised for the same printing and copying purposes”, and minimal costs were required for such transformation when compared to either the total value of the imported product or the size of the AD duty.

Commerce was, thus, satisfied with the evidence provided by the petitioners and reached an affirmative determination that such a product constitute merchandise “altered in form or appearance in minor respects”⁶² from in-scope merchandise and was subject to the relevant AD orders.

⁵⁹ See S. REP. NO. 100-71, at 100 (1987); see also *Nippon Steel*, 219 F.3d at 1354.

⁶⁰ See *Aluminium Extrusions* (either a minor alteration to subject merchandise and/or a later-developed product) P.R. China Department of Commerce International Trade Administration FR Doc. 2016–06299, Federal Register /Vol. 81, No. 54 /Monday, March 21, 2016 /Notices.

⁶¹ See *Certain Uncoated Paper* (Merchandise Subject to the Minor Alterations) Australia, Brazil, P.R. China, Indonesia, and Portugal, Department of Commerce International Trade Administration FR Doc. 2017–18589 Federal Register / Vol. 82, No. 169 / Friday, September 1, 2017 / Notices.

⁶² Pursuant to section 781(c) of the Act and 19 CFR 351.225(i).

The minor alterations provision essentially permits the inclusion “within the scope of the AD duty order of the products that are so insignificantly changed from a covered product that they should be considered within the scope of the order even though the alterations remove them from the order’s literal scope”⁶³. This reasonably includes an intent that the merchandise as altered would have been included in the scope of the investigation if the Commerce and the ITC had reason to consider this at the outset of the investigation. “The purpose of the provision is to prevent circumvention through imports of “products with minor alterations that contain features or technologies not in use in the class or kind of merchandise imported into the United States at the time of the original investigation⁶⁴”. In *Wheatland Tube*, for instance, the Court of Appeals for the Federal Circuit (hereinafter referred to as “**the Court of Appeal**”) held that a minor alterations inquiry is inappropriate with respect to “products unequivocally excluded from the order in the first place”⁶⁵.

However, in order to reach a determination whether the scope of an antidumping order includes one or the other merchandise, the Commerce is more inclined to perform a scope, rather than a minor alteration inquiry.

Thus, in reviewing the claim of domestic producers in *Columbia Forest Products, et al.*⁶⁶, as a part of a scope inquiry, the Commerce concluded that “questioned merchandise was clearly excluded from the scope of the orders”, and, consequently, section 1677j(c)(1) did not apply because it was “unnecessary for Commerce to include the “altered” merchandise to protect the antidumping duty order.⁶⁷” It was agreed that “commenting that interpreting the scope to both include and exclude [line and dual-certified pipe] would render the orders internally inconsistent”⁶⁸.

⁶³ See *Wheatland Tube*, 161 F.3d at 1371.

⁶⁴ See S. REP. NO 100–71, at 101 (1987).

⁶⁵ See 161 F.3d at 1371.

⁶⁶ See Slip Op. 19-98 United States Court of International Trade.

⁶⁷ See *Wheatland Tube Co. v. United States*, 973 F. Supp. 149, 163 (CIT 1997).

⁶⁸ See *Wheatland Tube*, 161 F.3d at 1371 (A minor alterations inquiry was “unnecessary because it can lead only to an absurd result” and would “frustrate the purpose of the antidumping laws because it would allow Commerce to assess antidumping duties on products intentionally omitted from the ITC’s injury investigation.”)

Despite the fact that the outcome of the scope inquiry and altered merchandise is not exactly the same, the Commerce relies in its analysis on the same rules⁶⁹. In *China-Certain Steel Nails*⁷⁰, the specific issue was “whether the anti-dumping order on imported nails from China excluded nails that were packaged in “mixed media” (i.e., tool kits containing a variety of items used for home repair)”⁷¹. Despite Commerce’s determination that the scope does not include merchandise under consideration, the Court of International Trade held that because the anti-dumping order included no express language discussing mixed media, the department “had no authority” even to “conduct a mixed media inquiry and exclude otherwise-subject merchandise”⁷².

It cited the basic due process principle and noted that “just as anti-dumping orders cannot be extended to include merchandise that is not within their scope “*as reasonably interpreted*”, so, conversely, “merchandise facially covered by an order may not be *excluded* from the scope of the order unless the order can reasonably be interpreted” to permit such exclusion⁷³.

The Court of Appeal then concluded that “because orders are subject to interpretation”, the Court of International Trade had erred in finding that the absence of express language in the Nails order regarding mixed media meant that the Commerce had no authority to conduct a mixed media inquiry or to exclude the nails that were imported as part of a kit. However, the Court of Appeal upheld the Court of International Trade in its conclusion that the Commerce had failed to articulate a reasonable interpretation of the anti-dumping order that would justify the exclusion of nails included in mixed media kits.

The Court of Appeal, however, did not end there, and went further by providing a detailed guidance as to how scope inquiries have to be performed:

⁶⁹ See July 18, 2013 Courts of Appeals for the Federal Circuit decision (“*Mid Continent Nail Corp v United States*” regarding the Department of Commerce's method of interpreting the scope of anti-dumping orders - <https://www.courtlistener.com/opinion/2713778/mid-continent-nail-corp-v-united-states/>).

⁷⁰ See *Certain Steel Nails from the People’s Republic of China and the United Arab Emirates: Initiation of Antidumping Duty Investigations*, 72 Fed. Reg. 38,816, 38,817 (Dep’t of Commerce July 16, 2007).

⁷¹ See CAFC 2012-1682, 1683.

⁷² See CAFC slip op at 7.

⁷³ See CAFC slip op at 10.

“[i]f the manner in which the otherwise-subject merchandise is incorporated into the mixed media item alters these properties so comprehensively as to effect a “substantial transformation”... such that it “can no longer be considered” the same merchandise, then the included merchandise is not subject to the order”.

Therefore, even being distinct and separate processes, scope and minor alteration inquiries, each apply “substantial transformation” test (perhaps not in an identical, but in a similar way) to reach a respective conclusion.

Fourth scenario in which anti-circumvention measures could be adopted in the USA covers “later-developed merchandise”, governed by 19 U.S.C. § 1677j(d). Section 1677j(d).

A critical legal issue is to establish what should be meant by the “later-developed merchandise”. The statute’s reference in Section 1677j(d)(1) to “later-developed merchandise” as merchandise “developed after” an antidumping investigation does not compel a particular meaning of “later-developed”. Usually, it is under the discretion of the Commerce to determine what kind of merchandise might be considered as “later-developed”.

For instance, based on its administrative precedents⁷⁴, the Commerce in *Specialty Merchandise Corporation v. National Candle Association*, defined the term “later developed merchandise” based on a commercial availability standard, noting that commercial availability means to include “[p]roducts either present in the commercial market or fully developed, i.e., tested and ready for commercial production, *but not yet in the commercial market*”⁷⁵.

The Commerce’s interpretation was found to be reasonable by the Court of International Trade for the following reasons. First, the commercial availability test was consistent with the dictionary meaning of the term “developed”. Second, this test was relevant because “[p]roduct’s actual presence in the market at the time of the [antidumping] investigation is a necessary

⁷⁴ See, for example, in each of *Portable Electronic Typewriters from Japan*, 55 Fed. Reg. 47,358 (Nov. 13, 1990) (final scope ruling), *Electrolytic Manganese Dioxide from Japan*, 57 Fed. Reg. 395 (Jan. 6, 1992) (final scope ruling), and *Erasable Programmable Read Only Memories from Japan*, 57 Fed. Reg. 11,599 (Apr. 6, 1992) (final scope ruling), the Commerce addressed the commercial availability of the later-developed merchandise in some capacity, such as the product's presence in the commercial market or whether the product was fully developed, i.e., tested and ready for commercial production).

⁷⁵ See *United States Court of Appeals, Federal Circuit, Specialty Merchandise Corporation, Plaintiff-Appellant, V. National Candle Association, Defendant-Appellee*, Nos. 2009-1518, 2009-1519.

prerequisite of its inclusion or exclusion from the scope of an antidumping order”⁷⁶. Third, such a test was in line with “the Diversified Products Analysis” provided for by 19 U.S.C. § 1677j(d)(1) designed to prevent circumvention of the AD order by a comparable product to the subject merchandise.

Specifically, substantial evidence to confirm or reject commercial availability of the subject merchandise on the market at the time of the issuing of the AD order, could include, inter alia, brochures, price lists, marketing materials dating; advertising surveys of product catalogues; affidavits and testimony of long-standing industry members; independent marketing studies; sales data; and pre-investigation patents⁷⁷.

At the same time, an absolute frontrunner in applying anti-circumvention practices, the EU, distinguishes between transshipment, slightly altered merchandise, shipping through exporter with lower rate (unless there was no due cause or economic justification for such activities), and importing or third country assembly (if exporters meet neither value of parts 60-40% test nor value added 25% test).

While sharing common features and interpretative practices, the USA and the EU do not address types of circumvention activities in an identical way.

As well as the USA, the EU has an extensive legislative basis covering the issues of circumvention.

The anti-circumvention rulebook of the EU (the Regulation) in its Article 13 covers all the above-mentioned types of circumvention practices as well as provides for procedural rules applicable to anti-circumvention inquiries.

To begin with, the thesis briefly introduces the concept of “insufficient due cause or economic justification”, as an integral part of the test applicable with regard to circumvention practices described by art. 13(1) of the Regulation, which are transshipment, slightly altered merchandise, shipping through exporter with lower rate.

Thus, for a practice, process or work to constitute a circumvention activity there should be no sufficient due cause or economic justification other than the imposition of the anti-dumping duty.

⁷⁶ See Issues and Decision Memorandum for the Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China, A-570-504, at 23 (Sept. 29, 2006).

⁷⁷ See *Ibid.*

As practice shows, the European Commission (hereinafter referred to as “the EC”) is not elaborate in the justification of its conclusions of the lack of economic justification for the specific actions. Mostly, its position is expressed in a following manner:

*“The investigation did not bring to light any other due cause or economic justification for the ... than the avoidance of the measures in force on the product concerned. No elements were found, other than the duty, which could be considered as a compensation for ...”*⁷⁸.

Important to mention that insufficient due cause or economic justification is usually addressed by the EC in combination with the “change in the pattern of trade” factor, as the two aspects are intertwined and interrelated.

Thus, change in the pattern of trade could stem from the practice of “increase of imports of the slightly modified product concerned as well as the parallel disappearance of imports of the product concerned since imposition of measures” as it was the case in Aluminum foil from China⁷⁹. Irrespective of the fact that the parties argued that the conclusion of the Commission with respect to the change in the pattern of trade was “not substantiated by evidence and remains only a presumption”, the EC claimed that parties did not provide any evidence to prove the opposite and gave a detailed explanation on how such a conclusion was reached⁸⁰. The EC

⁷⁸ See for example, Council Implementing Regulation extending the definitive anti-dumping duty imposed by Council Implementing Regulation (EU) No 791/2011 on imports of certain open mesh fabrics of glass fibres originating in the People's Republic of China to imports of certain open mesh fabrics of glass fibres consigned from India and Indonesia, whether declared as originating in India and Indonesia or not; Council Regulation extending the definitive anti-dumping duty imposed by Regulation (EU) No 511/2010 on imports of certain molybdenum wires originating in the People's Republic of China to imports of certain molybdenum wires consigned from Malaysia, whether declared as originating in Malaysia or not and terminating the investigation in respect of imports consigned from Switzerland.

⁷⁹ See Commission Implementing Regulation (EU) 2017/271 of 16 February 2017 extending the definitive anti-dumping duty imposed by Council Regulation (EC) No 925/2009 on imports of certain aluminium foil originating in the People's Republic of China to imports of slightly modified certain aluminium foil).

⁸⁰ “In order to establish the change in the pattern of trade the Commission analyses the volume of imports of the product concerned and the volume of imports of the slightly modified product concerned for the period between the imposition of the original measures (2009) until the initiation of anti-circumvention inquiry (September 2016). The investigation found that 80 % of the total volume of imports of the product under investigation originating in the PRC was the slightly modified product concerned for the reporting period. This ratio was then extrapolated for the years concerned since 2009. In order to establish the volume of the slightly modified product concerned within the product under investigation for the reporting period the Commission used the following methodology. Firstly,

determined that the drastic change in a general way in which trade was carried on among China and the EU, formed conclusive evidence for the determination of the change in the pattern of trade. The investigation further showed that such had insufficient due cause or economic explanation other than the imposition of the duty.

Thus, assessment of the change of the pattern of trade implies inquiry into the import statistics immediately after the imposition of an anti-dumping duty relatively to the conventional pattern existed prior the initiation of the anti-dumping investigation.

The next element of the test applicable in the anti-circumvention inquiries, is a “simplified injury test”⁸¹, which is performed to establish the existence of price undercutting or underselling. In other words, “to establish whether alleged circumvention undermines the rectifying effects of the duty”⁸².

In the performance of this test the EC relies on the data on quantities and prices of the merchandise that has been imported into the Community since the imposition of measures in the original investigation and compares such data with the current levels of imports. For example, in China-Glyphosate⁸³, it was established that imports of glyphosate in the

the Commission established the total volume of exports of the product under investigation from China on the basis of Eurostat. Secondly, from the verified questionnaire replies of the cooperating Chinese exporting producers, the Commission established the volume of the exports of ACF of the five cooperating companies. Thirdly, the Commission deducted the volume of exports of ACF made by the cooperating companies from the total exports from China. Given the very high level of non-cooperation, the Commission considered that it has a sufficient basis to assume that the non-cooperating companies are exporting the slightly modified product. On this basis, the Commission concluded that 80 % of the total exports from China are made of the exports of the slightly modified products and the 20 % are the exports of ACF. The Commission applied this ratio to establish the change of the pattern of trade”.

⁸¹ See Vermulst E., EU Anti-Circumvention Rules: Do They Beat the Alternative? European University Institute Robert Schuman Centre for Advanced Studies - Global Governance Programme, EUI.

⁸² Although it suffices as per Article 13(1) that the remedial effects of the duty are being undermined in terms of prices or quantities, the Commission tends to base its findings on both. See also COUNCIL REGULATION extending the definitive anti-dumping duty imposed by Regulation (EC) No 368/98 on imports of glyphosate originating in the People's Republic of China to imports of glyphosate consigned from Malaysia or Taiwan, whether declared as originating in Malaysia or Taiwan or not, and terminating the investigation in respect of imports from one Malaysian and one Taiwanese exporting producer.

⁸³ See Council Regulation extending the definitive anti-dumping duty imposed by Regulation (EC) No 368/98 on imports of glyphosate originating in the People's Republic of China to imports of glyphosate consigned from

investigation period of the original investigation were clearly exceeded by exports from the allegedly transshipped merchandise from Taiwan and Malaysia in the investigation period (with 1397 and 1864 tons respectively).

With regard to prices, the investigation revealed that the export prices were still below (if not lower than) the non-depressed level of Community prices as established in the original investigation. For those reasons the EC determined that the remedial effects of the existing AD duty on the subject merchandise were being undermined both in terms of quantities and price.

Analysis of the insufficient justification, change in the patterns of trade as well as of the injury alleged to be caused is done by the EC simultaneously with the determination of the type of circumvention activity.

As it was previously mentioned, grounds for the initiation of the anti-circumvention investigation in the EU is the availability at the disposal of the EC of sufficient prima facie evidence that the measures in force are being circumvented by means provided for by Article 13 of the Regulation.

According to the current statistics the most common circumvention practice in the Union's territory is consigning the product via third countries (transshipment)⁸⁴.

Generally, evidence of transshipment is confined to demonstration of the existence of an almost simultaneous surge in imports from the country subject to anti-dumping duties to the one through which the alleged transshipment takes place and afterward to the EU "in almost identical quantities"⁸⁵.

Transshipment arrangements between the allegedly circumventing exporter and the relevant importer in the EU⁸⁶ could also be relevant for the purposes of substantiation of the allegation on circumvention.

Malaysia or Taiwan, whether declared as originating in Malaysia or Taiwan or not, and terminating the investigation in respect of imports from one Malaysian and one Taiwanese exporting producer)

⁸⁴ See Annex 1; See also The Annual Report from the Commission to the European Parliament to the Council on the European Parliament on the EU's Anti-dumping activities... targeting the EU in 2018.

⁸⁵ See Commission Implementing Regulation (EU) 2016/32 of 14 January 2016 extending the definitive anti-dumping duty imposed by Implementing Regulation (EU) 2015/82 on imports of citric acid originating in the People's Republic of China to imports of citric acid consigned from Malaysia, whether declared as originating in Malaysia or not.

⁸⁶ See Ibid.

Thus, a quick web search allows to find some Asian-based firms actually offering services to help avoiding AD duty payment using various techniques⁸⁷. Settle Logistics, in Hangzhou, for instance, says on its website that it works with a factory in Malaysia and can obtain Malaysian certificates of origin for goods made in China⁸⁸.

Second type of circumvention practices as contemplated by the Article 13(1) of the Regulation, called “minor alteration”, is intrinsically more complicated than a simple transshipment. However, the EC still relies on a “prima facie evidence” it has in its possession, rather than conducting an in-depth analysis.

For instance, in the case involving imports of People’s Republic of China of slightly modified hand pallet trucks, the EC in its Regulation⁸⁹ stated that there was “sufficient prima facie evidence that the product under investigation has the same essential characteristics and uses as the product concerned”. Thus, the weight indicating system that was added to a product concerned was proved to be “inexpensive mechanism... easily removed and discarded after importation... (that is) neither transforms nor alters essential characteristics of the product concerned”.

The EC usually finds no “sufficient due cause or economic justification” for such a changed pattern of trade. Only seldom there have been instances where due cause other than imposition of duties was found with regard to modifications made to the product.

Thus, in the RMB’s case⁹⁰ it established that, first, slightly modified product was mostly destined for consumption of one particular consumer (upon which request it was designed).

⁸⁷ See Staff Report Duty Evasion: Harming U.S. Industry and American Workers Prepared for Senator Ron Wyden November 8, 2010.

⁸⁸ See Tariff Dodgers Stand to Profit Off U.S.-China Trade Dispute, available at: <https://www.nytimes.com/2018/04/22/business/china-trade-tariffs-transshipment.html>, (accessed 07.10.2019).

⁸⁹ See Commission Implementing Regulation (EU) 2015/2346 of 15 December 2015 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Implementing Regulation (EU) No 1008/2011, as amended by Council Implementing Regulation (EU) No 372/2013, on imports of hand pallet trucks and their essential parts originating in the People's Republic of China by imports of slightly modified hand pallet trucks originating in the People's Republic of China, and making such imports subject to registration).

⁹⁰ See Council Regulation extending the definitive anti-dumping duty imposed by Council Regulation (EC) No 2074/2004 on imports of slightly modified ring binder mechanisms originating in the People' Republic of China and terminating the investigation concerning the possible circumvention of anti-dumping measures imposed by Council Regulation (EC) No 2074/2004 on imports of certain ring binder mechanisms originating in the People’s

Second, that there was no production of slightly modified product using the facilities of the subsidiary company located in a country, where there were no antidumping duties in place. The combination of these two aspects sufficed to prove that modification of the product was economically justified (despite the preliminary negative determination)⁹¹.

The next type of circumvention activity is assembly operations in the importing country or the third country.

This type of circumvention is often referred to as “classic circumvention”⁹² and was the only target of the 1988 version of the EU Regulation.

Pursuant to article 13(2) of the Regulation, conditions that have to be satisfied for assembly operations to allegedly circumvent anti-dumping duties in force, are as follows: start or substantial increase of the operations since or just prior the initiation of the anti-dumping investigations; the value of parts constitutes 60% or more of the total value of the parts of the assembled product, unless the value-added to the parts brought in during the respective operations is greater than 25% of the manufacturing cost; the remedial effect of the anti-dumping duty under the order has been undermined in terms of the prices and/or quantities of the assembled like products; evidence of dumping exists.

The first condition to be established is “start or substantial increase of operations since or just prior to, the initiation of the investigation”.

As of today, there is neither a uniform rule on how to determine what could be considered as “substantial increase” nor there is a definition of the “just prior to” qualifier. The EC decides on this matter on a case by case basis and usually does not address abovementioned criteria separately, but as a single and uniform condition.

Thus, in China-Hand Pallet Trucks the EC reached a conclusion that there was indeed a substantial increase of operations since the initiation of investigation. However, it was determined that the condition requiring “start or substantial increase of operations...” (contemplating start or increase of assembly operations) has been already met based on the

Republic of China by imports of certain ring binder mechanisms consigned from Thailand, whether declared as originating in Thailand or not.

⁹¹ Savings in the use of raw material was “largely offset by the costs incurred for the adaptation of machinery before the production of slightly modified product could begin.

⁹² See Van Bael & Bellis EU Anti-dumping and Other Trade defence Instruments, Wolter Kluwer 2011, ISBN 978-90-411-3117-1, p. 640.

analysis of the sales volume to the Union. The EC did not go further in its assessment regarding dynamics of assembly operations (if any). It only relied on the evidence that market constantly increased (almost tripled) between the period when the definitive anti-dumping duty was enforced in 2013 to 70,8 % and the period reported for alleged circumvention⁹³.

The second part of the analysis, 60 % and 25 % tests, set force by Article 13(2)(b) is usually more grounded and coherent.

In accordance with Article 13(2)(b) of the basic Regulation, in order to establish the fact of circumvention, the Commission has to verify that the parts used in the assembly operation from the countries subject to the measures constitutes 60 % or more of the total value of the parts of the assembled product (“value-of-the parts test”) and that the value added to the parts brought in is not greater than 25 % of the manufacturing cost (“value-added test”).

