U.S. Customs and Border Protection

Slip Op. 13–52

MAX FORTUNE INDUSTRIAL CO. LTD., AND MAX FORTUNE (VIETNAM) PAPER PRODUCTS CO., Plaintiffs, v. UNITED STATES, Defendant, and SEAMAN PAPER COMPANY OF MASSACHUSETTS, INC., DEFENDANT-INTERVENOR.

Before: Richard W. Goldberg, Senior Judge
Court No. 11–00340
PUBLIC VERSION

[Plaintiffs' Motion for Judgment on the Agency Record under USCIT Rule 56.2 is denied.]

Dated: April 15, 2013

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Courtney S. McNamara, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Scott D. McBride*, Senior Attorney, International Trade, Department of Commerce.

Adam H. Gordon and *Laura El-Sabaawi,* Wiley Rein LLP, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiffs Max Fortune Industrial Co., Ltd. and Max Fortune (Vietnam) Paper Products Co., Ltd. ("MFVN") (collectively, "Max Fortune" or "Plaintiffs"), producers and exporters of tissue paper products from Vietnam, contest the final results of the U.S. Department of Commerce ("Commerce" or "the Department") in the antidumping duty circumvention proceeding published as *Certain Tissue Paper Products from the People's Republic of China*, 76 Fed. Reg. 47,551 (Dep't Commerce Aug. 5, 2011) (affirmative final determination of circumvention) ("*Final Determination*") and accompanying Decision Memorandum, A-570–894 (Aug. 1, 2011) ("*I&D Mem.*"). Max Fortune has moved for judgment on the agency record pursuant to Rule 56.2 of the

Rules of the U.S. Court of International Trade. The United States—Defendant in this case—and Seaman Paper Company of Massachusetts ("Seaman Paper")—Petitioner in the underlying review and Defendant-Intervenor in this case– oppose Plaintiffs' motion. This Court has jurisdiction pursuant to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c) (2006).

For the reasons discussed below, this court holds that Commerce's application of total adverse facts available ("AFA") and determination of circumvention is supported by substantial evidence on the record and otherwise in accordance with law. Accordingly, Plaintiffs' motion is DENIED and Commerce's determination is SUSTAINED.

BACKGROUND

On February 18, 2010, Seaman Paper requested that Commerce conduct an anti-circumvention inquiry, pursuant to Section 781 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677j,[1] with respect to the antidumping duty ("AD") order of certain tissue paper from China. On March 29, 2010, Commerce initiated its anti-circumvention inquiry and issued a questionnaire to Max Fortune, requesting sales and production information for the period January 1, 2005 to April 23, 2010. Max Fortune filed its response, stating that it could "confirm through its records and prove for the Commerce Department that since at least January 1, 2008, it did not convert in Vietnam any jumbo rolls and cut sheet of tissue paper from" China, but could not make such a confirmation for products produced before that date. *Max Fortune Vietnam's First Questionnaire Response*, June 28, 2010, at 5, 7, 9. In fact, Max Fortune admitted that "it is possible that [MFVN] might have made some tissue paper in Vietnam from" Chinese jumbo rolls during that period. *Id.* at 3.

Commerce also requested that Max Fortune provide information about the factors of production for its merchandise. Commerce needed this to calculate the value of the processing performed on Chinese jumbo rolls in Vietnam. However, Max Fortune responded that this question was not applicable because since January 2008, it had not imported any Chinese-origin jumbo rolls for use in the manufacturing of its tissue paper products. *Id.* at 14–15.

At verification, Commerce discovered that there were, in fact, Chinese jumbo rolls in MFVN's inventory as late as March 2010. On the last hour of the last day of verification in Vietnam, Max Fortune offered to provide documentation that pertained to the Chinese jumbo

[1] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

rolls. However, Commerce refused to accept this information because there was insufficient time to test the data for accuracy and completeness.

On March 31, 2011, Commerce issued its preliminary determination, which broke down the period of review into three separate periods. *Certain Tissue Paper Products from the People's Republic of China*, 76 Fed. Reg. 19,043 (Dep't Commerce Apr. 6, 2011) (preliminary affirmative circumvention determination) ("*Prelim. Determination*"). First, in light of Max Fortune's admission that it was "possible" that it made tissue paper from Chinese-origin jumbo rolls before December 31, 2007, and absent any further data supplied by the respondent, Commerce preliminarily determined, as AFA pursuant to 19 U.S.C. § 1677e (a) & (b), that all tissue paper produced and exported by Max Fortune during that period of time was made with Chinese jumbo rolls. *Prelim. Determination*, 76 Fed. Reg. at 19,045–46. Second, with respect to calendar year 2008, Commerce preliminarily found that because Max Fortune did not provide "verifiable production data," did not "tie its export sales data to its production data," and did not answer Commerce's questionnaires fully, it would determine as AFA that all tissue paper produced in Vietnam and exported by Max Fortune from January 1, 2008 to December 31, 2008 was produced using Chinese jumbo rolls. *Id.* at 19,046. Finally, Commerce also preliminarily found that, after January 1, 2008, Max Fortune had the "capacity and ability to produce tissue paper for export," but that Max Fortune had "jumbo rolls of Chinese-origin in inventory at the end of December 2008, which remained in inventory throughout 2009 and were later withdrawn from inventory in March 2010," as well as "significant amounts of tissue paper in finished goods and [work-in-progress] inventory," which it could not directly tie to any of its domestic or export sales. *Id.* at 19,047. Thus, Commerce preliminarily concluded that Max Fortune had exports "during 2009 and 2010" that included exports from inventory that were produced from Chinese jumbo rolls, and therefore were circumventing the antidumping order. *Id.*

To "prevent future evasion of the" tissue paper AD order, Commerce stated that it would instruct Customs and Border Protection ("CBP") to collect cash deposits on all tissue paper produced and exported by MFVN. *Id.* at 19,048. Commerce explained, however, that if Max Fortune requested an administrative review in the future, Commerce would "consider initiating a changed circumstances review pursuant to" 19 U.S.C. § 1675(b). If the results of the administrative review suggested that a change was necessary, Commerce would consider reclassifying future MFVN exports as non-subject merchandise (i.e.,

Vietnamese in origin). *Id.*

On May 20, 2011, Max Fortune filed its administrative case brief, challenging Commerce's analysis in the preliminary determination. The domestic industry filed a rebuttal brief. On August 1, 2011, Commerce issued its final determination, addressing the comments raised by both parties and reaffirming the results of the preliminary determination. *Final Determination*, 76 Fed. Reg. at 47,551. Commerce explained that the application of AFA to Max Fortune's exports was warranted, in light of the company's failure to provide necessary records, to prevent evasion of the AD order. *Id.* at 47,553. This appeal ensued.

STANDARD OF REVIEW

The Court "uphold[s] Commerce's determination unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (1994)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). This Court determines whether the agency action is reasonable in light of the entire record, including evidence that might detract from the substantiality of the evidence. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002).

The Court "reviews Commerce's verification procedures for an abuse of discretion." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT 1635, 1640, 353 F. Supp. 2d 1294, 1301 (2004). Commerce is given wide latitude to determine its verification procedures. *See Micron Tech., Inc.*, 117 F.3d at 1396 ("By requiring that Commerce report, on a case-by-case basis, the methods and procedures used to verify submitted information, Congress has implicitly delegated to Commerce the latitude to derive verification procedures ad hoc."). Furthermore, "[t]he decision to select a particular [verification] methodology rests solely within Commerce's sound discretion." *Hercules, Inc. v. United States*, 11 CIT 710, 726, 673 F. Supp. 454, 469 (1987).

DISCUSSION

To issue an affirmative determination of circumvention, Commerce must conclude that: (1) prior to the importation of the subject merchandise (here, tissue paper from China) into the United States from a third country (here, Vietnam), the merchandise produced in the third country contains materials or components sourced from the

country whose merchandise is subject to an AD Order; (2) the processing operations performed in the intermediate country are "minor or insignificant"; and (3) the value added in the country subject to the AD Order is "a significant portion of the total value of the merchandise exported to the United States." 19 U.S.C. § 1677j(b)(1).

Plaintiffs challenge (1) Commerce's determination, applying AFA, that all of the tissue paper MFVN exported during the Department's period of investigation was made from jumbo rolls originating in China, and (2) the Department's decision to require a cash deposit on the subject merchandise rather than institute a certification program.