According to the “value-of-parts” test the EU investigating authority generally requests to list all inputs used to produce the merchandise under consideration, including specific types of raw materials, labor, energy, subcontractor services, research and development; as well as other items (e.g., fixed assets, services, etc.), that allegedly circumventing exporter receives from affiliated parties.

This is required in order to assess whether the price of the goods reflects their market price, since it is widely recognized that “big multinational companies use an accounting trick called transfer pricing to avoid paying higher tariffs when shipping goods between their international subsidiaries”⁹⁴.

For each input identified, it is required to fill in the chart providing a complete list of parts broken down into raw materials and semi-finished products for the review period (usually 1 year), purchase prices for such inputs (including transportation costs, customs duties, customs clearance fees, etc.⁹⁵) and also information on the origin of each part.

⁹³ See Commission Implementing Regulation (EU) 2018/260 of 21 February 2018 terminating the investigation concerning the possible circumvention of anti-dumping measures imposed by Council Implementing Regulation (EU) No 1008/2011, as amended by Implementing Regulation (EU) No 372/2013, on imports of hand pallet trucks and their essential parts originating in the People's Republic of China by imports consigned from Vietnam, whether declared as originating in Vietnam or not.

⁹⁴ See *Tariff Dodgers Stand to Profit Off U.S.-China Trade Dispute*, available at: <https://www.nytimes.com/2018/04/22/business/china-trade-tariffs-transshipment.html>, (accessed 07.10.2019).

⁹⁵ Manufacturing costs, SGA and profit are not taken into account.

Based on such data the EC assesses the value of all the inputs that are used to produce the merchandise under consideration to determine whether the test under Art. 13 (2)(b) of the Regulation was met.

While performing the “value-of-parts” test the EC routinely applies the calculated average approach, however, as a matter of exception it could allow for some flexibility. For instance, in the Bicycles⁹⁶ investigations, the Commission “displayed sensitivity and refrained from imposing measures even though the 60% test had been met on a weighted average basis with respect to producers which could show improvement over time”⁹⁷.

It is also worth to mention that 60 % and 25 % tests are not cumulative, and it suffices to establish that either the first of the second criteria was met to reach a conclusion that a circumvention practice actually takes place.

For instance, in the same Hand pallet trucks-China⁹⁸, the EC found that for both cooperating companies the parts from the country subject to measures did not constitute 60% or more of the total value of the parts of the assembled products. Consequently, the EC considered that it was not necessary to examine the second criterion (25% test) and reached a conclusion that such assembly operations cannot be considered as circumvention within the meaning of Article 13(2) of the basic Regulation.

It is generally accepted that anti-circumvention regulation is a part of anti-dumping laws given the very purpose anti-circumvention inquiries serve. Consequently, taking into account that the Anti-dumping agreement is contained in Annex 1A to the WTO Agreement and is part of the multilateral “covered” agreements also within the meaning of Art.1 of the DSU, the thesis suggests that general principles, applicable to the standard of review of the matters concerning anti-dumping should also be relevant with regard to circumvention practices.

⁹⁶ See Bicycles from China, [1997] OJ L16/55 (extension bicycle parts) and the Electronic weighing scales (Certain retail electronic weighing scales from Japan, [1997] OJ L141/61 (termination Indonesia); Certain retail electronic weighing scales from Japan, Singapore, [1997] OJ L141/57 (termination).

⁹⁷ See Vermulst E., *Circumvention of Anti-Dumping Measures: Law and Practice of the European Union*, (2016), 11 *Global Trade and Customs Journal*, Issue 11/12, p. 505.

⁹⁸ See Commission Implementing Regulation (EU) 2018/260 of 21 February 2018 terminating the investigation concerning the possible circumvention of anti-dumping measures imposed by Council Implementing Regulation (EU) No 1008/2011, as amended by Implementing Regulation (EU) No 372/2013, on imports of hand pallet trucks and their essential parts originating in the People's Republic of China by imports consigned from Vietnam, whether declared as originating in Vietnam or not).

Therefore, this thesis claims that addressing only one criterion contained in Art. 13 of the Regulation should be made with a note of caution to allow the EC to make sufficiently precise recommendations and rulings in the course of anti-circumvention inquiries and not to exercise a false judicial economy.

While it might seem as a common wisdom that given a “restrictive manner” of interpretation of the value-added test by the EU⁹⁹, the value added brought to the parts in, during the assembly or completion operation would be greater than 25% of the manufacturing costs, it is not a rule of thumb.

As of today, there have been few anti-circumvention investigations where companies were found to have achieved the 25% test even despite the fact that the first part of the test (60/40% test) was also met. Thus, during investigation in China-Aluminum foil¹⁰⁰, it was established that the proportion of Chinese raw materials used by the applicant was 38% which is significantly below the threshold of 60 % required under Article 13(2)(b) of the basic Regulation. However, since manufacturing of the product under review occurred during the start-up production phase, manufacturing costs were recalculated and established to constitute 69% of the total value of the final product. The result of 25 % value added test further demonstrated that the applicant’s production activities cannot be considered as circumvention, since that value added to parts brought in China was significantly above the 25% of the manufacturing costs threshold within the meaning of Article 13(2)(b) of the basic Regulation.

In addition to the complexity of calculation, there is also a lack of clarity regarding whether investigating authority looks at the significance of incremental costs (which include, inter alia, the costs of additional labor, material and overhead to complete or assemble the good) or the costs in their entirety while performing its test under the art. 13(2) of the Regulation. This lack of transparency gives the EC significant portion of discretion while conducting its analysis.

⁹⁹ See European University Institute Robert Schuman Centre for Advanced Studies Global Governance Programme EU Anti-Circumvention Rules: Do They Beat the Alternative? Edwin Vermulst. “[c]alculations for this test notably exclude local parts, selling, general and administrative [SGA] costs and profit. Meaning that the manufacturing costs other than the material costs (parts value), namely direct labour, indirect labour and manufacturing overheads, should represent more than 25% of the total manufacturing cost including material cost”.

¹⁰⁰ See Commission Implementing Regulation (EU) 2017/271 of 16 February 2017 extending the definitive anti-dumping duty imposed by Council Regulation (EC) No 925/2009 on imports of certain aluminium foil originating in the People's Republic of China to imports of slightly modified certain aluminium foil.

The Regulation also provides for a shipping through exporter with lower rate as a means of circumvention. The aim of this provision is to catch any possible arrangement between exporters, that is an exporter subject to comparatively high anti-dumping duties makes an arrangement with another exporter of the same exporting country (with no or relatively lower duty) to export the subject merchandise to the EU.

One of the most vivid examples of how the mechanism of “low duty company” works could be illustrated by the EU ferro molybdenum AD case against China. In this case, following the imposition of provisional anti-dumping duties, the China Chamber of Commerce set up a grouping of Chinese ferro molybdenum producers accounting for 70 % of China’s overall output, with the aim to “avoid payment of anti-dumping duties” and to agree on distribution of specific export allocations based on the level of their provisional anti-dumping duties. However, the very fact that companies with low duty levels were allocated disproportionately high quotas and, in some instances, even in excess of their production capacities, was a harbinger of the possibility of occurrence of circumvention practices in the EC¹⁰¹. Therefore, by establishing one country wide AD duty for all exporting producers, the EC “alleviate” any chance of circumvention even before such practices could have occurred¹⁰².

To sum up, it should be said that despite the fact that the EU and the USA are so far the forerunners in elaborating AC laws and conducting AC inquiries, the practice of performing the last is far from being totally consistent. The very wording of the regulations governing anti-circumvention provides investigating authorities with a leeway to employ the tests provided thereby in a way to almost certainly achieve positive result in establishing the fact of circumvention.

1.2. Forces that lay behind the decision of exporters to circumvent

It is widely recognized, that countries, by imposing trade defense measures like anti-dumping duties, make an important if not essential contribution to the viability and global competitiveness of their domestic producers and exporters. Imposition of anti-dumping duties

¹⁰¹ See Ferro molybdenum from China (2001) OJ L214/3 (provisional).

¹⁰² See Ferro molybdenum from China (2002) OJ L35/1 (definitive).

allows not only to offset an injury to the domestic industry, but also to contribute in halting allegedly unfair trade practices.

At the same time, from the perspective of exporters such duties are considered as unfair and extremely protectionist barriers to trade. Extra burden in the amount of anti-dumping duty at the very least could lead to a substantial loss of the market share of such exporters or under the worst scenario could put their businesses in danger of closing down.

Certain companies in an attempt to avoid these obstacles try to find a way out to retain their position on the relevant market at lowest cost possible. One way is to circumvent payment of those duties, in other words to “avoid” their payment in any conceivable way.

But what is the driving forces that lay behind the decision of the relevant exporters to circumvent anti-dumping duties?

By examining “case studies” of the US and the EU, this thesis proposes an answer to this question as well as suggests how to strike a balance between effective adoption of anti-circumvention measures and protection of various interests’ groups.

It goes without saying that a newly imposed anti-dumping duty inevitably shrinks the profits of the affected exporting firm, and thus creates an incentive for circumvention.

However, individuals are rational calculators which weigh costs and benefits when consider whether to break the law or not. By the same token, the decision of firms to circumvent payment of anti-dumping duties is a choice overshadowed by uncertainty, as it involves a trade-off between gains, if their activities are not discovered, and losses, if they are discovered and penalized. This thesis claims that incentives for a firm to evade duties in order to maximize profits are closely linked to and follow the same logic as the decision of firms to participate in a shadow economic activity. Therefore, the same approach (although slightly adjusted), which is used to examine the determinants of the decision of firms to operate in the shadow economy sector could be applicable to explain the decision of exporters to circumvent anti-dumping duties.

According to the IMF working paper, shadow economic activities may be defined as those “activities and income earned that circumvent government regulation, taxation or observation”¹⁰³. Theoretical considerations provided thereby are supported by the following structural equation:

¹⁰³ See Medina L. and Schneider F., *Shadow Economies Around the World: What Did We Learn Over the Last 20 Years?* IMF Working Paper, 2018, International Monetary Fund WP/18/17.

$$SE = SE \left[p \left(A, F \right); f; B \left(T, W \right) \right]$$

where shadow economic activities are determined to “negatively depend on the probability of detection p and potential fines f , and positively on the opportunity costs of remaining formal, denoted as B . The opportunity costs are positively determined by the burden of taxation T and high labour costs W – individual income generated in the shadow economy is usually categorized as labour income rather than capital income – due to labour market regulations. The probability of detection p itself depends on enforcement actions A taken by the tax authority and on facilitating activities F accomplished by individuals to reduce the detection of shadow economic activities”¹⁰⁴.

The thesis claims that as well as shadow economic activities, the decision to circumvent AD order negatively depend on the probability of detection “ p ” and potential fines “ f ”, and positively on the opportunity costs of paying AD duties denoted as “ B ”. The opportunity costs are positively determined by the burden of AD duties “ T ” and substantial additional costs of exploring and entering a new market “ W ”.

Hence, the higher the size of the AD duty and new market “entering” costs, the more incentives individuals have to avoid these costs by creating ways to circumvent anti-dumping duties. The probability of detection “ p ” is claimed to depend on enforcement actions “ A ” taken by the relevant governmental authorities and on facilitating activities “ F ” accomplished by individuals to reduce the detection of anti-circumvention activities (such as bribery of officials and other similar means).

In addition to criteria mentioned before, this thesis claims that positive extra costs of circumvention such as changing the physical product characteristics or moving the location of production or shipping through an alternative transport route should also be taken into account while assessing the probability of circumvention activities to occur.

For some industries as it was in EU’s “Fasteners case”¹⁰⁵, installation of production capacities implies relatively low entry barriers (in terms of time, capital and know-how) and

¹⁰⁴ See Ibid.

¹⁰⁵ See Commission implementing Regulation (EU) 2015/519 of 26 March 2015 imposing of a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People’s Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in

therefore the chance of quick adjustment for these industries are significantly higher than, for example, for highly sophisticated equipment to produce the subject merchandise. In the latter case even slight modification of a good could be both time consuming and prohibitively expensive.

Following Mishra in its inquiry into the reasons of exporters to circumvent¹⁰⁶, the thesis reiterates that an exporter that is hit with a larger duty in an important market will be more likely to evade duties, *ceteris paribus*.

This fact is recognized not only by the researchers, but also by the interested parties themselves in course of anti-dumping inquiries. Thus, in their comments to a final disclosure, two interested parties in Steel fasteners - China¹⁰⁷ commented that lower duty rates would reduce the risk of circumvention, whereas duty rates that were too high could only encourage circumvention.

In addition to the high level of a tariff, the elasticity of circumvention depends on extra costs of circumvention as well as on the probability of getting caught¹⁰⁸.

It means that the probability of anti-dumping order circumvention is much higher if the costs the exporter has to bear are “insignificant” compared to the size of anti-dumping duties. There is no established threshold, though, of what could be considered “insignificant” if compared to substantial costs, meaning that this question is resolved on a case-by-case basis.

One of the cases where this question was at stake is the USA Anti-circumvention inquiry in Aluminum Extrusions from the People’s Republic of China¹⁰⁹, where the cost of products

Malaysia, whether declared as originated in Malaysia or not, following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009).

¹⁰⁶ See Mishra P., Subramanian and Topalova P., *Tariffs, Enforcement, and Customs Evasion: Evidence from India* 92 J. Public Econ. 1907–1925 (2008).

¹⁰⁷ See Commission Implementing Regulation (EU) 2015/519 of 26 March 2015 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009.

¹⁰⁸ See Puccio L. and Erbahar A. *Circumvention of Anti-dumping: A Law and Economics Analysis of Proportionality in EU Rules*, *Journal of World Trade* 50, no. 3 (2016), p. 399.

¹⁰⁹ See Aluminium Extrusions (either a minor alteration to subject merchandise and/or a later-developed product) P.R. China Department of Commerce International Trade Administration FR Doc. 2016–06299, *Federal Register* /Vol. 81, No. 54 /Monday, March 21, 2016 /Notices.

alteration resulted only in a 4.63% increase of the production cost if compared to the applicable 180% anti-dumping duty. This fact alone was sufficient to explain the decision of the exporter to circumvent. What is peculiar to this case, is that while taking into consideration one facet of the “circumvention success”, Chinese exporters completely neglected the second, but not less important one – the probability of getting caught. Thus, the manipulations with the product was of the nature that made its very purpose apparent to anyone who had even remote vision of the production process of this type of merchandise.

First of all, the heat-treatment as a tempering process was not recognized by respective certifying body for the domestic aluminum industry as the one that could be used in production of slightly altered merchandise.

Second, similar minor changes were subject to consideration in the Cut-to-Length Plate from China¹¹⁰ where the Commerce found similar alterations to alloying elements to be not sufficient to remove what would otherwise be subject merchandise from the scope.

Third, exporters, while deciding on the type of the modification that should be applicable to the product under consideration, did not take into account the fact that such a product was not “recognized ... as four 5xxx-series alloys employed in extrusion applications”. It means that the probability of getting caught became even higher given the risk of initiation of the “later developed merchandise” anti-circumvention inquiry by the Commerce¹¹¹.

This example is a clear evidence that among all the “driving forces” contributing to the decision of exporters to circumvent, the size of AD duty is the one having more weight when compared to all the other factors.

Usually, imposition of anti-dumping duties implies consecutive negotiations with the customers in the importing countries and lead to either absorption of the duty, increase in the price of the subject merchandise to the amount of the duty or to circumvention of the relevant AD order.

¹¹⁰ See Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate from the People’s Republic of China, 76 FR 50996 (August 17, 2011) (Cut-to-Length Plate from China).

¹¹¹ In its Final Affirmative Determination of Circumvention, the USDOC indeed established that all imports of the allegedly circumventing product constituted later developed merchandise that is circumventing, and should be included within, the scope of the Orders – See Aluminium Extrusions (later-developed product) P.R. China Department Of Commerce International Trade Administration FR Doc. 2017–15683, Federal Register / Vol. 82, No. 142 / Wednesday, July 26, 2017 / Notices.

Analysis of the implications of any price changes of subject merchandise on consumers might be difficult to ascertain and a common denominator for the purchasing decisions of consumers of different categories of goods is not easy to establish. For some categories increase in the price would not influence significantly the consumers' choices, as it was the case in the Handbags investigation in the EU¹¹². The most obvious explanation is that a handbag is an occasional purchase, which real price is something the conventional consumers are not aware of and, additionally, fashion items usually face the tendency where consumers are more inclined to make a choice in favor of brand loyalty rather than the cheaper substitute goods.

However, the same deliberations and conclusions could not be made regarding the goods with a highly volatile price, whose price is subject to vigorous monitoring by the homogeneous group of consumers and when any fluctuations in price could make a huge difference and influence not only the short but, most importantly, the long term demand for the goods, given the conditions of competition. The most suitable example of such group of goods is steel and products thereof. That is why exactly this type of merchandise is the most frequent target of AC inquiries¹¹³.

Therefore, investigating authorities should also pay attention to the type of merchandise subject to AD investigation to determine the most "sensitive" categories of goods in terms of risk of circumvention.

Despite being highly dependent on the size of an AD duty at force and the peculiarities of the product subject to the respective order, this thesis claims that occurrence of circumvention activities depends on the "interest" aspect.

Thus, imposition of anti-dumping measures affects the interests of the much broader number of participants than just domestic producers and exporters, it also includes, inter alia, industrial users and consumers of the subject merchandise.

Therefore, it is argued that the decision and the readiness of the exporters to circumvent is influenced not only by the unilateral will of the exporters, but additionally influenced by interests of respective importers (consumers and industrial users) of the subject merchandise.

Hence, what should be done at the stage of the initial investigation is analysis of the market trends, including any possible shift of consumers' tastes and preferences, any changes in

¹¹² See Handbags Council Regulation (EC) No. 1567/97 (1 August 1997) Definitive Anti-dumping duty.

¹¹³ See Annex 1.

demand, in concert with the size of the anti-dumping duty, position of the relevant exporter subject to the AD order on the market and any circumvention practices¹¹⁴.

In practice, importers of the subject merchandise are very well aware if any kind of duty evasion takes place. For example, in the USA Anti-circumvention inquiry in Aluminium Extrusions from the People's Republic of China¹¹⁵, the importer admitted to sourcing the product with a slightly different chemical composition (instead of traditionally used one), which was indicative of the existence of "circumvention arrangement" between the relevant exporter and importer.

The thesis further argues that even if the modalities of operation of the circumvention scheme are not necessarily agreed between the exporter and the importer, the latter should be very well aware of the real purpose of any change in the patterns of trade between them.

First of all, the very nature of the anti-dumping duty implies that its payment should be done by the relevant importer. This, in its turn, implies increased price in the relevant invoice if exporters follow the respective anti-dumping order.

Second, usually importers have a well-established "network" of exporters they collaborate with, which means that they are also aware of the specifications of the goods, transport conditions and/or any other peculiarities related to the conclusion of the transaction.

Therefore, any kind of endogenous shock (in this case – the imposition of an AD duty) requires time for the parties to adjust to the new reality, especially if the product could be produced or supplied only by a producer/exporter subject to an anti-dumping order and/or terms of collaboration between an exporter and an importer are attractive to both. Some clients will not be willing even to consider substitution of the respective trading partner (either in terms of a specific exporter or a country subject to the respective order in general). Consequently, it will be willing or endorse any circumvention techniques that would allow the best solution for both: itself and the relevant exporters.

Conclusion that can be drawn based on those deliberations is that understanding of the nature of the relationships between the exporters subject to the AD order and importers of the targeted merchandise could allow to anticipate and, most probably, prevent circumvention practices.

¹¹⁴ Rather concerning the same exporter or similar or almost identical situation.

¹¹⁵See Aluminium Extrusions (either a minor alteration to subject merchandise and/or a later-developed product) P.R. China Department of Commerce International Trade Administration FR Doc. 2016-06299, Federal Register /Vol. 81, No. 54 /Monday, March 21, 2016 /Notices.

Such practice already exists in some jurisdictions (e.g. Australia, New Zealand, the EU)¹¹⁶ as a part of a “public inquiry test”.

Therefore, this thesis argues that implementation and/or more intensive use of this mechanism could be introduced as a part of the pre-emptive anti-circumvention mechanism at the stage of the initial investigation and effectively contribute to elimination of such practices.

The purpose of the “public interest” inquiry is assessment of impact of an AD measure (before its imposition) on groups other than domestic producers in society and the country’s overall interest. Afterwards, investigating authorities may decide not to impose an anti-dumping measure based on the finding that such a measure is in contradiction with public interest, notwithstanding an affirmative injury and dumping determination. Although the cases where anti-dumping measures have been eliminated or not imposed for the sake of securing wider public interest concerns are quite rare.

The AD Agreement neither obliges nor prohibits considering wider public interest during anti-dumping investigations. During the Doha Round of Multilateral Trade Negotiations, a number of countries brought forward the proposal to include into the AD Agreement a mandatory requirement to consider a broader public interest before imposing anti-dumping measures. As was mentioned by Hong-Kong and China in their paper explaining the public interest proposal: “[w]ith this proposal, the importing Member does not simply assume that the application of an antidumping measure is beneficial to that Member, but actually considers whether that assumption is correct in the cases before it”¹¹⁷.

As it was already noted above, the antidumping measures have an effect not only on domestic producers, but also on other parties, such as industrial users and consumers. In addition, they impact trade and competition relationships in the market. Therefore, the application of a public interest test might serve to balance the competing interests and values of the parties involved,

¹¹⁶ Even despite the fact that there is no U.S. counterpart provision regarding a public interest procedure whereby the Commerce may recommend to the International Trade Administration that duties not be applied or be applied in less than the full amount, the “public interest” as a category exists in anti-dumping legislation of the USA. Thus, suspension of the anti-dumping investigation (will be discussed in more details in the next part) only if the Commerce is satisfied that such suspension is in the public interest (see 63 19 U.S.C. 1671c(d)). Therefore, even in the absence of the separate procedure for the public interest inquiry, the Commerce does factor it in circumstances mentioned above).

¹¹⁷ See TN/RL/W/194 dated 17 November 2005, p. 2

so that the negative effect of anti-dumping measures would not be disproportionate to its positive effect.

In the EU Regulation, the public inquiry test could lead to the non-imposition of duties or impact the form of the duty¹¹⁸, if it proves that negative impact on users, importers or consumers is clearly disproportionate to any benefit to the domestic industry by imposition of the duties.

Unlike the EU, a public interest investigation in Canada could result in either non-imposition of the duty or its imposition in reduced amount¹¹⁹.

The thesis claims that Canadian approach is more balanced, therefore, is in line with the principle of proportionality as provided for by the DSU, requiring that “the level of the suspension of the concessions or other obligations authorized by the Dispute Settlement Body (DSB) shall be equivalent of the level of nullification or impairment”¹²⁰.

What is typical for the public inquiries in Canada is that the CITT has periodically used non-economic policies to justify the outcome of public interest investigations as it was a case in Certain Prepared Baby Food¹²¹ and in Certain Iodinated Contrast Media¹²². In both cases a significant duty reduction was recommended due to concerns over health and welfare of the population, therefore the increase in price as a result of the duty would not be in the public interest.

Contrary to the Canadian practice the EU legislation does not provide for such an option¹²³.

Therefore, the next concern that usually arises when it comes to the public interest test is whether this test is supposed to determine if the duty is solely in the economic interest of respective parties involved or it is concerned with the overall welfare of the importing country meaning that non-economic considerations should also have a say. Notwithstanding the separation made between the economic and non-economic factors of the AD investigations, this

¹¹⁸ See Regulation 2016/1036, Art 9(4) and Regulation 2016/1037, Art 159.

¹¹⁹ See Special Import Measures Act RSC 1985 c. S-15 s 45(1).

¹²⁰ See Article 22.4 DSU.

¹²¹ See Certain Prepared Baby Food (30 November 1998) PB-98-001.

¹²² See Certain Iodinated Contrast Media (30 August 2000) PB-2000-001 at [3(a)].

¹²³ This right is constrained procedurally. Since only the parties who have economic interest could influence the outcome of the investigation limits these rights only to parties having economic interest in the investigation.

thesis claims that public interest factors could serve as objective determinants of the economic effect of the duties and therefore could not be neglected.

Hypothetical example to illustrate this point could be dumped construction materials, such as steel. If allegedly dumped steel is of higher quality than domestically produced steel, would it be justifiable to impose a duty if it might result in an increase in the price of the import, leading to a decrease in its use in the construction of residential houses and buildings? The policy considerations in this scenario are not just the economic impact of the duty being imposed, but the quality and safety of people's homes and buildings. It is economically justifiable to say that an increase in the price of the imported good might be disadvantageous to consumers and downstream industries because it raises their costs, but it is also in the public interest to have safe and well-constructed buildings.

If it is going to be more expensive for builders to use higher-quality imported steel or for hospitals to provide a certain medical procedure, the overall housing, infrastructure and healthcare objectives of the importing country could be undermined, resulting in a net negative public interest outcome.

The corresponding economic effect of such a scenario could be evasion of an AD duty, which is twofold in nature. On the one hand, such evasion could assure that the overall welfare of the importing country would not be negatively affected, although, on the other hand, it might undermine the objective of an AD inquiry, which would no longer be capable of offsetting the injury caused to domestic industry.

Thus, even though this thesis does agree that an AD inquiry should mostly rely in its deliberations on economic considerations, it also claims that complete ignorance of non-economic factors could lead to the circumvention of anti-dumping measures implying a clearly economic effect.

Therefore, this thesis states that some flexibility should be introduced to domestic AD legislation to allow modification of the duty due to the public interest. It is argued that public interests should be considered more frequently and should allow for the reduction of an AD duty to the extent when it is feasible to strike a balance between the various interests' groups.

For all the reasons above, the thesis submits that to reach a consistent conclusion of the anti-dumping investigation and to reduce the very initiative of the exporters to circumvent the AD order, the public interest investigation of economic and non-economic factors, should work in tandem and considered simultaneously. Such an approach would lead to the result where the interests of domestic industries, consumers and industrial users are taken into account by

establishing the duty on the level that corresponds to the wider public interest, but, at the same time still remedies the injury to the domestic industry.

1.3. Voluntary price undertakings as a mean to reduce circumvention practices

The aim of anti-dumping rules is commonly described as “protection of domestic industry against international price discrimination perceived as unfair if certain conditions laid down by the law are met, thereby effectively prohibiting lower cost foreign suppliers from participating in the domestic market”¹²⁴.

This goal could also be achieved by various means, including by an arrangement between a relevant exporter and an investigating authority, whereby the former obliges to revise its prices or, alternatively, to cease exports in the area in question in dumped prices so that investigating authorities are satisfied that the injurious effect of the dumping is eliminated¹²⁵.

Such set of commitments is commonly referred to as the voluntary price undertakings, a practice, which is widely used in the EC, but only seldom in the United States.

Voluntary price undertakings are twofold: on the one hand their approval means extra burden for the investigating authorities that have to monitor compliance with the terms of the relevant undertakings and, on the other hand, provides for increased flexibility and extremely wide discretion of the same authorities to determine and/or influence the content of such obligations.

This thesis contends that voluntary price undertakings, apart from being a flexible alternative to anti-dumping duties, could also reduce the incentive of exporters to circumvent their obligations as per the relevant anti-dumping order.

Despite generally accepted shortcomings of voluntary price undertakings (such as extra monitoring burden and risk of anti-competitive behaviour), there are set of advantages that proves them to be a viable and effective tool for elimination of the injurious effect of dumping and prevention of circumvention practices.

¹²⁴ See Montag F., *Price Undertakings in Anti-dumping Law: Recent Trends and Considerations from a Competition Law Perspective* Springer International Publishing Switzerland 2015. *Trade Policy between Law, Diplomacy and Scholarship* European Yearbook of International Economic Law, 10.1007/978-3-319-15690-3_21.

¹²⁵ See Art. 8(1) of the ADA.

Firstly, one should think about a voluntary undertaking, as the act of voluntarily assuming the obligation.

As it was elaborated by Hanoch Sheinman¹²⁶ “[t]he doing of (such) act must reflect a choice and must be accompanied by the intention not simply to do the act, but to do it in order to incur an obligation. A voluntary undertaking is ...an overt act done with the intention to incur an obligation and that communicates this intention to another, who understands it as such”. Therefore, it can be assumed with a high degree of probability that even irrespective of the fact that investigating authorities have a considerable leeway to modify or replace some “terms” of the voluntary undertakings, exporters will be more inclined to execute commitments that were shaped, at least partially, by their will.

Secondly, usually undertakings contain an obligation to restrain from circumventing, which is considered as “...a breach of the undertaking”¹²⁷. This obligation in combination with the right given to investigating authorities to carry verification visit at the premises of the relevant exporters could contribute to detection and halt of circumvention activities (if any) even before initiation of the relevant anti-circumvention investigation.

Thirdly, undertakings do not always cover all the product types subject to the respective AD order. Thus, it can be assumed that goods contained in the undertakings’ offer are the most important and interesting to an exporter (and, most probably) its clients in the importing country. Intuitively it means that exporters, suggesting the acceptance of undertakings, are already aware that compliance with the relevant AD order would be burdensome and, as a direct result, could lead to the creation of circumvention strategies unless the deal is reached between investigating authorities and exporters. Consequently, the thesis argues that even the very content of undertakings could give a clear and comprehensive picture of the interests pursued by exporters and could be used as a mechanism to detect product types which are under the risk of being subject to circumvention schemes.

¹²⁶ See Sheinman H. Contractual Liability and Voluntary Undertakings, *Oxford Journal of Legal Studies*, Vol. 20, No. 2 (2000), pp. 208.

¹²⁷ See Commission Implementing Regulation (EU) 2016/704 of 11 May 2016 withdrawing the acceptance of the undertaking for two exporting producers and amending Implementing Decision (EU) 2015/87 accepting the undertakings offered in connection with the anti-dumping proceeding concerning imports of citric acid originating in the People’s Republic of China.

Fourthly, this thesis claims that undertakings could be withdrawn at any time by the respective investigating authority with the subsequent application of the respective anti-dumping duty instead. Therefore, there is no chance for the wrongdoer to enjoy impunity.

All the above serve as an evidence that voluntary price undertakings could be a viable alternative to anti-dumping duties and could contribute to the reduced level of circumvention activities.

Nevertheless, both the EU and the USA use this practice mostly as an exception than as a rule.

In the EU, the Commission enjoys a wide discretion in accepting or rejecting undertakings offered by producers, which is given to it by the very wording of Article 8(3) of the Regulation, whereby the Commission is free not to accept undertakings offered “if their acceptance is considered impractical”. As practice shows, among the reasons to reject acceptance of undertakings are risks of cross-compensation schemes (in case an offer was provided by the MNE that has a branch in at least one of the Union countries)¹²⁸ or duplication of the EC’s control and monitoring system¹²⁹ (given separate undertakings offer provided by interested exporters).

To understand the nature of undertakings as contemplated by the anti-dumping law of the EU, several procedural and substantial aspects should be mentioned. As per the procedural requirements, the Commission may seek or accept relevant undertakings “only after a provisional affirmative determination of dumping and injury caused by such dumping has been made”¹³⁰. Acceptance of the undertaking in its turn, lead to the non-application of provisional or definitive anti-dumping duties to imports of the subject merchandise mentioned in the respective offer¹³¹. Undertakings are only valid while the relevant AD order imposing duties is in force¹³² and its acceptance does not preclude the completion of an anti-dumping investigation¹³³.

¹²⁸ See Ammonium nitrate (Russia), 2018 O.J. (L. 285), at recitals 39-40.

¹²⁹ See Certain castings (Chins), 2010 O.J. (L 77) 55.

¹³⁰ See Hot-rolled flat products of iron, non-alloy or other alloy steel (Brazil, Iran, Russia, Ukraine), 2017 O.J. (L 258) 24, at recital 669.

¹³¹ See Art. 8(1) of the Regulation.

¹³² See Case T-160/14, Yingli Energy (China) Co. Ltd v. Council, EU: T:2017:17:125, para. 46.

¹³³ See Article 8(6) of the Regulation.

Substantial requirements are, in their turn, mostly relate to the content of an undertakings' offer. The most important is to assure the ability of the latter to eliminate the injurious effect of dumping¹³⁴. To this end, various obligations are enshrined in an undertakings' offer, among which are establishment of a minimum import price for each product type contained in an offer, provisions dealing with the conditions of sale, monitoring obligations etc.

The same practice, even though, does not refer specifically to the name "voluntary price undertakings", exists in the USA and is usually an option when the respective anti-dumping investigation ends up by the issuing the Suspension agreement¹³⁵ by the Commerce.

Such an outcome implies that exporters accounting for substantially all imports of the subject merchandise shall either cease exports of the merchandise to the USA¹³⁶ or revise their prices to eliminate completely any amount by which the normal value of the subject merchandise exceeds the USA price, or to eliminate completely the injurious effect of imports.

The second option allows exporters to get so called "normal values" (hereinafter refers to as "NV(s)") for the subject merchandise to make its exportation into the USA feasible. Based on the author's experience, NVs are usually calculated and submitted by the relevant exporters for the approval of Commerce on a semi-annual basis before the commencement of the respective period¹³⁷.

¹³⁴ See Article 8(1) of the Regulation, third subpar., which provides that "[p]rice increase under such undertakings shall not be higher than necessary to eliminate the margin of dumping and they shall not be less than the margin of dumping if such increase would be adequate to remove the injury to the Union industry".

¹³⁵ See 19 U.S.C. 1673c. Commerce may suspend an investigation only in extraordinary circumstances (i.e., suspension will be more beneficial to the domestic industry than a complex investigation) based on an agreement to eliminate the injurious effect)

¹³⁶ Within 6 months after the investigation is suspended.

¹³⁷ Thus, for instance, normal value review covering sales and cost data from the period July 1, 2019 through December 31, 2019 (usually referred to as "period of review") should be submitted to establish NVs for the January 1, 2020 through June 31, 2020 period)

Basic steps to establish NVs contemplates the following tests to be conducted: home market arm's-length test¹³⁸; home market sales below cost test¹³⁹; home market expense and profit ratios¹⁴⁰, US per unit expenses and calculation of the respective NVs.

Afterwards average per unit expenses (as well as expenses on an overall basis) are determined for each product destined for sale in the US.

And as a last stage, NVs are derived for each product following the structure established in the suspension agreement.

Usually the process of deriving the final figures for NVs are time and resource consuming.

Except of providing the detailed chart with NVs calculated for each product, it is required from the exporters to fill in and submit a questionnaire whereby they provide information on organization, accounting practices, markets and merchandise (section "A"), sales in the home market or to a third country (section "B"), sales to the United States (section "C"), and cost of production and constructed value (section "D").

What is identical to the voluntary price undertakings' practice which exists in the EU, is that Commerce may suspend an investigation and, therefore, allow the obtain NVs, if it is satisfied that effective monitoring of a suspension agreement is practical¹⁴¹.

In a similar vein, if the Commerce determines that a suspension agreement is being, or has been, violated, it will order a suspension of liquidation and investigation will resume, if it had not been completed. If the original investigation was completed, Commerce will issue an antidumping duty order¹⁴².

Thus, both systems contain a "safety net" clause allowing resort to the "classical" duty outcome of anti-dumping investigations in case of infringement of the agreement between an investigating authority and respective exporter(s).

Even though there is a growing concern that "undertakings" overall are not an effective tool to offset an injury caused to domestic industry, this thesis claims that some changes to a form

¹³⁸ Meaning that the average net prices to the affiliated customers are on average within the range of 98,0% to 102,0% of the average net prices to all unaffiliated customers)

¹³⁹ To determine if domestic sales were below the cost of production in substantial quantities (20% or more).

¹⁴⁰Home market expense and profit ratios are expressed as a percent of cost (cost of manufacturing, G&A, and interest expenses).

¹⁴¹ See 19 U.S.C. 1673c(d).

¹⁴² See 19 U.S.C. 1671c(i) and 1673c(i)).

in which they currently exist, could make them an effective part of the pre-emptive mechanism of circumvention practices and therefore, would allow to retain and preserve the desired effect of anti-dumping investigations.

One of such improvements is an enhancement of the enforcement and compliance system. This allegedly could be done by introduction of a “double check” surveillance structure, implying more collaboration between the respective authorities of the exporting and importing countries. This thesis claims that initially the nature of anti-dumping investigations implies “country-country” relationships since allegation of dumping is directed against the whole country and not a specific company operating there.

Thus, to establish the most effective control against, inter alia, any possibility to circumvent the obligations assumed by the respective exporters, involvement of both: importing and exporting countries’ authorities is required.

As of today, there have been attempts to establish this kind of cooperation. For example, in 1984 the Japanese government introduced a system of minimum prices for export of hydraulic excavators when Japanese exporters of these goods were hoping to settle proceedings by price undertakings¹⁴³. This showed the high level of commitment and the readiness of the Japanese government to guarantee that the respective exporters will abide by their commitments.

The very same attempts have been undertaken within the framework of negotiations of a new draft of the Suspension Agreement on Mexican tomatoes, even though in a slightly different way.

The tipping point was in March 2019, when the Commerce expressed its intention to withdraw the said Agreement that had set floor prices and other ground rules for the product’s importing since 1996. In its explanation of such a decision the Commerce heavily relied on the allegations of Florida tomatoes’ growers arguing that “...[M]exican tomato growers have circumvented price floors, and generally decimated domestic tomato production”¹⁴⁴.

In order to bring an end to the existing tension, parties to the Agreement came with suggestions of “enhanced export management control” implementation.

¹⁴³ See Official journal, No L176 of 6 July 1985, points 12, 18.

¹⁴⁴ See With Duties Looming, Nogales Importers Hope for New Tomato Deal, available at: <https://fronterasdesk.org/content/869816/duties-looming-nogales-importers-hope-new-tomato-deal>, (accessed 07.10.2019).

Thus, the content of proposals was as follows¹⁴⁵: to block unintended exports of signatory grower tomatoes by non-grower signatories (including licensing requirements); to enhance the rights of the respective authorities under the Perishable Agricultural Commodities Act (PACA), in tandem with their right to “independently investigate potential agreement violations without an official complaint or allegation (which will) [s]ubject such violations to additional civil penalties.” (under the 18 USC 1001 and 734(i) of the Tariff Act). And the last “set of enforcement proposals” is suggestions with regard to the enhanced control of the Commerce.

These activities, *inter alia*, could include requiring “quarterly verifications, in Mexico, at border-crossing locations or through questionnaires issued by the Department, to spot check compliance”.

There is no further information as of the date of this thesis, however, it is argued that the enhanced level of enforcement of voluntary undertakings (previously referred to as “the probability of getting caught”) could make a valuable contribution to the reduction of circumvention practices by the respective exporters.

To make voluntary price undertakings even more potent and to ensure their acceptance by the investigating authorities, one should pay attention to the reasons for rejection of the respective undertakings by the investigating authorities.

Based on the practice of the EU, several recommendations could be made to the exporters willing their undertakings offer to be accepted.

Thus, undertakings should take into account the volatility of prices, including the prices for the main input¹⁴⁶. The formula to calculate price (price indexation) should be as simple as possible, excluding significant price variation and eliminating injurious dumping¹⁴⁷. The number of exporters should allow effective monitoring of the undertakings¹⁴⁸ and could not create a situation under which exporter would be free to decide to subject higher-priced products to the undertakings, and the lower-priced to the respective duty,¹⁴⁹ etc.

¹⁴⁵ See *Ibid.*

¹⁴⁶ See *Certain manganese dioxides (South Africa)*, 2008 O.J. (L. 69) 1, at recitals 68-69.

¹⁴⁷ See *Cotton-type bed linen (Pakistan)*, 2004 O.J. (L. 66), 2008 O.J., at recitals 135-137 and 2006 O.J. (L 121) 14, at recital 71.

¹⁴⁸ See *Potassium chloride (Belarus, Russia, Ukraine)*, 2000 O.J. (L 112), at recital 128.

¹⁴⁹ See *Polypropylene binder or baler twine (Poland, Czech Republic, Hungary)*, 1999 O.J. (L 75) 1, at recital 78.

Taking into account the above, the thesis argues that voluntary price undertakings could be a potent instrument for prevention of circumvention practices by the exporters. Being able to easily adjust to new market conditions and allowing to reach an agreement between parties of how the adherence to the terms and obligations contained therein could be achieved, the voluntary price undertakings are claimed to be underestimated component of the anti-dumping and anti-circumvention mechanisms.

Therefore, its improvement and more extensive use might strengthen anti-dumping system and leave limited or even no space for circumvention.

CHAPTER 2. ANTI-CIRCUMVENTION INQUIRIES AND «PRE-EMPTIVE» MECHANISM TO ALLEVIATE CIRCUMVENTION

2.1 Procedural aspects of anti-circumvention inquiries

This thesis in the Chapter 1 covers issues related to the substantive part of the AC inquiries based on the practice of the USA and the EU. This Chapter, in turn, covers the procedural steps of the respective AC inquiries and other means to combat circumvention, including, inter alia, via scope rulings and modifications to respective AD questionnaires. The thesis claims that it may contribute to setting up a comprehensive framework for the preemptive AC mechanism.

The USA AD rulebook, even though it does not provide for a separate step-by-step guidance as to how the AC inquiry should be conducted, directs the Commerce to take necessary action to “prevent evasion” of AD orders when it concludes that circumvention takes place. Beyond

that it is an obligation of the Commerce established by the case law “to administer the law in a manner that prevents evasion of the Order”¹⁵⁰.

The AC inquiry in the USA usually¹⁵¹ starts from the allegation made on behalf of domestic parties that imports of the respective merchandise circumvent the relevant AD order in force. Domestic parties usually identify specific exporters in their petition, although this does not preclude them to request Commerce to issue a country-wide finding of circumvention (if any). The Commerce, however, has to ensure that a petition contains evidence that satisfied criteria under respective section of the Act (as per the alleged type of circumvention) to initiate an AC inquiry.

Country-wide finding is feasible if exports from allegedly circumventing companies account for a large volume of subject merchandise and also if limiting an affirmative determination to certain companies will create the possibility of future circumvention by other companies that may not be identified (which could be a persuasive explanation for the majority of circumvention inquiries)¹⁵².

At the same time, to ensure that “non guilty” companies (those not involved in circumvention activities) would not be unfairly treated, the Commerce usually establishes a certification process to administer the country-wide finding of circumvention and allow imports that are not circumventing the relevant AD order to enter the USA and not be subject to cash deposit requirements¹⁵³.

The Commerce then issues quantity and value questionnaires to solicit information from producers and exporters of the subject merchandise for individual examination and subsequent verification at the premises of the respective party.