I. Commerce's Circumvention Determination Is Supported by Substantial Evidence and Is Otherwise in Accordance with Law

Plaintiffs claim that Commerce erred by holding that Max Fortune circumvented the AD order. The Department determined that it was missing necessary information because of Max Fortune's failure to cooperate to the best of its ability. Accordingly, Commerce applied AFA to MFVN's exports of tissue paper from Vietnam and determined that Max Fortune was circumventing the AD order for the period of review. For the following reasons, the court finds that Commerce's decision to resort to AFA, as well as its subsequent circumvention determination, is supported by substantial evidence and is otherwise in accordance with law.

A. Application of Total AFA to Imports from 2005–2007

Max Fortune does not challenge Commerce's determination with respect to merchandise from this period and recognizes that its books for the period were unreliable. *Max Fortune Vietnam's First Questionnaire Response* at 5, 7, 9–12. Indeed, given that it did not have the accounting records the Vietnamese government clearly requires, it does not challenge Commerce's application of this adverse inference pursuant to 19 U.S.C. § 1677e(b).

B. Application of Total AFA to Imports since 2008

1. Commerce did not abuse its discretion in rejecting MFVN's last-minute information

Max Fortune claims that Commerce officials "summarily and erroneously refused" documentation that it offered at verification "to conclusively establish that tissue paper produced from" the Chinese jumbo rolls were "not exported to the United States." Br. in Supp. of Pls.' Rule 56.2 Mot. for J. upon the Agency R. ("Pls.' Br.") at 19. Max

Fortune argues that, in rejecting the proffered data, Commerce violated "its duty to base its determination on all available evidence" and that because MFVN offered the documents "during verification," the provision of that documentation "was not untimely." *Id.* at 33.

"The Court reviews Commerce's verification procedures for an abuse of discretion." *Tianjin*, 28 CIT at 1640, 353 F. Supp. 2d at 1301. Although the statute requires that Commerce verify "all information relied upon in making . . . a final determination in a review," the statute does not delineate the precise means for conducting verification. 19 U.S.C. § 1677m(i)(3). Rather, "[t]he decision to select a particular [verification] methodology rests solely within Commerce's sound discretion." *Hercules,* 11 CIT at 726, 673 F. Supp. at 469. Moreover, in selecting its verification procedures, "the statute gives Commerce wide latitude," *see Am. Alloys, Inc. v. United States*, 30 F.3d 1469, 1475 (Fed. Cir. 1994), and Commerce is owed "considerable deference" by the Court. *Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Technical, Salaried & Mach. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993).

The purpose of verification is to "verify the accuracy and completeness of submitted factual information." 19 C.F.R. § 351.307(d) (2012). "The burden of creating an adequate record rests with [Max Fortune]," and "[d]ue to stringent time deadlines and the significant limitations on Commerce's resources, 'it is vital that accurate information be provided promptly to allow the agency sufficient time for review.'" *Tatung Co. v. United States*, 18 CIT 1137, 1140–41 (1994) (quoting *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 406, 636 F. Supp. 961, 967 (1986)).

In response to Commerce's questionnaires prior to verification, MFVN submitted an inventory-related worksheet. Commerce could not verify this worksheet because MFVN did not provide any accounting records for its 2008 production and sales experience, or any evidence as to the production source of the merchandise subsequently withdrawn from inventory in 2009 or 2010. At verification, upon review of MFVN's books and records, Commerce discovered that there were, in fact, Chinese jumbo rolls in MFVN's inventory as late as March 2010. Two days after Commerce officials discovered the rolls—during the last hour of the fifth day of a five-day verification in Vietnam—MFVN finally offered to provide documentation allegedly pertaining to the Chinese jumbo rolls. However, Commerce refused to accept the information because it was impossible to "test/examine the data for completeness in the time permitted." Def.'s Nonconf. Opp'n to Pls.' Mot. for J. upon the Agency R. ("Def.'s Br.") at 27.

Max Fortune relies on *Fischer* for the proposition that the Department's refusal to accept the information proffered at verification was contrary to law. *Fischer S.A. Commercio, Industria, & Agricultura v. United States*, 34 CIT __, 700 F. Supp. 2d 1364 (2010). In *Fischer*, the court held that the Department "abused its discretion in rejecting Fischer's additional agreement pages as untimely" because

> (1) no finality concerns demanded exclusion of the additional data at the preliminary results stage; (2) failure to consider the additional pages to correct information already provided was a violation of Commerce's duty to determine Fischer's dumping margin as accurately as possible; (3) consideration of the additional data is necessary to ensure that the remedial, nonpunitive nature of the antidumping laws is not violated by imposition of inaccurately high antidumping duties on Fischer despite the evidence that was rejected . . . .