¹⁵⁰See *Tung Mung Development v. United States*, 219 F. Supp. 2d 1333, 1343 (CIT 2002), aff’d 354 F 3d 1371 (Fed. Cir. 2004) (finding that Commerce has a responsibility to prevent the evasion of payment of antidumping duties).

¹⁵¹“While the Commerce has the authority to self-initiate such reviews, self-initiation of AC reviews are extremely rare” – See Spicer M., Clarke P. and Horlick G., *Anti-Circumvention of Anti-Dumping Measures: Law and Practice of the United States*, Global Trade and Customs Law, 2016 Kluwer Law International BV, The Netherlands, Volume 11, Issue 11-12, p. 539.

¹⁵²See Memorandum, “Issues and Decision Memorandum for the Anti-Circumvention Inquiry of the Antidumping Duty Order on Certain Carbon Steel Butt-Weld Pipe Fittings from the People’s Republic of China”.

¹⁵³ See 19 CFR 351.210(e)(2).

If the case at issue presents significant difficulties for the Commerce, it issues a notice of preliminary findings and provides for additional comments before making its final determination.

When the Commerce issues a preliminary affirmative determination¹⁵⁴, it instructs U.S. Customs and Border Protection to suspend liquidation and require a cash deposit of estimated duties on the merchandise (except for the parties subject to a certification process as it was mentioned before).

At this stage the Commerce might issue supplemental questionnaires or request additional information from any party for verification. In accordance with 19 CFR 351.309, the Commerce then invites parties to comment on the preliminary determination and respective verifications.

It is important that interested parties cooperate and act “to the best of their abilities”¹⁵⁵, in course of an AC inquiry.

If the Commerce finds that “[a]n interested party has failed to cooperate, it may use an inference adverse to the interests of that party in selecting from among the facts otherwise available”¹⁵⁶. Adverse inference could be made by the Commerce irrespective of the “affirmative evidence of the bad faith on behalf of the respondent”¹⁵⁷. This mandate of the Commerce allows it “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated”¹⁵⁸.

The Commerce is supposed to issue a final affirmative determination, within 300 days of the date of publication of the respective initiation. However, as practice shows, it is very seldom when the Commerce actually follows such a deadline¹⁵⁹.

All the notices (i.e. for the initiation of an AC inquiry, preliminary and final determinations) are published in the Federal Register in accordance with sections 781(c) of the Act and 19 CFR 351.225(i) and (j).

¹⁵⁴See 19 CFR 351.225(l)(2).

¹⁵⁵See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel*).

¹⁵⁶ See Section 776(b) of the Act.

¹⁵⁷See *Nippon Steel*, 337 F.3d at 1382-83; see also *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997).

¹⁵⁸See SAA, H.R. Doc. 103-316, Vol. 1 (1994) at 870).

¹⁵⁹ See Spicer M., Clarke P. and Horlick G., *Anti-Circumvention of Anti-Dumping Measures: Law and Practice of the United States*, Global Trade and Customs Law, 2016 Kluwer Law International BV, The Netherlands, Volume 11, Issue 11-12, p. 539.

A final affirmative determination of the Commerce is not “the end of the story”, though. All AC determinations are subject to judicial review¹⁶⁰ and can be appealed to the Court of International Trade¹⁶¹, and afterwards to the Court of Appeals for the Federal Circuit¹⁶². The purpose of this review is to establish whether there is “a rational link between the facts found and the choices made”¹⁶³.

What is peculiar to the AD system of the USA is that not only AC inquiry may be used to combat circumvention, but also other means to combat circumvention, such as scope rulings.

Thus, under US law, there is an option to determine whether a product under consideration should be covered by the existing AD order – a scope inquiry¹⁶⁴.

The main difference between a scope ruling and an AC investigation is that as a result of a scope inquiry the Commerce determines whether a product is included within the scope of an order, while an AC inquiry usually answers a question “whether a product that falls outside the scope of the respective AD order in force could still be included in such an order to prevent its circumvention?” Procedurally, there are also several differences between the two.

Thus, there is no such a requirement in a scope enquiry to publish the notice of initiation (unlike the initiation of the AC inquiry) in the Federal Register. Instead, the Commerce notifies the interested parties by letter and only publishes quarterly notifications of the status of scope inquiries in the Federal Register¹⁶⁵.

The deadline for the Commerce is twice as short as for an AC inquiry (120 days instead of 200), but what is common is that usually scope inquiries are not completed within a deadline.

¹⁶⁰ See 19 U.S.C. § 1516a(b)(1)(B)(i) and 19 U.S.C. § 1516a(a)(2)(B)(vi).

¹⁶¹ Within thirty days from the date of publication of the final determination.

¹⁶² Within sixty days of the issuance of the final decision of the Court of International Trade.

¹⁶³ See *SunEdison, Inc. v. United States*, Ct. No. 15-00066, 2016 WL 3264167 *5 (CIT 2016).

¹⁶⁴ See 19 C.F.R. § 351.225(k).

¹⁶⁵ A list of notifications for scope rulings can be found online at, <http://enforcement.trade.gov/scope/scope-ruling-fr-notices.html>. However, such notifications are not highly informative, since they contain only short summary of the determination, the name of the requestor, and details of the respective AD order.

The foremost difference between AC and scope inquiries, though, is that decision of an AC inquiry is company specific (except for some cases, such as Petroleum Wax Candles from the People's Republic of China)¹⁶⁶, while scope rulings are always universal in coverage.

The thesis claims that this feature of scope rulings secures the “predictability” of the Commerce determinations by providing a precedent of kind. In *Mid Continent Nail Corp v United States*, for instance, scope ruling was determined as “a coherent and consistent guidance to regulated parties”¹⁶⁷, since it “allows reference to prior scope rulings on the same general issue when interpreting the scope of an anti-dumping order”. The thesis argues that scope inquiry practice is an instrument that might be capable of contributing to prevention of circumvention practices. Therefore, it could be borrowed and introduced by other jurisdictions as a part of their domestic AD legislation.

Practice of the EU with regard to the procedural steps followed in course of AC inquiries resembles the one which exists in the USA in many aspects. Thus, similarly to how it works in the US, an AC inquiry in the EU begins with initiation of the investigation by the Commission either in its own capacity (ex-officio investigation)¹⁶⁸ or by the request of any interested party or any Member State “on the basis of sufficient evidence regarding the factors supporting the allegation of circumvention of the respective AD order”¹⁶⁹.

In case the Commission is satisfied with the existing (in case of ex-officio initiation) or submitted evidence, it initiates an AC inquiry and makes “imports of the products under investigation subject to registration”¹⁷⁰ to ensure that, should an investigation result in findings of circumvention, AD “[d]uties of an appropriate amount can be levied from the date on which

¹⁶⁶ See *Later-Developed Merchandise Anti-Circumvention Inquiry of the Anti-dumping Order on Petroleum Wax Candles from the People's Republic of China: Affirmative Final Determination of Circumvention of the Anti-dumping Duty Order*, 71 Fed. Reg. 59,075, 59,076 (6 Oct. 2006).

¹⁶⁷ See (12) CAFC slip op at 18.

¹⁶⁸ For example as it was the case in ceramic tableware and kitchenware from China, where the Commission apart from having sufficient evidence in its disposal with regard to “a reorganisation of patterns and channels of sales of the product concerned” also has been informed “about ongoing customs authorities' investigations on the misuse of company specific TARIC codes” - *Tableware and kitchenware (ceramic) (shipping through exporter with lower duty rate), P.R. China*, Commission Implementing Regulation (EU) 2019/464 22.03.2019 OJ L 80, p. 18 [R700].

¹⁶⁹ See Art. 13(3) of the Regulation.

¹⁷⁰ See Art. 14(5) of the Regulation.

registration of such imports was imposed”¹⁷¹. The Commission, however, provides for an exemption procedure according to which, upon submission of persuasive and substantiated evidence of non-involvement in any kind of alleged circumvention activity, interested parties could shield themselves from payment of the respective duties¹⁷².

The parallel may be drawn between this practice and the respective certification procedures applicable in the USA.

In order to obtain information, it deems necessary for an investigation, the Commission sends questionnaires to allegedly circumventing parties. Article 18 of the Regulation allows the Commission to make its findings on the basis on the facts available. This is possible, inter alia, in cases where false or misleading information was provided to the Commission.

Distinct feature of AC inquiries in the EU is the right of the interested parties to request the intervention of the Hearing Officer in the proceedings. The latter, for instance, may organize hearings and mediate between the parties and the Commission “[t]o ensure that the interested parties’ rights of defense are being fully exercised”¹⁷³.

According to the Hearings Officer’s annual report as of 12 June 2017¹⁷⁴, for example, the Officer was requested to participate and/or intervene in 18% of the circumvention inquiries in the year 2015 and in 50% of such inquiries in 2016. This almost 50 % increase in the participation rate of the Hearing Officer might be indicative of its increasingly important role in course of such proceedings.

The next stage of an AC inquiry is submission of questionnaire’ replies by the respective companies which could also be accompanied by requests of their exemption from the possible extended measures¹⁷⁵. This is followed by the verification visits of the Commission authorities to the premises of the respective companies and subsequent hearings.

¹⁷¹ See Ibid.

¹⁷² See Art. 13(4) of the Regulation.

¹⁷³ See Decision (EU) 2019/339 of the President of the European Commission of 21 February 2019 on the function and terms of reference of the hearing officer in certain trade proceedings, L 60/20 Official Journal of the European Union 28.2.2019)

¹⁷⁴See Annual Report of the Hearing Officer for Trade Proceedings 2015/2016. - https://trade.ec.europa.eu/doclib/docs/2017/june/tradoc_155618.pdf.

¹⁷⁵ See Article 13(4) of the Regulation.

All interested parties are informed by the Commission of the essential facts and considerations leading to either an extension of a duty or termination of the respective investigation without extension of a duty. If a duty is extended, it applies to the whole country with an exception of exempted parties.

The latter is possible if the Commission reaches a conclusion that there was indeed proper justification and reasonable economic grounds for the activities alleged to constitute circumvention of the respective AD order¹⁷⁶.

Irrespective of the outcome of an investigation, the Commission directs the Customs authorities to discontinue the registration of imports of the subject merchandise (if such a registration was imposed).

Normally, AC investigations are to be concluded within nine months¹⁷⁷. All the Regulations adopted by the Commission are subject to their publication in the Official Journal of the European Union.

In addition to the standard AC inquiry there are two more procedures in the EU that serve the purpose of ensuring that the respective AD order is respected, which are origin and anti-absorption investigations.

Origin investigations may come into play in case of assembly operations in third countries, which inherently raises the question of the origin of the respective goods. Such investigations imply application by the EU authorities “of the non-preferential origin rules...sometimes in addition to AC investigations”¹⁷⁸.

The main aim of an origin investigation in the EU is to find an answer to a question which country could be considered as a country of origin of goods, if their production involves more than one country or territory? Guidance as to how to answer this question could be found in Art. 60.2. of the Union Customs Code (hereinafter referred to as “**the UCC**”), according to

¹⁷⁶ For instance in Seamless pipes and tubes of stainless steel from India (Seamless pipes and tubes of stainless steel (transshipment), Commission Implementing Regulation (EU) 2017/2093, L 299; 16.11.2017) it was established that the “business model of the company’s accounting for the vast majority of exports to the Union has not changed since the imposition of the duties... these companies were profitable before the initiation of the original investigation and remained profitable until and including the reporting period... and [t]he majority of the companies were equipped by the necessary fixed assets already before the initiation of the original investigation”.

¹⁷⁷ See Art. 13(3) of the Regulation.

¹⁷⁸ See Rovetta, Vermulst, Origin Rules in EU Anti-Dumping Law and Practice: An Update, 3(10) GTCJ 337–348 (2008).

which such goods shall be deemed to originate “in the country where they underwent their last substantial, economically justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture”.

There is no generally accepted and widely used approach as to how “substantial”, “economically justified” concepts should be determined. Some clarity, however, was introduced by the First Delegated Regulation of the EU¹⁷⁹. Thus, Art. 34 of this Regulation contains a list of minimal operations that are not considered to be substantial and/or economically justifiable for the purpose of conferring origin to a particular good. Such operations, for instance, include simple packaging operations, affixing marks, labels, simple operations consisting of the removal of dust, simple assembly operations of parts of products to constitute a complete product etc.

Simple assembly operations, in their turn, constitute one of the most common types of circumvention of the respective AD orders. The decisive criteria in answering the question whether the respective process could be considered as screwdriver operations or could indeed confer origin to goods.

In *Brother International*¹⁸⁰ the reference was made to the Kyoto Convention to evaluate to what extent assembly operations could constitute substantial process or operation. However, in the absence of the straightforward criteria, the European Court of Justice (hereinafter referred as to “**the Court**”) provided two important definitions: of the “simple assembly operations” and “substantial process or operation”.

Thus, “simple assembly operations” were determined as “[o]perations which do not require specific staff with special qualifications or sophisticated tools or specially equipped factories for the purposes of assembly. Such operations cannot be held to be such as to contribute to the essential characteristics or properties of the goods in question”¹⁸¹.

¹⁷⁹ See Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, Official Journal of the European Union L343/1, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2446&from=EN>.

¹⁸⁰ See Case C-26/88 *Brother International GmbH v Hauptzollamt GieBen*, ECLI:EU:C:1989:637, para 17).

¹⁸¹ See *Ibid.*

As with regards to what could be deemed to constitute a substantial process or operation¹⁸², the Court further said that “an assembly operation may be regarded as conferring origin where it represents from a technical point of view, and having regard to the definition of the goods in question, the decisive production stage during which the use to which the component parts are to be put becomes definitive and the goods in question are given their specific qualities”.

However, the Court did not stop there and stated that “technological criteria” is not necessarily decisive and “substantial transformation” could also be assessed from the perspective of the value added¹⁸³. In Court’s view to satisfy “value-added” criteria assembly should cause an appreciable increase in the commercial value of the goods at the ex-factory stage”¹⁸⁴.

Therefore, in order to prevent “origin hopping”, to ensure the attempts that goods attain a favorable treatment by means of minimal operations, the First Delegated Regulation in Art. 33 provides that “[a]ny processing or working operation carried out in another country or territory shall be deemed not economically justified if it is established on the basis of the facts available that the purpose of that operation was to avoid the application of the measures referred to in the Art. 59 of the Code”.

The Court interpreted this provision and applied it to the specific circumstances of the case related to circumvention of the AD order by saying that “where the transfer of the assembly coincides with the entry into force of the rules, which are avoided, the trader concerned must prove that there were reasonable grounds for carrying out the assembly operations in the country from which the goods were exported, other than the avoidance of consequences of the provisions in question”¹⁸⁵.

In the context of circumvention General rules for the interpretation (GRI) of the HS, i.e. rule 2(a)¹⁸⁶, also provides guidance as to as how simple assembly operations could be involved to

¹⁸² See Ibid, para. 19.

¹⁸³ See Ibid, para 20,21.

¹⁸⁴ See Ibid.

¹⁸⁵ See Ibid, para. 28.

¹⁸⁶ General Rule 2(a) provides that: “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled).

transform the respective product. However, in case the parts of the product are imported in separate consignments, invocation of this provision is not feasible¹⁸⁷.

The last avenue of resort when the relevant AD order is not being respected is initiation of the anti-absorption investigation (as provided for by art. 12 of the Regulation). However, “it is difficult to consider absorption a “traditional” form of circumvention, unless there are customs valuation issues”, since it has in principle only to do with the price of a product¹⁸⁸. Therefore, the thesis does not provide for details of how this type of inquiry is to be performed.

Understanding of the complexity of substantial and procedural aspects of AC inquiries provides insights into the core elements competent authorities are looking at in the course of AC proceedings. According to the thesis, pertinent issues of law and facts as they investigated during AC inquiries could become a part of the initial AD investigation and become a step towards prevention of circumvention at the earliest stage possible. In light of the above this thesis suggests that the format of AD questionnaires as it exists today might be modified to the extent it contains data relevant to detect intention and/or possibilities of exporters to circumvent AD duties. To this end, the thesis further provides for amendments to be made with regard to the existing questionnaire templates that are claimed to be a powerful tool to alleviate circumvention.

2.2. Toolkits to address circumvention at the stage of anti-dumping investigations

The term “circumvention” “implies the presence of a will or intent necessary to avoid a certain thing or situation”¹⁸⁹. The key words here are “will” and “intent”. While it is not feasible to determine the will of exporters to circumvent an AD order at the outset of an AD investigation, establishment of an intent seems a more realistic task.

¹⁸⁷ See Case C-35/93, *Develop Dr Eisbein GmbH & Co v. Hauptzollamt Stuttgart-West* (1994) ECR I2655).

¹⁸⁸ See Folkert Graafsma & Joris Cornelis “Anti-Circumvention: A Comparison” *Global Trade and Customs Law*, 2016 Kluwer Law International BV, The Netherlands, Volume 11, Issue 11-12, p. 547.

¹⁸⁹ See Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R / WT/DS340/R / WT/DS342/R / and Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, 119- DSR 2009:II, 625, para. 7.326.

Dictionary meaning of the word “intent” implies “meaning, planning or wanting to do something”¹⁹⁰.

Therefore, to understand whether exporters might have an intention to circumvent a future AD order (in case of affirmative determination of dumping), what is required is to “expose such a plan”. The only opportunity to do so is to pose “right” questions in the course of AD investigation that would allow to establish a necessary link between ends (actual opportunities and plans to circumvent the order) and means (circumvention itself).

The thesis, thus, claims that AD questionnaires¹⁹¹ should request information that might be indicative of the “intent” to circumvent the order. In addition, the thesis provides for advices as to how such information could be gathered and utilized, including, inter alia, list of questions that could be posed to the domestic industry.

To begin with, the thesis suggests identifying key elements that might be illustrative of the existence of any kind of circumvention options.

For the sake of convenience, this analysis is split into sections, according to the type of circumvention activities (as discussed in Chapter 1).

Thus, the first section deals with transshipment and shipment through the “lower rate” exporter.

The second one suggests how to address slightly altered merchandise and later developed merchandise; and the last one touches upon the assembly operations in the importing as well as any other third country.

The final result of the deliberations provided thereby is a list of changes to AD questionnaire templates as well as a list of key questions addressed to domestic industry concerning subject merchandise (See Annex 2 and Annex 3 respectively).

2.2.1. Transshipment and shipment through the “lower rate” exporter

Transshipment typically contemplates that there is no direct shipping route to the place of destination. In the ordinary course of business transshipment could be a good option if there is no possibility to ship goods directly from an exporting to an importing country, and/or if there

¹⁹⁰ See Cambridge Dictionary, available at: <https://dictionary.cambridge.org/dictionary/english-german/intent>, (accessed 07.10.2019).

¹⁹¹ All the suggestions are based on the AD questionnaires used by the EU and the USA.

is a need to save money on shipping costs. The drawback though is increased time of delivery and more “paperwork” required.

Thus, delays are inevitable when shipments are made using a transshipment route simply because consignments have to be unloaded and reloaded onto a different vessel, which requires extra time. Leaving alone the fact that it is hardly possible that shipment to the final destination will be done immediately after all the operation at port are completed. Usually it can turn into month long delays.

That is why transshipment is not always a viable option for transactions involving perishable goods and/or if timely delivery of the goods is indispensable for the further manufacturing process in an importing country.

Therefore, it is necessary to have a full picture of the “lifetime” of the product subject to investigation in order to detect if there are any kind of objective constraints making transshipment an impossible circumvention option. Such analysis might include assessment of the nature of goods (perishable or non-perishable), the terms and conditions of their delivery (time of delivery, transport conditions etc.), their end-use (whether it is used as a main input in the further production process or constitutes ready-to-use item destined for subsequent distribution on the domestic market of an importing country) etc.

Thus, the main objective is to establish the importance of the merchandise to the importer (including the effort required to substitute for such goods), whether “the time of delivery” aspect is critical for such an importer as well as the end-use goods are destined for.

Almost all these questions can be answered based on the existing AD questionnaire templates, inasmuch as detailed explanation of how delivery takes place is given in the respective part of the questionnaires. Moreover, verification at the premises of the exporter or the exporting producer is an additional venue that can be used to check information and/or get additional clarifications.

However, there are several aspects that could not be traced based on the respective questionnaire, although might serve as an indicator of possible circumvention.

Such indicators include “appearance” in the transaction chain of a logistics company known as a provider of “circumvention services” (See Chapter 1 for more details) and/or if goods are

destined for a country known on the basis of past experience as a “conduit” for transshipment schemes¹⁹².

As a part of an effective AD enforcement framework respective investigating authorities may elaborate a detailed “check list” including information on “conduit” countries, as well as the names of companies and the subject merchandise that have ever been involved in transshipment practices before. This could serve as a filter allowing to control countries and/or companies allegedly more “inclined” to be involved in circumvention schemes.

The thesis argues that abovementioned factors in concert with evidence of a sudden halt or substantial decrease of transactions to the importing country from the original exporting country might serve as a preemptive “changed pattern of trade” analysis pertinent to AC inquiries. Therefore, such factors might be considered as “Red flags” by the respective competent authorities at the stage of authorization of the merchandise for exportation¹⁹³.

Previous behavioral pattern, however, might not necessarily mean that exporters willing to circumvent would have resort only to shipment through the other country. Given particular circumstances of the case, shipment through the other company in the exporting country could be a better option (given the lower AD duty such other company might get). Consequently, specific arrangements that may exist between different companies that were sampled for AD investigations have to be assessed more thoroughly during AD investigations to allow signs that might be indicative of potential circumvention.

These signs are not so easy to determine since any kind of arrangement could be made spontaneously without following a specific pattern.

One of the main indicators of circumvention via “lower rate” exporter is “a sudden increase in the volume supplies from the particular exporter”¹⁹⁴. It means that early detection of this type of circumvention is possible, given the need to have evidence of the changed pattern of trade that is not possible to establish at the stage of an AD inquiry. However, in case there is a large divergence in the size of duties established for different companies of the exporting country, the probability of circumvention is higher than if duties vary only insignificantly. In light of the above the thesis claims that the only possibility to control for the risks of circumvention via

¹⁹² For instance, Malaysia, Thailand, Indonesia, Philippines, India, Vietnam, Taiwan, Mexico.

¹⁹³ “Red flags” practice is discussed in more details by Chapter 3 of the thesis.

¹⁹⁴ See *Tableware and kitchenware (ceramic)*, P.R. China, Commission Implementing Regulation (EU) 2019/464, 22.03.2019 OJ L 80, p. 18 [R700] at recital 6.

“low rate” exporter is through the high level of cooperation between the respective authorities of importing and exporting countries. In such a case, more stringent “inside” control may be established in the exporting country, which may allow to “watch” transactions among the companies subject to the AD duty. Among the suspicious signs there might be, for instance, supply of the merchandise in excess of the production capacity of a particular company (given the absence of any other explanation apart from taking part in circumvention scheme). All the information necessary, including data on production capacity, inventories and the list of “conventional” customers have to be indicated in the respective part of a “Red flags” annex to the AD order (See Annex 4).

2.2.2. Slightly modified product and later developed merchandise

In order to effectively combat circumvention of AD duty orders the respective competent authorities have to determine that “certain types of articles are within the scope of an order, even when articles do not fall within the order’s literal scope”¹⁹⁵. In other words, without unlawfully expanding the order’s reach, they have to examine if it could be claimed that merchandise otherwise subject to AD order was altered in form or appearance in minor respects.

Therefore, whether any kind of modification did not significantly alter the merchandise at issue¹⁹⁶ or amounts to more than insignificant alteration of the product are the key questions when it concerns this type of circumvention.

The thesis argues, that only through collaboration between a domestic industry and respective investigating authorities would it be possible to answer this question. First, domestic producers are perfectly aware of all the peculiarities of the product under investigation and its place on the market. Second, they are the main stakeholders interested in ensuring compliance with the respective AD order. Third, reiterating the first two arguments, there is a higher chance that domestic producers will be willing to cooperate with the investigating authorities on this matter.

¹⁹⁵ See *Target Corp. v. United States*, 609 F.3d 1352, 1355 (Fed. Cir. 2010) (quoting *Wheatland*, 161 F.3d at 1370).

¹⁹⁶ As, for instance in *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1350, 1356–57 (Fed. Cir. 2000), where it was concluded that products with “chemical weight exceeding the literal scope of the duty order by extra 0,0008% of boron cannot be considered as significant”.

Thus, this thesis suggests that a separate list of questions addressed to domestic industry could be issued in every AD investigation (See Annex 3). These questions would refer to all the minor modifications possible with regard to merchandise subject to the AD order. The objective is to compile a list of slightly modified like products with the same essential characteristics as the product concerned, although, “slightly different” in chemical content, physical composition, technical characteristics, commercial uses¹⁹⁷ etc.

This information has to be as detailed as possible, to allow proper assessment of all the aspects pertinent to AC inquiries, including, inter alia, possible “economic justifications” for any kind of modifications made to the merchandise other than imposition of a duty.

To this end additional aspects as regards economic reasons to produce and/or export slightly modified products have to be given a separate attention.

This information may include, for instance, logistical reasons or storage conditions required if compared with the merchandise subject to the order¹⁹⁸.

Such an analysis is to assess (at least roughly) whether other considerations may be regarded more important (in economic terms) than avoiding the initial duties, meaning that the respective analysis has to be carried out. For instance, if hypothetical savings arising from logistical

¹⁹⁷ See BP Products North America Inc. where it was concluded that “all the imports of biodiesel blends (including slightly modified) must undergo the same transformation process and are targeted at the same final demand and that they therefore injure the same European industry”, Judgment of the General Court (Fourth Chamber) of 16 January 2014. BP Products North America Inc. v Council of the European Union. Dumping - Subsidies - Imports of biodiesel originating in the United States - Circumvention - Article 13 of Regulation (EC) No 1225/2009 - Article 23 of Regulation (EC) No 597/2009 - Slightly modified like product - Legal certainty - Misuse of powers - Manifest errors of assessment - Obligation to state reasons - Equal treatment - Principle of sound administration. Case T-385/11, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1569687525248&uri=CELEX:62011TJ0385>.

¹⁹⁸ As, it was alleged by the applicant in BP Products North America Inc. “[s]torage time is more limited” for the altered merchandise ... must be stored in specialized “Fatty acid methyl esters” tanks, which are smaller and more expensive than those used for blends with a lower proportion of biodiesel”. See Judgment of the General Court (Fourth Chamber) of 16 January 2014. BP Products North America Inc. v Council of the European Union. Dumping - Subsidies - Imports of biodiesel originating in the United States - Circumvention - Article 13 of Regulation (EC) No 1225/2009 - Article 23 of Regulation (EC) No 597/2009 - Slightly modified like product - Legal certainty - Misuse of powers - Manifest errors of assessment - Obligation to state reasons - Equal treatment - Principle of sound administration. Case T-385/11, recital 98, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1569687525248&uri=CELEX:62011TJ0385>.

concerns represent only a negligible amount of the tentative amount of AD duty (if any), there is a very low probability that such actions might find economic justifications if AC inquiry is to be initiated.

This list should also consider all the types of merchandise that, although excluded from the scope of AD investigation (based on the lower dumping and/or injury margin thus calculated or given the absence of export sale of the particular product), are the most “likely candidates” to substitute export of the products affected by the initial AD duties.

All data concerning potential modifications of the subject merchandise is suggested to be included in the “Red flags” annex to provide for high level of compliance and enforcement of the respective AD order.

Based on the list prepared by the domestic producers as well as the respective questionnaire replies investigating authorities may access whether such types of “slightly modified” merchandise are manufactured by the producing exporters/producers or whether there is a capacity to produce “modified” types of merchandise in future.

The thesis further claims that approach concerning potential modifications of the subject merchandise might also be useful to detect a type of circumvention involving a “later-developed” product¹⁹⁹.

Thus, while the concept of the later developed merchandise is mostly used with respect to any later-developed merchandise which incorporates a significant technological advance or significant alteration of an earlier product²⁰⁰, the Commerce analysis in course of an AC inquiry touches upon the same tipping points as are relevant for the “slightly altered” merchandise, which are: A) general physical characteristics, B) expectations of the ultimate purchasers, C) ultimate uses; D) channels of trade; and E) advertisement and display²⁰¹. In a nutshell, “[t]he later-developed merchandise provision is designed to prevent circumvention of an antidumping order by a comparable product (as determined by the Diversified Products analysis) to the subject merchandise”²⁰². The only major difference is that in “later developed” type of circumvention inquiry merchandise is usually “not commercially available at the time of the

¹⁹⁹ As this this the case in the USA.

²⁰⁰ See section 781(d) of the Act.

²⁰¹ See Section 781(d)(1)(A)-(E) of the Act.

²⁰² See Target I, 578 F. Supp. 2d at 1375-76; Target III, 609 F.3d at 1358-60.

investigations”²⁰³. Therefore, what could be done on behalf of domestic industry is sharing insights (if any) with regard to any possible modifications of the product that might be considered as “significant”. One of the sources of obtaining this information is proclamations by the exporters of the plans to release new product and/or any changes either on the official websites or relevant catalogues/brochures of the range of goods offered for sale. Both changes have to happen after the initiation of the respective AD investigation²⁰⁴.

In this regard it is crucial not to constrain the time limit for the domestic industry to submit this kind of information to the investigating authority, thus, ensuring a constant collaboration between the two.

2.2.3. Assembly operations in the importing as well as any other third country

The question: “When does the relocation of production and assembly to a third or importing country constitute circumvention of an AD duty?”- has traditionally been highly contentious.

The biggest concern pertinent to this issue is how to distinguish legitimate commercial activities from activities that should be deemed as circumvention. The decision of a company to relocate its production facilities to other countries is not necessarily driven by the imposition of an AD duty. Commercial considerations, such as rising costs, changes in consumer tastes and preferences and/or changes in the political and economic realities²⁰⁵, might play even higher role than threat of imposition of AD duties.

²⁰³See Aluminium Extrusions from the People’s Republic of China: Initiation of Anti-Circumvention Inquiry: Affirmative Preliminary Determination of Circumvention of the Antidumping and Countervailing Duty Orders and Intent to Rescind Minor Alterations Anti-Circumvention Inquiry, 81 FR 79444 (November 14, 2016) (Preliminary Determination) and accompanying Preliminary Decision Memorandum.

²⁰⁴ For instance, in Aluminum Extrusions from China the offering for sale of a product that did not exist before the initiation of the investigation but was added in the catalogues of the respective exporters almost immediately after. What is also important to note that this “allegedly later developed” type of merchandise was advertised and displayed similarly to the subject merchandise, shared the same general physical characteristics as well as it had the same or comparable ultimate uses, channels of trade and expectations of the ultimate purchasers. All those factors allowed to reach a positive determination of circumvention. See Ibid.

²⁰⁵ For instance, as this is relevant nowadays for American companies with factories in China after the commencement of the trade tensions between the two countries. Thus, relocation was the only possibility to retain positions in the respective market for some American firms according to the recent findings of the US-China Business Council’s (USCBC) 2018 Member Survey. See <https://www.uschina.org/media/press/uscbc-releases-2018-member-survey>.

Sometimes, however, companies do not relocate their production facilities to other countries, nor they invest in production facilities having legitimate concerns in mind. Instead, they simply complete the subject merchandise using the “assembly company” in a country where no trade restrictive measures exist only with intention to circumvent AD duty payment.

The thesis argues that what is required for such actions to be identified and detected is “quantitative and qualitative analysis” of production steps to manufacture subject merchandise

Nowadays, even though AD questionnaires contain information pertaining to the production process of the subject merchandise, it mostly has a general character and does not seek to serve the purpose of detecting and/or preventing any potential possibilities to circumvent an AD order.

Based on the assessment of the practice of various jurisdictions in this regard, including the EU and the USA, the main question to be addressed in course of an AC inquiry concerns the “size, scope, and sophistication”²⁰⁶ of the importing or third country assembly.

Thus, manufacturing process occurring in “assembly plants” sometimes “[r]epresents a relatively minor portion of the overall manufacturing of finished ... (merchandise), in terms of the stages, production activities and processes involved”²⁰⁷. Therefore, the thesis argues that the key issue to detect this type of circumvention is to determine whether a particular manufacturing process could be considered as minor in terms of both: contribution to the value added (quantitative analysis) and its nature (qualitative analysis).

Quantitative and qualitative differentiation between the major and minor manufacturing steps regarding the subject merchandise, might be done by requesting exporters to describe production process of such a merchandise in a particular format. The thesis, thus, provides for suggestions as to the possible modifications of AD questionnaires (See Annex 2). It further claims that even if proposed changes do not contribute to the prevention of circumvention activities, information on the nature and value added of each step of the manufacturing process of the subject merchandise may be useful for the conduct of AC inquiry (if initiated) by contributing to making a determination concerning the “significance” of the assembly process.

²⁰⁶ See 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 People’s Republic of China, A-570-029, C-570-030 Anti-Circumvention Inquiry, May 16, 2018, <https://enforcement.trade.gov/frn/summary/prc/2018-11029-1.pdf>.

²⁰⁷ See Ibid.

To this end, the thesis, first, proposes a list of details to be requested regarding subject merchandise production process descriptions.

The list will be followed by a subsequent explanation as to how this information might be interpreted to control for early indicators of circumvention.

As a rule of thumb, AD questionnaires contain a section dedicated to description of production process and costs associated with such production. However, the respective costs are only calculated with regard to different types of merchandise and not assigned to the specific stages of production. Furthermore, data pertaining to a description of company's production facilities, stages of the production process etc. is submitted only in the narrative part of a questionnaire. Flowcharts of the production cycle attached to questionnaires usually do not contain enough information to provide a full overview of the full lifecycle of the merchandise.

Therefore, the thesis suggests that in addition to information generally requested, cost of production section of questionnaires might also provide for a chart to be completed on behalf of the respective producing exporter/producer, where the following information has to be indicated: (See Annex 2).

Qualitative assessment

- Nature of the production process – production, processing, assembly, completion of semi-finished goods. It is important to mention whether some steps are or can be done in the same production line²⁰⁸. And or if any production stage is completed by an affiliated company.
- Production equipment, production activities (with a more detailed description in the narrative part);
 - Input necessary at each manufacturing stage and resulted output;
 - Total cost of production for each production stage.

²⁰⁸ What was important in Certain Cold-Rolled Steel Flat Products (CRS) from China while assessing the relative importance of assembly operations in Vietnam: “[r]olled Steel ITC Report and Cold-Rolled Steel ITC Reports, the vast majority of production activities necessary to produce CRS occur at the molten steel, semi-finished steel, and hot-rolling stages (including melt stage, ladle metallurgy station, slab casting stage, rolling stage, temper pass, pickling and light oil coating, and levelling and slitting/shearing). In contrast, the processing in Vietnam involves only two or three steps that can be done in the same production line (such as pickling, cold-rolling of HRS, and annealing, where applicable)”. See <https://enforcement.trade.gov/frn/summary/prc/2017-26607-1.pdf>.

*Quantitative assessment*²⁰⁹

- Value of each stage as a total value of the merchandise exported (including the respective proportion of value added of each step).

The thesis argues that such an approach might give an understanding of the importance of each step the product has to undergo to be transformed into a final good as well as of the recourses (including, inter alia, inputs, production overheads, time) necessary to commence and complete each stage. Moreover, by assigning specific values required for each production stage to be completed it may serve the same purpose as “substantial transformation analysis” (See Chapter 1) used in AC inquiries.

Thus, for instance, in Certain Cold-Rolled Steel Flat Products (CRS) from China, Commerce determined that 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”²¹⁰. The Commerce assessed, inter alia, the materials, energy, labor, and capital equipment used by the assembly plant in Vietnam in comparison to the materials, labor, energy, and capital equipment used by its suppliers in the production of the input.

As a result, it was demonstrated that the vast majority of the production process necessary to manufacture CRS occurs in China and importance of the production process in Vietnam was minimal in terms of both: the nature of the production process and the value added to the final cost of the product.

In light of the above, this thesis argues that information about the input required at each production stage, the respective importance of each stage (quantitative and qualitative) might contribute to the prevention of circumvention activities.

For instance, based on the data submitted by exporters, the respective investigating authority would be aware which production stages might be considered as major and which as minor and,

²⁰⁹ Quantitative assessment of each production stage is claimed to be important since specific process may require highly skilled labour force. This might rise significantly the value added of the respective manufacturing stage and produced product and thus, increases the importance of the specific manufacturing stage at the entire production process.

²¹⁰ See Preliminary Decision Memorandum for Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders on Certain Cold-Rolled Steel Flat Products from the People’s Republic of China A-570-029/C-570-030 Anti-Circumvention Inquiry Public Document E&C/Office VI: JD/TW, December 5, 2017.

most importantly, which inputs are required at each step. This information in a concise form is suggested to be included in the respective “Red flags” annex (See Annex 4) to the AD order to ensure compliance therewith.

Thus, in case an exporter commences exportation either to the importing country and/or any other third country²¹¹ of the product which is included in the “Red flags” annex as an input for assembly operation, this transaction has to be subject to end-use check. Consequently, before the confirmation is obtained from the end-user that these products are not to be used in the manufacturing and/or further supply to the country with AD duties in force, such transaction could not be authorized.

The thesis further submits that voluntary price undertakings might play a role in diminishing the possibilities to resort to this type of circumvention.

This could be done by including an obligation of an exporter not to sell the subject merchandise to the first independent customers in the importing country via its related parties located therein. Additionally, in case an assembly or any other minor processing take place in importing and/or any other country voluntary price undertaking may also include an obligation not to sell a final product to independent customers in importing country²¹².

This thesis, thus, suggests the toolkits aim to provide the respective investigating authorities with practical, user-friendly guidance in implementing the preemptive AC mechanism. These are followed by three annexes containing templates as to how this mechanism may be implemented. First, Annex 2 provides for changes to the respective AD questionnaires that may be helpful in understanding the specificities of the production process of the subject merchandise from the perspective of the importance and “the value” of each consequent stage of manufacturing. Second, Annex 3 addresses the “allegedly altered merchandise” prevention strategy by ensuring “on-the-ground” support on the domestic industry-level. Third, the thesis in Annex 4 recommends how to facilitate and intensify co-operation between various competent authorities to ensure compliance with the respective AD order.

²¹¹ With a particular focus on destinations where assembly operations to circumvent AD orders have been detected.

²¹² In RBMs from China, for example, voluntary price undertakings with such obligations might prevent or reduce the risk of circumvention, based on the fact that that 60%–70% of the parts were purchased by the Vietnamese assembler from its related companies in China. See *Certain ring binder mechanisms from China* (2004) OJ L232/1 (extension Vietnam). In *Lighters from China* (2013) OJ L82/10 (extension Vietnam).

The thesis claims that implementation of all the above-mentioned strategies might assist countries to successfully tackle circumvention of AD orders.

CHAPTER 3. OTHER METHODS TO PREVENT CIRCUMVENTION IN ANTI-DUMPING

3.1. The role of enforcement of anti-dumping orders in preventing circumvention

The integration of national economies and markets has increased substantially in recent years. This has put a strain on the AC framework, which could not be designed to anticipate all the means available to exporters not willing to follow AD orders. The current AC rules have revealed the weaknesses of the whole inquiry process, thus requiring a bold move to ensure that dumping practices could be effectively eliminated as a result of the initial AD investigation, not giving space for “circumvention options” per se.

As it was asserted in Chapter 1 of the thesis, one of the most potent reasons why exporters resort to circumvention of AD orders is weakness of the enforcement system. Therefore, effective control on trade in goods subject to AD duty is vital for countering the risks associated with the proliferation of circumvention practices.

This thesis claims that consistent and strong enforcement system is necessary to ensure compliance with AD orders.

It is argued that to make the whole enforcement system viable, proportional and consistent there should be collaboration between competent authorities of the importing and exporting countries, as well as enhanced collaborative working arrangements between the importing and exporting countries’ authorities.

An example of such a “domestic collaboration” is Australia’s “whole-of-government approach” it has implemented to “[m]onitoring potential non-compliance and circumvention of

anti-dumping measures”²¹³. This includes through the AD Commission “[r]eferrals of potential non-compliance with measures to the Australian Border Force (hereinafter referred to as the “ABF”), conducting joint site visits, and regular communication about potential circumvention matters”²¹⁴.

According to the Self-Assessment Report of the AD Commission during 2017-18, “Home Affairs provided the Commission with access to its import database and information requested by the Commission on trade flows, to assist the Commission in monitoring the effectiveness of measures. In addition, Home Affairs/ABF has supported a number of anti-dumping investigations by providing targeted import data and advice (for example, on tariff classifications) early in the investigation process”²¹⁵. To further develop and streamline their interactions the AD Commission and Home Affairs/ABF agreed on the Protocol for working arrangements to “ensure an effective collaborative approach”²¹⁶.

Thus, a foundation for these working arrangements is laid down by the key principles, which include sharing of information of possible instances of non-compliance and circumvention of AD measures; cooperation in identification of opportunities to improve voluntary compliance with AD measures; participation in training opportunities (including exploring new data analytic techniques) to develop greater capability and in-house expertise in relation to monitoring compliance and circumvention etc.

The thesis submits that these principles might also be relevant for establishing the framework for international cooperation to combat circumvention in AD.

Therefore, the thesis provides guidance based on best practices worldwide, which aims to ensure that competent authorities could adequately and effectively identify, check and track transactions that involve merchandise subject to AD to secure compliance with the respective AD order.

²¹³ See Applying for an anti-circumvention inquiry, available at: <https://www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/applying-for-an-anti-circumvention-inquiry>, (accessed 07.10.2019).

²¹⁴ See Self-Assessment Report: The Anti-Dumping Commission 26 November 2018, available at: <https://www.industry.gov.au/sites/default/files/2019-01/anti-dumping-commission-self-assessment-rpf-report-2017-18.pdf>, (accessed 07.10.2019).

²¹⁵ See Ibid.

²¹⁶ See Ibid.

The first step towards mitigating the risks associated with evasion of AD orders is to establish a framework to support national competent authorities of the exporting country in the exercise of their responsibility for deciding on authorization of export of the merchandise subject to AD duty. In practice it would mean a need for a clear organizational structure with well-defined responsibilities as well as sufficient technical resources.

Such practices have been suggested by the Wassenaar Agreement and include, inter alia, guidance for transit and transshipment²¹⁷, effective export control enforcement²¹⁸, guidance related to Dual-Use Goods compliance.²¹⁹

These documents suggest various methods on how suspicious, unreliable or risky transactions should be evaluated. Among the proposed instruments there are maintenance of the list of the consignees, end-users and other parties to the transaction; educational outreach programs for export controls; increased cooperation between enforcement agencies and licensing authorities; detainment of suspected shipments, etc.