Id. at 1376. Likewise, Max Fortune argues that in this case, the Department was required to accept the information because it was offered during verification and it was necessary to ensure that the Department's determination was based on all available evidence and was as accurate as possible. Pls.' Br. at 33.

However, MFVN's reliance on *Fischer* is inapposite. The issue in *Fischer* was whether Commerce abused its discretion when it refused to accept new information to clarify information *that had already been properly submitted* on the record. 34 CIT at __, 700 F. Supp. 2d at 1376. The court in *Fischer* specifically distinguished that situation from the one here, in which "the plaintiffs either failed to respond to a questionnaire from Commerce . . . or failed verification . . . , then later asked the court to overturn Commerce's rejection of untimely fact submissions and Commerce's consequent application of adverse facts available." *Id.* at 1377 (citing *Uniroyal Marine Exps. Ltd. v. United States,* 33 CIT __, __, 626 F. Supp. 2d 1312, 1313–14 (2009); *Yantai Timken Co. v. United States,* 31 CIT 1741, 1755, 521 F. Supp. 2d, 1356, 1360–62 (2007); *Tianjin*, 28 CIT at 1643–44, 353 F. Supp. 2d at 1303–04). The court noted that "[i]n upholding Commerce's enforcement of its regulatory deadline for factual information, the courts [in *Uniroyal*, *Yantai*, and *Tianjin*] noted that the information the plaintiffs offered did not correct a mistaken previous submission, but instead attempted to fill the gap caused by failure to provide a questionnaire response or evidence requested during verification." *Id.* at 1377 (citing *Uniroyal*, 33 CIT at __, 626 F. Supp. 2d at 1314, 1316; *Yantai*, 31 CIT at 1754, 521 F. Supp. 2d at 1370; *Tianjin*, 28 CIT at 1644, 353 F. Supp. 2d at 1304).

Here, Commerce's decision not to use the information Max Fortune offered is reasonable and consistent with its practice. MFVN attempted to offer new information that Commerce did not have time to verify because it was submitted on the last hour of the last day of verification. Commerce properly exercised its discretion in rejecting the late-submitted information. This court has repeatedly upheld Commerce's refusal to accept new information submitted in an untimely manner, and does so again here. *See, e.g.*, *Uniroyal*, 33 CIT at __, 626 F. Supp. 2d at 1316; *Yantai*, 31 CIT at 1754, 521 F. Supp. 2d at 1370; *Tianjin*, 28 CIT at 1644, 353 F. Supp. 2d at 1304. In light of the circumstances and the risk of manipulation of the record, Commerce's refusal to accept new information in the last hour on the last day of verification was a proper exercise of its discretion.

2. It was reasonable for Commerce to resort to other facts available

Given that Commerce did not abuse its discretion in rejecting MFVN's last minute information, the court next considers whether Commerce properly resorted to using facts otherwise available. "The burden of creating an adequate record rests with [the respondent]," *Tatung Co.*, 18 CIT at 1140, and Commerce may use facts otherwise available if "necessary information is not available on the record." 19 U.S.C. § 1677e(a)(1).

Commerce properly determined that the absence of necessary information impeded its investigation and analysis. Specifically, Commerce determined that MFVN had (1) "failed to provide complete accounting and production records for 2008," which Vietnamese accounting law required it to retain for up to ten years, to support its claim of the non-usage of Chinese-origin jumbo rolls; (2) failed to provide documentation showing that it did not have Chinese-origin jumbo rolls and/or cut sheets in its finished goods and/or work-in-progress inventory at the end of 2008; (3) failed to provide documentation that Chinese jumbo rolls were not used in "the finished tissue paper it later sold in 2009 from that inventory"; and (4) failed to show that Chinese jumbo rolls were not used in "the tissue paper it pulled out of [work-in-progress] inventory in 2009 to make finished tissue paper products." *I&D Mem.* at cmt. 1, pp. 4–5. As to 2008, for example, Max Fortune only provided a worksheet containing its annual summary trial balance, but was unable to locate its monthly trial balances or any other detailed accounting records. Def.'s Br. at 19. This gap is especially glaring given that under Vietnamese accounting law the company is required to keep those records for ten years.