Some of these instruments could also be relevant to strengthen the enforcement system in AD. These include training and awareness raising, transaction screening process and procedures, performance review, audits, reporting and corrective actions.

Training and educational seminars, for instance, might carry out awareness raising for the respective competent authorities and, thus, ensure that they possess the knowledge to control compliance of the respective parties with AD order.

Giving the “leading role of customs authorities” in export control activities²²⁰, they are usually among the most frequent “users” of such training programs.

²¹⁷ See Best Practice Guidelines for Transit or Trans-shipment, available at: <https://www.wassenaar.org/app/uploads/2019/consolidated/01Best-Practice-Guidelines-for-Transit-and-Trans-shipment.pdf>, (accessed 07.10.2019).

²¹⁸ See Best Practices for Effective Export Control Enforcement, available at: <https://www.wassenaar.org/app/uploads/2019/consolidated/Best-Practices-for-Effective-Export-Control-Enforcement.pdf>, (accessed 07.10.2019).

²¹⁹ See Best Practice Guidelines on Internal Compliance Programmes for Dual-Use Goods and Technologies, available at: <https://www.wassenaar.org/app/uploads/2019/consolidated/2-Internal-Compliance-Programmes.pdf>, (accessed 07.10.2019).

²²⁰ See Wolfgang H. and Harden K., The new European customs law, *World Customs Journal*, Volume 10, Number 1.

It should be mentioned that in the USA trainings and seminars for governmental employees, including customs authorities, are considered as part of a broader goal of reformation of the government to become “[l]ean, accountable and more efficient”²²¹.

Thus, to “eliminate waste and inefficiencies, and maximize individual performance of the employees”, the U.S. Customs and Border Protection (CBP) provides a wide array of “short-term and long-term technical training”, including on export controls²²².

Similar possibilities exist in the EU, that is being a proponent of “facilitating legitimate trade and ensuring the effectiveness of customs controls”²²³ suggests various training programs for the customs professionals under the EU Customs Competency Framework²²⁴.

However, both the US and the EU provide for programs that mostly concern detection of contraband, investigation of illegal transfer of nuclear materials and missile equipment, etc.

Neither country focuses on identification, monitoring and assessment of risks related to circumvention of AD orders, even though the interests at stake are no less important than in case of contraband.

Even though Customs authorities are allegedly the main audience for such training programs, the thesis argues that training might also be relevant for the authorities responsible for authorization of exports of goods subject to AD order (export licensing authorities)²²⁵.

This is because licensing authorities would be the first bodies to thoroughly assess the transaction on any signs indicative of circumvention.

Given the highly protectionist approach in the matters related to international trade many countries have adopted nowadays, “dumping” is no longer a buzzword. Circumvention of the

²²¹See USA Memorandum M-17-22, available at: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-22.pdf>, (accessed 07.10.2019).

²²² See Export Control and Related Border Security (EXBS) Program Overview, available at: <https://www.cbp.gov/border-security/international-initiatives/international-training-assistance/exbs>, (accessed 07.10.2019).

²²³ See L 343/558 Official Journal of the European Union 29.12.2015 Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code.

²²⁴ See The EU Customs Competency Framework, available at: https://ec.europa.eu/taxation_customs/eu-training/eu-customs-competency-framework_en, (accessed 07.10.2019).

²²⁵ If “licensing practice” as suggested thereby, is to be implemented.

respective AD orders, thus, is a real challenge that requires immediate action. Therefore, the thesis argues that a strong knowledge is required and should be at the heart of the anti-circumvention framework.

To this end it is necessary to ensure that customs and export licensing authorities on the one hand and investigating authorities, on the other hand have a common vision on how to mitigate risks related to circumvention and properly understand the distinct role of each other in this process.

This goal could be achieved by providing compulsory periodic training for customs authorities and respective licensing authorities in the form of “external seminars, ..., in-house training events” by the investigating authorities officials²²⁶. To be as effective as possible, these trainings may incorporate international experience and lessons learnt from “performance reviews, audits, reporting” related to circumvention²²⁷.

The key idea is to align operational work of customs, licensing and investigating authorities with goals of ensuring enforcement of AD orders and preventing their circumvention.

Such format of a training might facilitate, first, the ability of the competent authorities to correctly classify and prioritize risks that might arise upon exportation of the goods subject to AD order.

Second, such training might be an indispensable instrument for successful implementation of the practice of “Red flags” (as further elaborated thereby).

Third, educational seminars would allow interaction between all the involved parties, which is conducive for efficient and result-oriented collaboration and could serve as a forum for sharing of experiences. These forums might also act as a capacity-building exercise and a means of on-the-job training, thereby promoting mutual understanding and contributing to building trust.

As a direct result, knowledge obtained during training programs might serve as a bedrock for implementation of effective transaction screening procedures and respective performance reviews.

²²⁶ See Best Practices for Effective Export Control Enforcement, available at: <https://www.wassenaar.org/app/uploads/2019/consolidated/Best-Practices-for-Effective-Export-Control-Enforcement.pdf>, (accessed 07.10.2019).

²²⁷ See Ibid.

The nature of transaction screening and performance review procedures was thoroughly determined and explained by the EU in its Recommendations on internal compliance programmes for dual-use trade²²⁸ as actions which “[a]im to ensure that no transaction is made in breach of any relevant trade restriction or prohibition”.

To detect the risk of a breach the EU suggests employing a “Red flags” screening system while conducting transaction assessment, licensing and post-licensing control to handle suspicious transactions.

“Red flags”²²⁹ would indicate signs intrinsic to suspicious transactions. Their identification is vital for countering risks of proliferation of restricted or prohibited activities.

This thesis claims that this practice (taking into account the peculiarities of circumvention in AD), could also be used in the context of ensuring compliance in dumping.

Based on the proposed changes to AD questionnaire²³⁰ and also taken into account data that is usually subject to the analysis during the AD inquiry, this thesis suggests the following.

First, “Red flags” in AD have to be identified and determined by the respective investigating authorities in the course of AD investigation and set out in an annex to the respective AD order. Such an annex is to be considered as a document with limited access concerned only authorities responsible for enforcement of AD orders (See Annex 4).

Second, even though there could not be a single control list to be checked upon exportation of the goods subject to an AD order, the thesis states that a uniform template may serve as a starting point giving guidance for respective investigating authorities in their determination of “Red flags”.

Third, given the fact that investigating authorities have the most broad expertise in AD (as well as the peculiarities of each specific case), the thesis claims that ensuring that all the important findings concerning subject merchandise are shared with authorities responsible for enforcement of AD orders, might be a valuable asset in combating circumvention.

²²⁸ See Recommendations Commission Recommendation (EU) 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009 5.8.2019 Official Journal of the European Union L 205/15. See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019H1318&from=EN>.

²²⁹ See List of “Red flags” is based on existing best practice and is derived from: — the Wassenaar Arrangement list of advisory questions for industry (Agreed at the 2003 Plenary and review agreed at the 2018 Plenary) — the 2010 Compliance Code of Practice (Department for Business Innovation & Skills, United Kingdom).

²³⁰ See as provided for in Chapter 2.

Introduction of “Red flags” practice, thus, would allow convergence between substantive, procedural and enforcement aspects of AD. Being based mostly on the data submitted in the respective questionnaires (one of the procedural steps of the AD inquiry), “Red flags” practice is supposed to take into account all the deliberations and conclusions of the investigating authorities (part of a substantive analysis) and subsequently used by the competent authorities while authorizing the respective merchandise for exportation (enforcement of AD order).

Consequently, this practice might induce collaboration between the respective competent authorities and make “check process” smoother and more effective. Additionally, it would allow to consider every aspect of the particular AD order and, thus, minimize the probability of circumvention.

Therefore, the main aim of identification of “Red flags” in AD would be to ensure that any changes to the merchandise subject to AD order (including chemical composition, thickness, width, unusual shipping, packaging etc.) have a sufficient economic justification other than avoidance of applicable AD duties. Consequently, if there is any change that could serve as an indicator of circumvention, such a transaction should be either stopped and/or be subject to additional checks/approvals before goods could be allowed for exportation.

The post-authorization licensing control, in its turn, allows to stop or put on hold items when any of “Red flags” are raised after the authorization was obtained to ensure that a particular transaction does not circumvent the AD order. For example, if the competent authorities receive a “whistle” or any other data that requires additional check prior to actual exportation of the merchandise.

This mechanism, where trade control decisions are reviewed and double-checked (the “four eyes principle”)²³¹, guarantees that attempts of circumvention could be detected and stopped even if the respective transaction was authorized for export.

Such double step analysis might also allow to take effective corrective actions and adapt the export control operations according to the findings of the past performance review and to further improve and strengthen AD enforcement system.

Consequently, the strengthening of the enforcement system in AD, including the ability of the competent authorities to interdict and investigate suspicious exports, is necessary to ensure compliance with respective AD order and, thus, combat circumvention.

²³¹ See What is the four-eyes principle? available at: <https://www.unido.org/overview/member-states/change-management/faq/what-four-eyes-principle>, (accessed 07.10.2019).

As it was stated, international dimension of AD underscores the need for a concerted effort between countries and their competent authorities when dealing with AD cases. It implies that effective measures against circumvention could be undertaken and ensured only through international cooperation.

Therefore, this thesis further asserts that to handle the circumvention problem in a coherent and efficient way, the framework for mutual administrative assistance between the respective competent authorities is required in addition to actions identified before. Mutual administrative assistance could include, inter alia spontaneous exchange of information, country-by-country reporting, simultaneous examinations or examinations abroad.

All the above-mentioned actions have been proved to be effective instruments within the scope of the OECD and G 20 BEPS project²³². Under the BEPS inclusive framework, “[o]ver 130 countries are collaborating to put an end to tax avoidance strategies that exploit gaps and mismatches in tax rules to avoid paying tax”²³³. BEPS refers to tax planning strategies to artificially shift profits to low or no-tax locations where there is little or no economic activity. These schemes undermine the fairness and integrity of tax systems because of the competitive advantage businesses that use BEPS gain over enterprises that operate at a domestic level.

Given the resembling nature of evasion practices in taxation and circumvention in AD, these practices might be relevant in the context of dumping.

To begin with, the thesis suggests that “spontaneous exchange of information” determined as Action 5²³⁴ in the BEPS project might be one of the most significant for the purpose of prevention of circumvention practices. Being widely used in the area of advanced tax rulings, this action is designed to prevent the very occurrence of risk of tax evasion schemes. Thus, it might be capable of contributing to the prevention of circumvention practices in AD as well.

²³² Thus, according to the 2019 OECD Secretary-General Report “[t]oday, more than 4500 exchange of information agreements are in force with 90 jurisdictions implementing the CRS in 2018). As a result, 47 million offshore accounts – with a total value of around 4.9 Trillion euros – have been exchanged for the first time. The latest update brings the amount to over EUR 95 billion in additional revenue (tax, interest, penalties) from such initiatives”. See OECD (2019), OECD Secretary-General Report G20 Finance Ministers and Central Bank Governors – June 2019, OECD, Paris, www.oecd.org/tax/oecd-secretary-general-tax-report-g20-finance-ministers-june-2019.pdf.

²³³ See OECD/G20 Inclusive Framework on BEPS, available at: <https://www.oecd.org/tax/beps/about/>, (accessed 07.10.2019).

²³⁴ See Action 5 “Counter harmful tax practices more effectively, taking into account transparency and substance”.

Spontaneous exchange of information in AD would mean that if a country (importing or exporting) suspects that there is a risk of circumvention of an AD order, it has to share this information with the other country even if no such request was submitted beforehand²³⁵.

Upon processing of the respective information, the next step could be an arrangement between interested countries to examine simultaneously each in its own territory the question they have a common or related interest in or, alternatively, to allow the representatives of the competent authorities to be present during the appropriate part of the examination in the state that provided such data²³⁶.

Exchange of information was recognized as an effective tool not only to address problems arising in taxation, but also in anti-trust law. Thus, since governments use both AD and competition rules with a single goal of promoting efficiency and competition, the thesis claims that experience elaborated and used in the competition law might be relevant for AD.

According to UNCTAD reports “international cooperation among competition authorities can be regarded as a tool for effective enforcement of competition laws”²³⁷.

Indeed, UNCTAD questionnaire responses from member States in 2013 show that enforcement cooperation has been regarded as a key ingredient to effective enforcement of competition law. This is illustrated by the numerous efforts undertaken by international institutions, such as UNCTAD and the OECD, as well as established networks, including the

²³⁵As per the 2019 OECD BEPS Project Report this action “[l]ead to more transparency and equipped tax administrations with more data on the international tax arrangements of their multinational groups thus enabling earlier detection of aggressive tax planning/ non-compliance. See OECD/G20 Inclusive Framework on BEPS, Progress report July 2018-May 2019, <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-progress-report-july-2018-may-2019.pdf>.

²³⁶ Both these actions are contemplated by the Convention on Mutual Administrative Assistance in Tax Matters (in art. 8 and 9 respectively) (OECD and Council of Europe (2011), The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol, OECD Publishing. <http://dx.org/10.1787/9789264115606-en>.

²³⁷ See Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices Geneva, 6–10 July 2015 Item 6 (b) of the provisional agenda Consideration of proposals for the improvement and further development of the Set, including international cooperation in the field of control of restrictive business practices International cooperation in merger cases as a tool for effective enforcement of competition law, https://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d4_en.pdf.

International Competition Network, and the recent upsurge in other forms of informal cooperation arrangements and forums.

A good example of the positive effect of international cooperation is the Rio Tinto and BHP Billiton case. “The corporation and coordination between the Australian Competition and Consumer Commission, the EC, the German Cartel Office, the Japan Fair Trade Commission and the Korea Fair Trade Commission enabled all agencies to have similar remedies for the joint venture proposal necessitating the applicants to withdraw their application. The possible joint venture was found to have anticompetitive effects in the markets of all the countries concerned. Through sharing of information and exchange of opinions, Korea Fair Trade Commission took the lead by sharing its findings with the other authorities, therefore mounting the pressure on the two companies to succumb to the force of the coordinated action and pulled out of the proposed deal. Such is the force of cooperation in handling competition cases”²³⁸.

What is important is that positive effect of cooperation was recorded not only for developed countries, but also developing countries, which further proves universality of cooperation as a tool for effective enforcement actions.

Based on the UNCTAD survey in 2014²³⁹, many competition authorities in Africa, for instance, reported having cooperated (although, informally) in resolving merger cases in their various jurisdictions.

Brazil has also engaged successfully in coordination with advanced competition authorities in the USA and the EU, such as the US Department of Justice and the EU Commission (DG Competition) in merger cases. Moreover, to deal with specific cases, Brazil was also seeking assistance from other agencies, including Federal Trade Commission, FAS Russian Federation etc., which “has proved to be an effective way of enhancing Brazil’s enforcement efforts”²⁴⁰.

²³⁸ See Ibid.

²³⁹ See Trade and Development Board Trade and Development Commission Intergovernmental Group of Experts on Competition Law and Policy Fourteenth session Geneva, 8–10 July 2014 Item 3 (a) of the provisional agenda Consultations and discussions regarding peer reviews on competition law and policy, review of the Model Law on Competition and studies related to the provisions of the Set of Principles and Rules Distr.: General 28 April 2014 Original: English Informal cooperation among competition agencies in specific cases. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/504/84/PDF/G1450484.pdf?OpenElement>.

²⁴⁰ See Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices Geneva, 6–10 July 2015 Item 6 (b) of the

Another example of successful collaboration with foreign authorities can be illustrated by the Nestlé-Pfizer merger case, where “Chile consulted and held a number of meetings with foreign authorities, mainly from Latin America, in order to identify the relevant market, the economic analysis applied in each country and the measures implemented to mitigate the problem. In this regard, Chile found informal cooperation with the Mexican Federal Competition Commission very relevant as it significantly facilitated the analysis of the case”.

Consequently, similarly to practices which exist in competition and taxation law, cooperation in the form of exchange of information, might become a potent platform for exchange of experiences in AD that would allow to build understanding between countries and confidence in each other as enforcement partners.

Providing co-operation can be both time and resource intensive, this cost is however advantageous in the long term when cooperation is ongoing and shows significant performance results.

Global value chains and the increased role of MNEs make the worldwide economy extremely interrelated and intertwined. It implies that to fully understand the modalities of operation of an allegedly circumventing company, competent authorities could not rely exclusively on the data they have in their possession and/or that was provided by such a company upon request. Instead, to carry out proper assessment of the questioned activities, information exchange agreements are required. The lack of quality data on circumvention practices has been a major limitation to measuring and preventing the occurrence of such practices, making it difficult and time consuming for the authorities to conduct AC inquiries. Country-by-Country reporting²⁴¹, in its turn, may facilitate the implementation of the Information Exchange Agreements²⁴². These Agreements could become a powerful instrument ensuring consistency while reaching conclusion with regard to particular transaction and risks associated with its authorization (such as circumvention of AD orders).

provisional agenda Consideration of proposals for the improvement and further development of the Set, including international cooperation in the field of control of restrictive business practices International cooperation in merger cases as a tool for effective enforcement of competition law, https://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d4_en.pdf.

²⁴¹ See Action 13 on the BEPS project.

²⁴² Confidentiality concerns, however, could not be compromised and could allegedly be overcome through the use of waivers.

Alternatively, Country-by-Country reporting could be done through the creation of a “focused multinational information-sharing platform”, following the initiative of UNCTAD in 2013. Key features of the platform might “[i]nclude the pooling of resources to create a visible flow of non-confidential information in order to enhance enforcement capabilities...”²⁴³.

Under this platform, information on past and ongoing practices related to enforcement of AD orders could be easily accessible, which might reduce enforcement fragmentation, and enhance efficiency of authorities responsible for the enforcement of the respective AD orders.

The databank would also contribute to learning and informal ad hoc collaboration, thus reducing costs associated with international cooperation.

In a modern world information is considered as one of the most valuable assets. Accordingly, the thesis submits that unconstrained access to information on enforcement practices in AD in various jurisdictions could facilitate and encourage cooperation and, as a result, contribute to prevention of circumvention practices.

AD implies compliance with the requirements contained in the respective order. One the main requirements is to abstain from circumvention of AD duty payment.

In this regard the thesis suggests that some instruments that are used by the world-wide community to prevent and suppress illicit transactions could be used in enforcement of AD orders.

Thus, the practice that could be “borrowed” (although, slightly modified) is the “freezing”²⁴⁴ of the amount of the applicable AD duty if any kind of “Red flags” (as previously determined) was identified at the time post-authorization step²⁴⁵. This amount could be returned to the importers’ accounts only upon the confirmation from the importer (and/or end-user if they are not the same) that such goods would not be used in the production of merchandise subject to the AD order and subsequently supplied to the respective importing country; and/or confirmation that goods are not merely transshipped but destined for the consumption in that

²⁴³ See Ibid.

²⁴⁴ “Freezing” applies to assist jurisdictions in implementing the targeted financial sanctions contained in the United Nations Security Council resolutions (UNSCRs) relating to the prevention and suppression of the financing of terrorist acts – UNSCR 1267 and its successor resolutions and UNSCR 1373 and any successor resolutions related to the freezing, or, if appropriate, seizure of terrorist assets.

²⁴⁵ Meaning that the respective transaction was previously authorized.

country etc. Such measures, therefore, could be understood as “measures of conservancy” permitting enforcement of the relevant AD order.

Until such conformation from the importer would be received by the relevant customs authorities, the merchandise could be subject to the procedure similar to the “end-use check” (as exists for example in the EU²⁴⁶). This implies that such merchandise could be retained for the time necessary to make all the verification checks and/or to get all the required documents from the exporters and/or importers.

The “end-use” confirmation procedure has been recently recognized as being capable to contribute to combating circumvention practices.

Thus, in the EU case Certain Aluminum foil from China “end-use procedure in accordance with Article 254 of the Union Customs Code” ... was implemented “in order to prevent any future circumvention of the measures”²⁴⁷ and was claimed as the only effective way to do so.

The thesis also argues that given the complexity of today’s supply chain, enforcement system would be more effective if it allows and encourage cooperation with a general public.

This is possible to achieve by introducing “whistleblower” procedures to govern the actions of employees when a suspected or known circumvention of the respective AD order occurred. Whistleblowers with inside information could become the best eyes and ears for the competent authorities in their “battle against circumvention practices”.

For instance, in January 2018, textile importer American Dawn agreed to pay \$2.3 million²⁴⁸ to resolve allegations that it mislabelled towels as polishing cloths in the hopes of paying a lower tariff rate. The case was brought by a former employee who received approximately 17% of this settlement for blowing the whistle.

Thus, according to the USA False Claims Act, whistleblowers²⁴⁹ could earn an award by simply showing a company avoided a tariff by not disclosing a country of origin;

²⁴⁶ See Art. 254 UCC.

²⁴⁷ See Commission Implementing Regulation (EU) 2017/271 of 16 February 2017 extending the definitive anti-dumping duty imposed by Council Regulation (EC) No 925/2009 on imports of certain aluminium foil originating in the People's Republic of China to imports of slightly modified certain aluminium foil, Official Journal of the European Union, L 40/51.

²⁴⁸ See Department of Justice U.S. Attorney’s Office Northern District of Georgia, Thursday, January 11, 2018 - <https://www.justice.gov/usao-ndga/pr/textile-importer-resolves-false-claims-act-allegations-0>.

²⁴⁹ Called a relator by the False Claims Act.

misrepresenting the nature or physical characteristics of imported goods in order to pay a lower duty or tariff; or undervaluing goods etc.

The USA, however, is not the only user of such an instrument. The EU also has plenty of examples when whistleblowing practices made significant contributions to the public interest.

One of the most prominent examples is the UBS case, where UBS banker Bradley Birkenfeld helped to successfully expose one of the world's largest tax evasion schemes and to recover at least USD 10 billion²⁵⁰.

In Australia, reporting of “any suspicious activities or apparent non-compliance” with an AD order could be made through centralized e-server, called “Border Watch”²⁵¹. This platform allows everyone who possesses information he/she considers illustrative of circumvention just by clicking a hyperlink and filling up the e-form²⁵².

Australia overall is highly committed to working with general public to identify and address compliance issues. It, thus, has established the Compliance Advisory Group²⁵³ as a collaborative forum with industry to co-design solutions for trade and goods compliance issues. The “guiding star” of this collaborative framework is the Industry Engagement Strategy 2020²⁵⁴, that “focuses on improving voluntary compliance by working with industry”.

The vision of the Department of Immigration and Border Protection (Australia's competent authority) for industry engagement is based on 4 principles: (1) clear strategic direction (implemented through forward work plans, reviewed regularly); (2) effective communication (forums for meaningful and consistent two-way engagement including through industry consultative committees, issue-specific industry advisory groups and the annual Industry Summit); (3) in partnership and collaboration and with a focus on (4) responsive action (pro-active engagement, responsive to requests and feedback, focus on actions and results,

²⁵⁰See Mark Worth “Gaps in the System: Whistleblower Laws in the EU”, <https://www.changeofdirection.eu/assets/uploads/BLUEPRINT%20-%20Gaps%20in%20the%20System%20%20Whistleblowers%20Laws%20in%20the%20EU.pdf>.

²⁵¹See Border Watch Online Report, available at: <https://www.homeaffairs.gov.au/help-and-support/departmental-forms/online-forms/border-watch>, (accessed 07.10.2019).

²⁵² The person, however, can choose to remain anonymous.

²⁵³See Compliance Advisory Group, available at: <https://www.abf.gov.au/importing-exporting-and-manufacturing/trade-and-goods-compliance/compliance-advisory-group>, (accessed 07.10.2019).

²⁵⁴ See Industry Engagement Strategy 2020, available at: <https://www.abf.gov.au/trade-and-goods-compliance-subsite/files/ies-trade-customs-traveller.pdf>, (accessed 07.10.2019)..

accountable for our commitments). The stakeholders concerned include industry as well as community groups, academia, local and state governments, foreign governments and international organizations.

Moreover, Australia succeeded in implementation of various channels of communication with general public through digital channels, including websites, service centers and regular information updates through digital and face-to-face channels. The next step is “to develop a dedicated industry website portal with information tailored specifically for industry sectors... link(ed) with other relevant government trade and industry information portals”²⁵⁵.

Therefore, partnership with society could be a potent tool to achieve the higher level of compliance with relevant AD order and preventing their circumvention.

Apart from collaborating with society, government authorities could use a wide variety of methods to encourage and secure compliance with the law. One of the most widespread actions to enforce the respective law is application of monetary penalties (fines) to a wrongdoer. This enforcement instrument is intended both: to punish non-compliance and prevent its future re-occurrence.

The thesis reiterates the hypothesis elaborated in Chapter 1 and argues that since importers are usually aware whether circumvention of an AD order is taking place, monetary penalty should be applied not only to the circumventing exporter but also the respective importer. The AD duty thus is suggested to be allotted equally between them. This “double pressure mechanism” might not only facilitate reduction of circumvention practices, but also would be in line with the principle of proportionality and fairness given the involvement in circumventing activities of both parties.

Application of penalties, in its turn, should mostly serve to remediate the consequences of dumping, rather than “punish offenders” and collect revenue. Thus, it should consider possibility of voluntary reporting and compensation for injury due to circumvention by the offender.

²⁵⁵ See Ibid.

The system to collect such fines has to be transparent and consistent²⁵⁶ and allow for systematic consideration of many factors (such as continued/repeated circumvention despite the order of the competent authority to cease it, etc.).

Additionally, the thesis claims that a penalty system if introduced as a part of the AD law should be “effective, proportionate and dissuasive”²⁵⁷. These three concepts are widely used in the EU case law and deal with the relationship between the seriousness of the offence and the type and severity of the penalty. Therefore, an effective penalty has to ensure that the goal, which is successful enforcement of an AD order, is reached, despite the occurred circumvention. Effective penalty would also aim to prevent any future attempts of circumvention from happening, because “non-compliance becomes economically unattractive”²⁵⁸. Proportionality of the penalty, at the same time, would mean that it “is appropriate to attain the objectives set by the legislation in question and does not go beyond what is necessary in order to attain these objectives”, meaning in the context of AD that such a penalty could not exceed the level of injury established in the course of AD investigation²⁵⁹.

In the field of competition law, the question of “proportionality” was addressed slightly differently. This is visible in the EC Court of Justice’s affirmation in *ACF Chemiefarma*²⁶⁰, according to which “corporate fines” imposed by the EC for violations of competition rules (namely, Articles 81 and 82 of the EC Treaty) “have as their object to punish illegal conduct as well as to prevent it being repeated”, which contemplates a precautionary context as well.

The last criterion, which is dissuasiveness of a penalty would imply that “the risk it represents for offenders, has a genuinely deterrent effect”²⁶¹. To assess whether a penalty in fact has a “deterrent effect” it is necessary to compare if “the offender is at an advantage when not complying with legal obligations and when penalties are applied, the penalty system is not dissuasive enough”²⁶².

²⁵⁶ Consistency of approach, though, does not necessarily mean uniformity (by virtue of the peculiarities of specific industry and product type), but a similar approach in similar circumstances to achieve compliance with the AD law.

²⁵⁷ See Judgment of 26 September 2013, *Texdata Software*, C-418/11, EU:C:2013:588, par. 50.

²⁵⁸ See Opinion of Advocate General Geelhoed of 29 April 2004 in *Commission / France*, Note 11 above, par. 39.

²⁵⁹ See case Judgment of 13 July 2017, *Túrkevei Tejtermelő Kft.*, C-129/16, EU:C:2017:547, par. 66.

²⁶⁰ See Judgment of 15 July 1970 in *Case 41/69 ACF Chemiefarma* [1970] ECR 661 para 173.

²⁶¹ See Judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, par. 63.

²⁶² See Judgment of 27 March 2014, *LCL Le Crédit Lyonnais*, C-565/12, EU:C:2014:190, pars. 50 and 51.

Thus, the thesis claims that an effective, proportionate and dissuasive penalty for a breach of an AD order is the one that may ensure compliance with the AD law.

Such a penalty may have a deterrent effect, by creating a credible threat of being disclosed and fined by shifting the balance of expected costs and benefits and, thus, discouraging circumventing companies from engagement in circumvention activities.

As explained above, fines in AD should in principle exceed the expected gain from the violation of an AD order multiplied by the inverse of the probability of a fine being effectively imposed, but the amount may in some cases have to be limited to a lower level because of the requirements of proportionality.

For this reason, the thesis suggests that the extent to which the company concerned cooperates with the competent authorities can justify a lowering of the fine. Cooperation can in two ways be advantageous for AD enforcement. Firstly, it reduces the administrative cost as well as the duration of the screening of the respective transaction. Indeed, the spillover effect of such saving of administrative costs is that it might allow to redeploy the resources saved to the other transactions, thus increasing the overall probability of detection of circumvention practices and lowering the general levels of AD fines.

Secondly, the cooperation might bring the circumvention to an end earlier, thus decreasing its negative consequences. The shorter duration of the circumvention activities may correspondingly reduce any potential gains from the violation and therefore, also lower the amount of fine required to redress the balance. However, lowering the fine because of cooperation may be only justified if and to the extent that the cooperation has the beneficial effects described just above.

The very purpose of AD is to offset injury sustained by the domestic industry. Therefore, enforcement in AD has to ensure that respective orders are not being circumvented, so that achievement of such purpose is not endangered.

The thesis argues that no single recommendation on its own could achieve the level of enforcement of AD orders that would result in an immediate halt to circumvention practices. Rather the interplay among different means and mechanisms, could make this possible. The thesis, therefore, argues that diversity in enforcement methods, could put in place effective enforcement mechanism in AD and assist with prevention of circumvention.

First, this could be done through anticipatory (ex ante) intervention, implying reduction of the opportunities to commit violations. The prevention of circumvention, thus, could be enforced through a system of training and awareness raising, transaction screening procedures

(i.e. licensing, post-licensing control, including “Red flags” practice) and performance review as suggested by the thesis.

Second, one could try to prevent circumvention by reducing willingness to resort to circumvention practices. This could be done through cooperation with general public (including whistleblowing practice) as well as by imposition of fines. Indeed, these instruments might not only have a deterrent effect, by creating a credible threat of punishment for those who would be willing to circumvent, but also might have moral effects. This is because cases involving imposition of fines and public denunciation are usually widely reported and for those companies who care about public image and reputation, this could become additional cost that clearly outweighs all the benefits associated with circumvention.

FINAL CONCLUSIONS AND RECOMMENDATIONS

There are no general rules on the multilateral level that specifically protect against circumvention of AD orders, nor is there a common framework to provide assistance as to how this problem may be addressed.

Notwithstanding the elaborated “domestic” AC framework, even the most developed countries, such as the EU and the USA suffer from the undermining effects circumvention of AD duties implies. This highlights the importance to amend existing approaches and adopt new ones.

The thesis, thus, suggests recommendations as to how circumvention problem might be rooted out by providing for a “pre-emptive” AC framework at the stage of initial AD investigations.

The key recommendations refer primarily to adjustments to the existing AD questionnaire templates and to the framework for closer collaboration between the competent authorities to effectively enforce AD orders.

According to the thesis, the format of AD questionnaires is not elaborated enough to allow detection of intention and/or possibilities of exporters to circumvent AD duties. Therefore, it provides for several bespoke solutions as to how this information may be gathered and utilized.

The thesis further claims that with its immense trade distortive effect, the problem of circumvention in AD also requires increased level of cooperation and common actions between the countries. It, thus, suggests different mechanisms that may put in place effective enforcement mechanism in AD and assist with prevention of circumvention. Among these mechanisms are training and awareness raising, transaction screening procedures as well as increased cooperation with general public and imposition of fines.

As a part of suggested enforcement actions framework, the thesis put forward the innovative approach (namely “Red flags” mechanism) that may allow early “identification, detection and appropriate response” to suspicious transactions involving merchandise subject to an AD order.

Additionally, the thesis assumes that revisiting and attributing more value to the concepts of “public interest inquiries” and “voluntary price undertakings” may have important positive implications for the alleviation of circumvention practices.

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Annex 1

Data on the EU and the USA anti-circumvention investigations initiated or concluded (with and/or without the extension of duty) during the period 1 January - 21 August 2019 (chronological by date of publication)

EU			
Product	Country of origin (consigned from)	Regulation/Decision N°	OJ Reference
2016			
Initiated			
Aluminium foil (slightly modified merchandise)	P.R. China	Commission Implementing Regulation (EU) 2016/865	L 144; 01.06.2016, p.35
Citric acid (transshipment)	Malaysia	Commission Implementing Regulation (EU) 2016/32	L 10; 15.01.2016, p.3
Solar panels (crystalline silicon photovoltaic modules and key components) AD+AS (transshipment)	Malaysia	Commission Implementing Regulation (EU) 2016/184	L 37; 12.02.2016, p.56 & p76
Solar panels (crystalline silicon photovoltaic modules and key components) AD+AS (transshipment)	Taiwan	Commission Implementing Regulation (EU) 2016/184	L 37; 12.02.2016, p.56 & p76
Hand pallet trucks and their ess. Parts ((slightly modified merchandise)	P.R. China	Commission Implementing Regulation (EU) 2016/1346	L 214; 09.08.2016, p.1
2017			
Initiated			
Seamless pipes and tubes of stainless steel (transshipment)	P.R. China	Commission Implementing Regulation (EU) 2017/272	L 40; 17.02.2017, p.64 AD
Hand pallet trucks and their ess. parts (transshipment)	Vietnam	Commission Implementing Regulation (EU) 2017/1348	L 188; 20.07.2017, p.1 AD
Citric Acid (transshipment)	Cambodia	Commission Implementing Regulation (EU) 2017/2300	L 329; 13.12.2017, p.39 AD
Concluded with extension of duty			
Aluminium foil (slightly modified merchandise)	P.R. China	Commission Implementing Regulation (EU) 2017/271	L 40; 17.02.2017, p.51 AD
Concluded without extension of duty/termination			
Seamless pipes and tubes of stainless steel (transshipment)	India	Commission Implementing Regulation (EU) 2017/2093	L 299; 16.11.2017,
2018			
Concluded without extension of duty/termination			
Hand pallet trucks and their ess. parts (transshipment)	Vietnam	Commission Implementing Regulation (EU) 2018/260	L 49; 22.02.2018, p.16
Citric Acid (transshipment)	Cambodia	Commission Implementing Regulation (EU) 2018/1236	L 231; 14.09.2018, p.20
2019			
Initiated			
Tableware and kitchenware (ceramic) (shipping through exporter with lower duty rate)	P.R. China	Commission Implementing Regulation (EU) 2019/464	22.03.2019 OJ L 80, p. 18 [R700]

USA			
Product	Country of origin (consigned from)	Regulation/Decision N°	FR** Reference
2016			
Initiation			
Certain Uncoated Paper (Merchandise Subject to the Minor Alterations)	Australia, Brazil, P.R. China, Indonesia, and Portugal	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2016-26847	Federal Register /Vol. 81, No. 215 /Monday, November 7, 2016 /Notices
Aluminum Extrusions (either a minor alteration to subject merchandise and/or a later-developed product)	P.R. China	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2016-06299	Federal Register /Vol. 81, No. 54 /Monday, March 21, 2016 /Notices
Certain Corrosion-Resistant Steel Products (3d country assembly or completion)	Vietnam	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2016-27327	Federal Register / Vol. 81, No. 219 / Monday, November 14, 2016 / Notices
Certain Cold-Rolled Steel Flat Products (3d country assembly or completion)	Vietnam	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2016-27850	Federal Register /Vol. 81, No. 222 /Thursday, November 17, 2016 /Notices
Preliminary affirmative anticircumvention determination			
Aluminum Extrusions (either a minor alteration to subject merchandise and/or a later-developed product)	P.R. China	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2016-27346	Federal Register / Vol. 81, No. 219 / Monday, November 14, 2016 / Notices
2017			
Initiation			
Carbon Steel Butt-Weld Pipe Fittings (3d country assembly or completion)	Malaysia	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2017-18046	Federal Register / Vol. 82, No. 164 / Friday, August 25, 2017 / Notices
Diamond Sawblades and Parts Thereof (3d country assembly or completion)	Thailand	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2017-26398	Federal Register /Vol. 82, No. 234 /Thursday, December 7, 2017 /Notices
Preliminary affirmative anticircumvention determination			
Certain Uncoated Paper (Merchandise Subject to the Minor Alterations)	Australia, Brazil, P.R. China, Indonesia, and Portugal	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2017-12001	Federal Register / Vol. 82, No. 110 / Friday, June 9, 2017 / Notices
Certain Corrosion-Resistant Steel Products (3d country assembly or completion)	Vietnam	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2017-26606	Federal Register / Vol. 82, No. 236 / Monday, December 11, 2017 / Notices

Certain Cold-Rolled Steel Flat Products (3d country assembly or completion)	Vietnam	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2017-26607	Federal Register / Vol. 82, No. 236 / Monday, December 11, 2017 / Notices
Final affirmative anticircumvention determination			
Aluminum Extrusions (later-developed product)	P.R. China	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2017-15683	Federal Register / Vol. 82, No. 142 / Wednesday, July 26, 2017 / Notices
Certain Uncoated Paper (Merchandise Subject to the Minor Alterations)	Australia, Brazil, P.R. China, Indonesia, and Portugal	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2017-18589	Federal Register / Vol. 82, No. 169 / Friday, September 1, 2017 / Notices
2018			
Initiation			
Carbon and Certain Alloy Steel Wire Rod (Merchandise Subject to the Minor Alterations)	Mexico	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-02445	Federal Register / Vol. 83, No. 26 / Wednesday, February 7, 2018 / Notices
Aluminum Extrusions (either completed or assembled in other foreign countries and/or represents a minor alteration) <i>Commerce intends to issue its final determination within 300 days of this initiation, in accordance with section 781(f) of the Act.</i>	Vietnam	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-04390	Federal Register / Vol. 83, No. 43 / Monday, March 5, 2018 / Notices
Certain Corrosion-Resistant Steel Products (3d country assembly or completion)	Vietnam	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-16565	Federal Register / Vol. 83, No. 149 / Thursday, August 2, 2018 / Notices
Certain Cold-Rolled Steel Flat Products (3d country assembly or completion)	Vietnam	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-16566	Federal Register / Vol. 83, No. 149 / Thursday, August 2, 2018 / Notices
Certain Hardwood Plywood Products (later developed Product) <i>Commerce intends to issue its final determination within 300 days of this initiation, in accordance with section 781(f) of the Act.</i>	P.R. China	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-20609	Federal Register / Vol. 83, No. 184 / Friday, September 21, 2018 / Notices
Preliminary affirmative anticircumvention determination			
Carbon Steel Butt-Weld Pipe Fittings (3d country assembly or completion)	Malaysia	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-15882	Federal Register / Vol. 83, No. 143 / Wednesday, July 25, 2018 / Notices

Uncovered Innerspring Units (3d country assembly or completion)	Macau	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-17784	Federal Register / Vol. 83, No. 162 / Tuesday, August 21, 2018 / Notices
Carbon and Certain Alloy Steel Wire Rod (Merchandise Subject to the Minor Alterations)	Mexico	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-22843	Federal Register / Vol. 83, No. 203 / Friday, October 19, 2018 / Notices
Diamond Sawblades and Parts Thereof (3d country assembly or completion) <i>Final determination is due to February 27, 2019.</i>	Thailand	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-24939	Federal Register / Vol. 83, No. 221 / Thursday, November 15, 2018 / Notices
Final affirmative anticircumvention determination			
Certain Corrosion-Resistant Steel Products (3d country assembly or completion)	Vietnam	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-11028	Federal Register / Vol. 83, No. 100 / Wednesday, May 23, 2018 / Notices
Certain Cold-Rolled Steel Flat Products (3d country assembly or completion)	Vietnam	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-11029	Federal Register / Vol. 83, No. 100 / Wednesday, May 23, 2018 / Notices
Uncovered Innerspring Units (3d country assembly or completion)	Macau	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2018-27677	Federal Register / Vol. 83, No. 245 / Friday, December 21, 2018 / Notices
2019			
Initiation			
Diamond Sawblades and Parts Thereof (3d country assembly or completion)	P.R. China	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019-09066	Federal Register / Vol. 84, No. 86 / Friday, May 3, 2019 / Notices
Aluminum Extrusions (3d country assembly or completion)	P.R. China	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019-09214	Federal Register / Vol. 84, No. 87 / Monday, May 6, 2019 / Notices
Hydrofluorocarbon Blends (Third-Country Blends Containing Chinese Components) (3d country assembly or completion)	P.R. China	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019-12841	Federal Register / Vol. 84, No. 117 / Tuesday, June 18, 2019 / Notices
Hydrofluorocarbon Blends (Unfinished Blends) (Completion of Merchandise in the United States)	P.R. China	DEPARTMENT OF COMMERCE International Trade Administration	Federal Register / Vol. 84, No. 117 / Tuesday, June 18, 2019 / Notices

		FR Doc. 2019–12848	
Hydrofluorocarbon Blends (Components) (Completion of Merchandise in the United States)	P.R. China	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019–12849	Federal Register /Vol. 84, No. 117 /Tuesday, June 18, 2019 /Notices
Corrosion-Resistant Steel Products (3d country assembly or completion)	Costa Rica, Guatemala, Malaysia, South Africa, and the United Arab Emirates	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019–18012	Federal Register /Vol. 84, No. 162 /Wednesday, August 21, 2019 /Notices
Certain Corrosion-Resistant Steel Products (3d country assembly or completion)	Malaysia	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019–18013	Federal Register /Vol. 84, No. 162 /Wednesday, August 21, 2019 /Notices
Preliminary affirmative anticircumvention determination			
Aluminum Extrusions (3d country assembly or completion)	P.R. China	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019–10275	Federal Register /Vol. 84, No. 96 / Friday, May 17, 2019 /Notices
Certain Hardwood Plywood Products (3d country assembly or completion)	P.R. China	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019–12285	Federal Register /Vol. 84, No. 112 /Tuesday, June 11, 2019 /Notices
Certain Corrosion-Resistant Steel Products (3d country assembly or completion)	Vietnam	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019–14694	Federal Register /Vol. 84, No. 132 /Wednesday, July 10, 2019 /Notices
Certain Cold-Rolled Steel Flat Products (3d country assembly or completion)	Vietnam	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019–14721	Federal Register /Vol. 84, No. 132 /Wednesday, July 10, 2019 /Notices
Final affirmative anticircumvention determination			
Carbon and Certain Alloy Steel Wire Rod (Merchandise Subject to the Minor Alterations)	Mexico	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019–04622	Federal Register /Vol. 84, No. 49 /Wednesday, March 13, 2019 /Notices
Carbon Steel Butt-Weld Pipe Fittings (3d country assembly or completion)	Malaysia	DEPARTMENT OF COMMERCE International Trade Administration FR Doc. 2019–13252	Federal Register / Vol. 84, No. 120 / Friday, June 21, 2019 / Notices