The company was also unable to provide any documentation that showed how it used the Chinese-origin materials so as to enable

Commerce to determine when it stopped using materials of Chinese origin to produce products for sale in the United States. Similar gaps exist in the inventory records. Max Fortune only provided Commerce with an inventory worksheet. The company claimed it prepared the worksheet using internal warehouse inventory records; however, it could provide detailed inventory ledgers only from December 31, 2008 and later. *Id.* at 17. Max Fortune did not provide any verifiable support data, and Commerce was unable to tie the numbers in the worksheet to Max Fortune's books and records.

Gaps also exist for the post-2008 period. Because Max Fortune did not provide detailed financial accounting records for 2008, Commerce could not determine the origin of the finished and work-in-progress tissue paper remaining in inventory at the end of 2008. Commerce was thus unable to determine which tissue paper exports in 2009 and 2010 originated from Chinese-rolls. *I&D Mem.* at cmt. 3, p. 19.

Given these significant gaps, it was reasonable for Commerce to conclude that the records are incomplete and resort to other facts available under 19 U.S.C. § 1677e(a).

3. Commerce's application of AFA was reasonable

Max Fortune argues that, even though it was unable to provide all requested information, it cooperated to the best of its ability in providing the Department with production and shipping data beginning in April 2008. Plaintiffs thus challenge Commerce's decision to use an adverse inference in selecting from other information available on the record.

Commerce may draw an adverse inference when selecting from among the facts available to reach its determination when it finds that a party has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). Commerce need not find willful or deliberate noncompliance to resort to an adverse inference. *Nippon Steel Corp. v. United States*, 24 CIT 1158, 1171, 118 F. Supp. 2d 1366, 1378 (2000). However, although the statutory "standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Commerce concluded that an adverse inference in the application of facts available was warranted because MFVN "did not act to the best of its ability when it failed to provide accounting and production records" to support its various claims with respect to its inventory and 2008 production and export experience. *I&D Mem.* at cmt. 1, p. 6. Commerce found that Plaintiffs had failed to maintain their account-

ing records for at least ten years, as required by Vietnamese law. *Id.* at cmt. 1, pp. 4–6. In addition, Commerce determined that, despite MFVN's claims "that it could accurately account for its inventory as of January 1, 2008," Max Fortune could not account for the ultimate destination or usage of the Chinese-origin jumbo rolls, which Commerce discovered were in MFVN's inventory until March 2010, and could not account for Chinese-origin work-in-progress inventory that could have been used to make finished products at a later date. *Final Determination*, 76 Fed. Reg. at 47,553; *see also I&D Mem.* at cmt. 1, p. 6. Thus, Commerce found that, in light of MFVN's failure "to provide the requested production and accounting records to show when it ceased using Chinese-origin jumbo rolls and/or cut sheets in its production of tissue paper products for export to the United States," the use of an adverse inference was warranted in determining whether MFVN's tissue paper production and exports in 2008, and exports from inventory in the years that followed, circumvented the AD order. *Final Determination*, 76 Fed. Reg. at 47,553.

Max Fortune has failed to show that Commerce's decision to use an adverse inference is unsupported by substantial evidence or otherwise not in accord with the law. Max Fortune "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). Plaintiffs have not successfully shown that they acted to the best of their ability given their multiple reporting and verification failures. MFVN could not provide even the most basic records mandated by Vietnamese law. At the very least this qualifies as "inadequate record keeping" under *Nippon Steel*. 337 F.3d at 1382.

4. Commerce's determination is supported by substantial evidence

Plaintiffs claim that Commerce's circumvention determination is unsupported by substantial evidence because it "was based solely on the remote possibility that a miniscule quantity of tissue paper sold for export to the United States may not have been produced from jumbo rolls produced by MFVN in Vietnam." Pls.' Br. at 30. MFVN maintains that Commerce's conclusion is "'predicated on a series of conjectures, and conjectures are not facts and cannot constitute substantial evidence.'" *Id.* (quoting *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1207 (2004) (internal citations omitted).