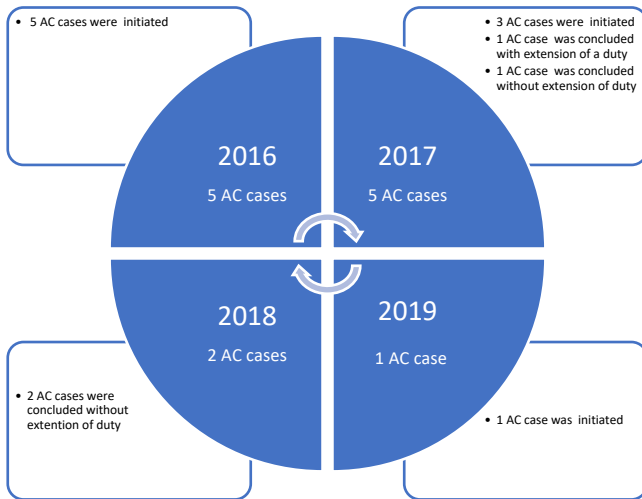
*OJ - Official Journal

**FR - Federal Register

Summary statistics

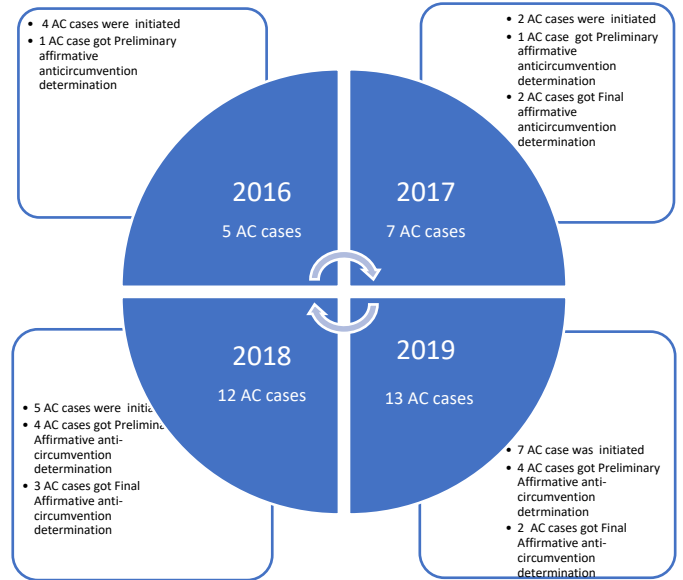
By the number of AC inquiries

EU



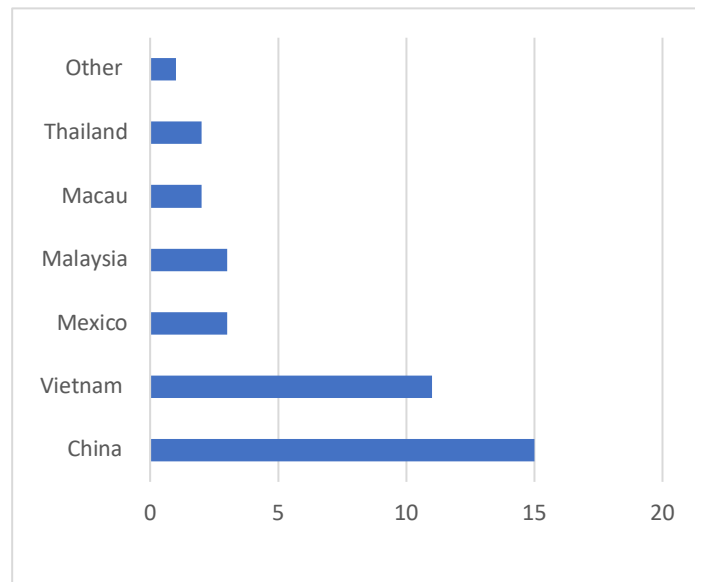
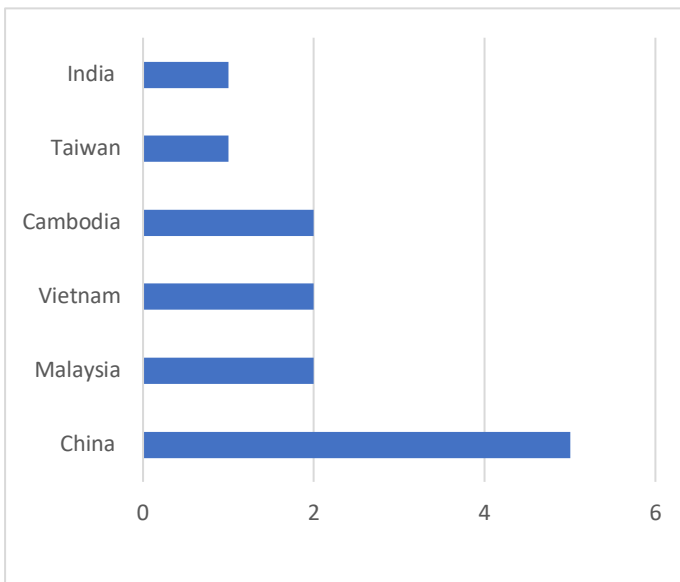
Total 2016-2019 – 13 AC cases

USA

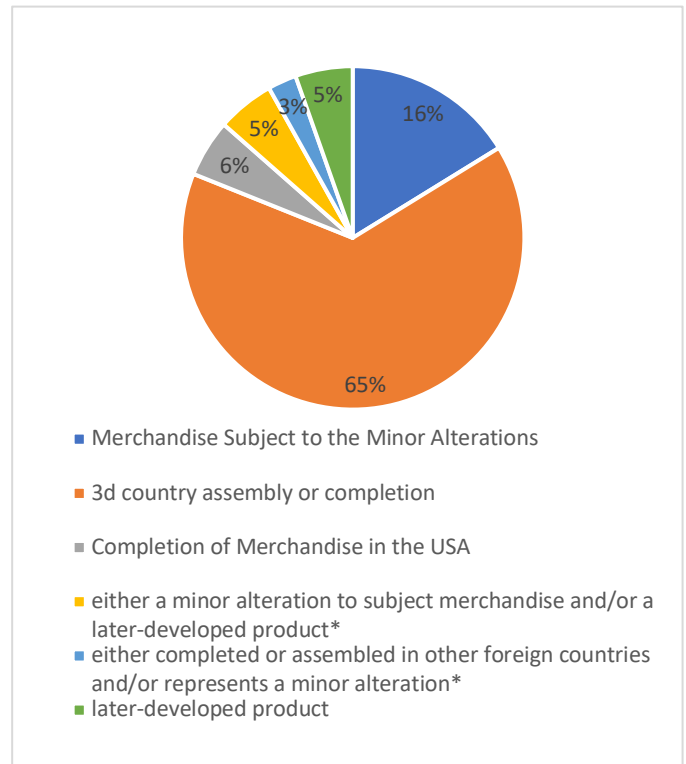
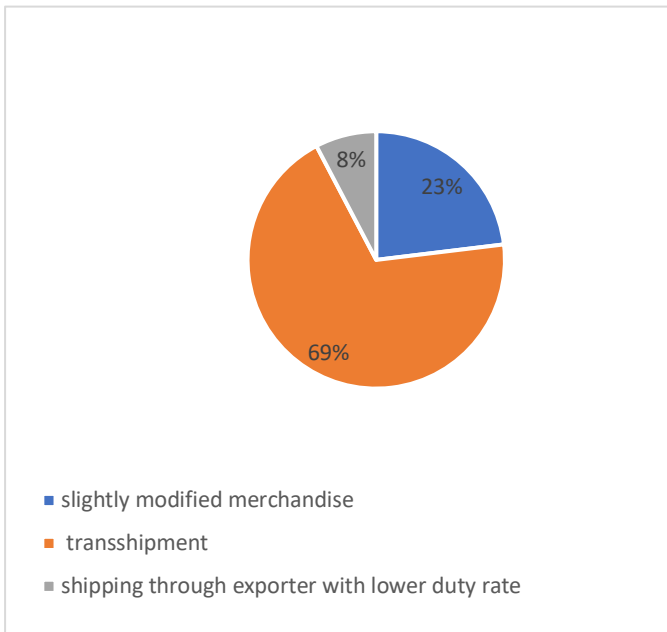


Total 2016-2019 – 37 AC cases

By the allegedly circumventing country



By the type of circumvention



* such a determination is possible on the stage of the initiation of the AC inquiry before the substantial analysis was held

By the type of product (for both: the EU and the USA) – steel and products thereof take the leading positions in terms of the number of the AC inquires in the respective period.

Annex 2

Suggested changes to the anti-dumping questionnaire template

I. The Nature and Value Added of Production Process of subject merchandise

- (a) This Section asks for specific information on the nature of the production process of the subject merchandise. Please prepare a chart named “Table “[]” (See Addendum I) for all stages of the production process (i.e. production, processing, assembly, completion of semi-finished goods etc.) and include information:
- on the production facilities and whether some stages of the production process are subcontracted (to related/ unrelated companies).
 - On the main inputs necessary at each production stage and resulted output.
 - On the total cost of production for each production stage.
 - On the respective value added of each production step.
 - On the respective proportion of value added of each production step calculated as a percentage in the resulting total.

II. For the purposes of replying to question I. (a) above please note the following:

- (b) If the inputs (e.g. primary material, semi-finished products) and/or outputs (being within the types of subject merchandise) required at the specific production stage are different depending on the sales market, please highlight and explain the difference.
- (c) As regards production facilities, please mention whether some production stages can be done using the same production line and/or facilities. Please mention for each production stage whether it should be regarded as a major or minor based on the complexity of the process.
- (d) In the event that any production stage of the subject merchandise includes payments made for contract labor, report separately the amounts incurred therefor. Indicate whether the contractors are related to your company. Describe the production services provided by the labor contractors.
- (e) “Table “[]” has to cover all (without exception) types of the subject merchandise which were produced and/or sold on the export markets during the investigation period, by your company and by each related company separately. Please prepare two sets of tables if there are any differences including, inter alia, in the production stages, cost of production based on the market (which means that within one month and one group the costs of production in the internal market are not equal to the costs of production for export for the same calculation group, including differences between different export destinations of supply). Explain and highlight the reasons for the differences in the figures.
- (f) It is permissible to provide aggregate information as regards specific types of the merchandise in case the nature and value added of production process for such types are identical.
- (g) Please ensure that the information provided in this Section of the questionnaire is consistent with the information given in other Sections of the questionnaire.

The Nature and Value Added of Production Process Chart Template

N	Type of the subject merchandise	Stage of the production process					Main inputs necessary	Resulted output	Total cost of production	Value added	Proportion of value added (in %)
		Name of the process	Complexity of the process		Place of the activity						
					Manufactured by the company	Subcontracted					
			Maj or	Min or		Related company					
	Indicate respective types of subject merchandise	<i>Production</i>	<i>X</i>			<i>Indicate the name of the company</i>	<i>Indicate the name of the company</i>				
		<i>Processing</i>		<i>X</i>	<i>X</i>						
		<i>Assembly</i>									
		<i>Etc.</i>									

Annex 3

List of Questions to the Domestic Industry Template

Part A “Slightly modified merchandise” (the “SAM”)

Guide: In this part of the document, an aggregate reply on behalf of the domestic industry has to be provided regarding any possible alterations to the subject merchandise. Such alterations might concern, inter alia, slight modifications to the basic physical, technical and chemical characteristics of the subject merchandise.

If information is not relevant or not available, please use the abbreviation “N/A”.

- I. (a) Please provide a list of all the minor modifications possible and known as of today concerning subject merchandise in the format as suggested below.

N	Specific type of the subject merchandise	Possible differences in:					Transformation processes that have to be additionally undergone to produce the SAM	Change in HS code (if any)	The name of the SAM
		<i>chemical content</i>	<i>physical composition</i>	<i>technical characteristics</i>	<i>commercial uses</i>	<i>other properties of the subject merchandise</i>			
1									
2									
3									

- (b) Please provide answers to the following questions:

- Whether the SAM is targeted at the same final demand at the importing country market?

- Whether minor alterations might influence the quality or price of the respective SAM? Explain how.
- Whether minor alterations might change the consumer's perception of the subject merchandise?
- Whether there might be any possible economic justifications to produce the SAM? If possible, provide (approximate) figures corresponding to the respective economic gains (for instance, savings due to decreased transportation or storage costs emanating from the peculiarities of the SAM if compared to the subject merchandise).
- What facilities are required to produce the SAM? Whether the producing exporter/producer has such facilities?

(c) Please indicate the sources of the information provided in this document (list the sources)

Part B "Later developed merchandise" (the "LDM") *if relevant*

- II. (a) In this part, please provide data available on the new types of merchandise (if any), being at the stage of development and/or design by the respective producing exporter/producer.
- (b) Please indicate whether there have been any changes from the moment of initiation of this anti-dumping investigation in producing exporter's/producer's websites, catalogues, brochures etc., concerning the range of the merchandise offered for sale.

Annex 4

Anti-circumvention “Red Flags” Template

Important: This template must be adapted to reflect and comply with regulatory requirements of the particular jurisdiction.

This template is an optional guide for investigating, enforcement and compliance authorities designed to identify, detect and respond to “Red flags”—patterns, practices or specific activities—that could indicate circumvention of the respective AD order.

Template Use

“Red Flags” template is designed to be a starting point and has to be customized to adequately address substantial and procedural rules of the particular jurisdiction.

Definitions

“End-use” check — procedure that implies that any suspicious transaction (including, inter alia, supply of the merchandise that could be used as an input for further assembly operations in third and/or importing country) could be retained for the time necessary to make all the verification checks and/or to get all the required documents from the importers and/or exporters (if necessary).

“Red flags”— patterns, practices or specific activities that might be indicative of any future attempts to circumvent the respective AD order.

“Red flag’s” Actions — reasonable policies and procedures required to:

- (1) Identify relevant “Red flags” for the respective AD order, and incorporate those as an annex thereto;
- (2) Detect “Red flags” that have been incorporated into an annex to the respective AD order;
- (3) Respond appropriately to any “Red flags” that are detected to prevent and mitigate circumvention risks; and
- (4) Update the “Red flags” list periodically to reflect any changes.

Abbreviations

“AD” – anti-dumping

“AC” – anti- circumvention

“Red flag’s” Actions

Identifying Relevant “Red Flags”

To identify relevant “Red flags”, respective investigating authority assesses risk factors and possible sources of circumvention, as well as the types of circumvention activities most likely to occur.

Guide: To identify relevant “Red Flags”, relevant investigating authorities assess these risk factors: (1) the type of subject merchandise, (2) previous incidences of circumvention activities, and (3) any other suspicious signs, such as use of “logistics” companies providing “circumvention services”; place of delivery known as a “transshipment hub” etc. In addition, investigating authorities consider suspicious documents and/or activities commenced after the initiation of an AD investigation; and notices, alerts from other sources (including whistleblowing) as they fit the situation. Based on this review of these risk factors, investigating authorities identify respective “Red flags”, which are contained in the first column of the attached “**Red Flag Identification and Detection List**” (the “**List**”).

Detecting Red Flags

Investigating authorities address how, in connection with the respective circumvention threat, it will detect the “Red flags” identified in the second column of the List.

Guide: Detection of those “Red flags” that have been identified is based on the practice established in course of the conduct of AC inquiries. It can include monitoring and verifying the respective transactions before their authorization, “end-use” check etc. Second column of the attached List contains suggestions how to detect each of the identified “Red flags”.

Respond appropriately to identified and detected “Red flags”

Investigating authorities must provide responses to its identified and detected “Red flags” that match the circumvention risk involved.

Procedures to Prevent and Mitigate Circumvention

As appropriate to the type and seriousness of the circumvention threat the following steps are to be undertaken:

Export control:

1. Review transaction documents application. Review of the respective sales and purchase contract along with all the supporting documents (including, inter alia, invoice, specifications) as well as voluntary price undertakings (if relevant) and previous involvement in circumvention activities.
2. Get transaction authorization. If no risk has been identified regarding the relevant transaction, it can be authorized for export.
3. Seek additional verification. If the potential risk of circumvention indicated by the “Red flag” is probable, competent export control authority verifies transaction through the following not exhaustive list of methods:
 - a. Contacting the customer to get information on the end-use of the merchandise,
 - b. “Freezing” the respective amount of AD duty for the period of verification,

- c. Independently verifying information by comparing it with information obtained from the respective investigating authority, public databases or other sources available, or
 - d. Obtaining additional information from any other source it deems necessary.
4. Deny the authorization. If export control authority has an evidence that the respective exporter might resort to circumvention practices, it will deny authorization of such a transaction.
 5. Report. If the respective transaction was denied in authorization, export control authority will report it to appropriate local and state law enforcement, as well as the respective investigating authority. Export control authority also prepares a short statement of facts in writing. Non-confidential version of such a statement of facts have to be publicly accessible (e.i. by publishing the data on its official website).

For “Red flags” raised by general public (whistleblowers):

1. Watch. Respective export control and enforcement agencies (hereinafter collectively rereferred to as the “Agencies”) monitor and/or temporarily suspend transaction reported to be suspicious until the situation is resolved.
2. Check with the customer and/or the end user. The Agencies contact the customer and/or the end-user to verify whether there has been an attempt to circumvent the respective AD order.
3. Heightened risk. The Agencies determine if there is a particular reason that makes the probability of circumvention higher (including, for instance, start of advertisement campaign of the new product, allegedly sharing the similar characteristics with the subject merchandise and/or respective changes in the catalogues/brochures etc.)
4. Collect and check incident information. If there is an evidence of circumvention and/or threat thereof, the Agencies may collect any data available to support their determination in making a finding. The respective enforcement agencies should have a right to verify information it was provided with at the premises of the respective firm alleged to circumvent the respective AD order.
6. Report. If there is a sufficient basis to conclude that circumvention took place and/or there is a high risk thereof, export control authority will report it to appropriate local and state law enforcement, as well as the respective investigating authority. Export control authority also prepares a short statement of facts in writing. Non-confidential version of such a statement of facts have to be publicly accessible (i.e. by publishing the data on its official website).
5. Assist the whistleblower. The Agencies work with the respective whistleblower to minimize the potential impact of providing any evidence of circumvention or threat thereof by offering security assurances.

Internal Compliance Reporting

The Agencies staff prepare internal AD compliance report on a quarterly basis for its subsequent incorporation into the annual Country-by-Country report.

Guide: Agencies’ staff who are responsible for developing, implementing and administering internal AD compliance, prepares report on the “Red Flags” identified in the respective period. The report might address the effectiveness of export and enforcement control regarding the risk

of circumvention, provide details as to the significant incidents involving either attempts to circumvent the respective AD order or the actual occurrence of circumvention, identify loopholes in AD enforcement framework and formulate recommendations for changes to be implemented.

Updates and Annual Review

The Agencies might implement the respective update policy and annual review of their internal compliance reporting.

Guide: The Agencies might update the framework they rely on while enforcing of AD orders or monitoring compliance therewith whenever there is a material change to their operations, and/or internal structure, or when based on the past experience and/or experience of the other jurisdictions there are more efficient ways to address specific aspect of circumvention risks more efficiently.

ATTACHMENT: Addendum I. “Red Flag” Identification and Detection List (the “List”)

Red Flag Identification and Detection List

This List provides “Red Flags” categories (based on the types of possible circumvention activities) and examples of potential “Red flags”. These examples are neither an exhaustive nor a mandatory checklist. Some examples may not be relevant to the specific exporter, while others may be relevant when combined or considered with other indicators of identity circumvention.

Guide:

Red Flag	Detecting the Red Flag
Category: Transshipment	
a. Place of delivery: Malaysia, Thailand, Indonesia, Philippines, India, Vietnam, Taiwan Mexico.	a. 1. To check if the subject merchandise is destined for one of the conduit countries as listed.
b. Use of “logistics” companies	a. 2. To report about the suspicious transaction to the import control authorities. b. To verify whether the respective logistic company has a record of being involved in utilizing transshipping to import goods without the need to pay AD duties and/or openly advertises such services.
<i>Other red flags in this category based on the particular case</i>	<i>Methods to detect these “Red flags”</i>
Category: “Lower rate” exporter	
c. Extension of the list of importers (<i>to attach the list of importers</i>) for the exporter with a lower AD duty rate	c. To report about the suspicious transaction to the import control authorities.
d. Supply in excess of the average monthly capacity (<i>to indicate the average production capacity and size of inventories</i>) either regarding particular transaction or cumulatively by the end of the month.	d. To request and verify documents to justify the increased volumes of supply.
<i>Other red flags in this category based on the particular case</i>	<i>Methods to detect these “Red flags”</i>
Category: Slightly modified merchandise/Later developed merchandise	
e. Supply of the allegedly slightly modified (or, if relevant, later developed) merchandise (<i>to attach the reply of the domestic industry as regards slightly modified/ later developed merchandise</i>).	e. 1. To check if there is any type of a merchandise destined for exportation as provided by the list of slightly modified/ later developed merchandise. e. 2. To require economic justifications for supply of this type of merchandise upon the

	authorization for exportation could be granted.
<i>Other red flags in this category based on the particular case</i>	<i>Methods to detect these "Red flags"</i>
Category: Assembly operations	
f. Supply of the items identified as an input for assembly operations.	f. "End-use" check
<i>Other red flags in this category based on the particular case</i>	<i>Methods to detect these "Red flags"</i>