However, Max Fortune's characterization of Commerce's determination is inaccurate. As discussed *infra*, Commerce properly applied AFA because Max Fortune failed to provide necessary information

and failed to cooperate to the best of its ability. Applying AFA, there is substantial evidence on the record to support Commerce's determination.

Further, although Max Fortune recognizes that it did not provide all the data Commerce required, it argues that because it nonetheless provided a "good deal of" information, Commerce "ignored controlling judicial precedent and 'threw the baby out with the bath water'" by relying on total AFA. Pls.' Br. at 25–27, 29 (citing generally *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333 (Fed. Cir. 2011)). *Zhejiang* addressed a challenge to one of Commerce's less than fair value investigations. 652 F.3d at 1334–35. Commerce applied partial AFA with respect to a number of unavailable U.S. sales. *Id.* at 1339. The Federal Circuit determined that "[b]ecause Commerce could calculate the transaction specific dumping margin . . . without that missing information, it was improper for Commerce to apply" AFA. *Id*. at 1348.

However, Max Fortune's reliance on *Zhejiang* is misplaced. In the context of the anti-circumvention inquiry here, unlike in the anti-dumping investigation in *Zhejiang*, there is no "calculation." "[T]he purpose of an anti-circumvention inquiry is to determine if merchandise exported to the United States is evading an AD order." *I&D Mem.* at cmt. 3, p. 18. If Commerce finds that a company has circumvented the order, it must determine whether the evidence on the administrative record indicates that the circumvention has ceased. *Id.* Here, as previously discussed, Max Fortune did not provide any verifiable evidence that the circumvention had ceased, and Commerce properly applied AFA to determine that Max Fortune continued to circumvent the AD order in 2009 and 2010.

Finally, Plaintiffs argue that, even assuming that the inventory available on December 31, 2009 included "tainted" paper bought in 2008, at most it only represents a *de minimis* percentage of the sales in 2009 and 2010. Pls.' Br. at 31; Pls.' Br. in Response to Def.'s and Def. Intervenor's Brs. in Opp'n to Pls.' Rule 56.2 Mot. for J. upon the Agency R. ("Pls.' Resp. Br.") at 10. However, the statute does not impose a numerical threshold or a *de minimis* exception—a company is either circumventing the order or it is not. *See* 19 U.S.C. § 1677j(b)(1)(E). The question in this case was not the quantity of circumvention, it was whether the AD Order has been and continues to be circumvented, and Commerce properly answered that question in the affirmative.

Given the proper resort to AFA, Commerce's determination that Max Fortune continued to circumvent the antidumping order after January 1, 2008 is supported by substantial evidence and in accordance with law.

II. Commerce's Order that CBP Collect Cash Deposits Is Supported by Substantial Evidence and in Accordance with Law

Commerce ordered CBP to collect cash deposits of estimated AD duties on all tissue paper produced by MFVN and exported from Vietnam. Plaintiffs challenge Commerce's determination to require a cash deposit. Specifically, Max Fortune argues that Commerce's imposition of cash deposits unlawfully transformed the antidumping duty laws from remedial to punitive. Pls.' Br. at 35. Second, Max Fortune contends that the appropriate remedy in this case, rather than to require a cash deposit, would have been to allow MFVN to certify the origin of its exports. *Id.* And third, Plaintiffs claim that Commerce failed to adequately explain its departure from its past practices. *Id.* at 39. However, MFVN's arguments are unpersuasive. For the following reasons, the court sustains Commerce's order that CBP collect cash deposits.

A. Commerce's Order that CBP Collect Cash Deposits was Remedial and Not Punitive

Max Fortune argues that Commerce's imposition of cash deposits unlawfully "transformed the remedial antidumping duty laws into a form of punishment." Pls.' Br. at 35 (quoting *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 35 CIT __, __, 783 F. Supp. 2d 1343, 1351 (2011)).

However, Commerce's determination is not punitive. Commerce reasonably determined that the remedy of collecting cash deposits on MFVN's tissue paper exports, while permitting Max Fortune to avoid the assessment of duties upon the entries of nonsubject merchandise through the conduct of an administrative review, was "in no way punitive." *I&D Mem.* at cmt. 3, p. 19. Commerce explained that this remedy "effectively addresses the circumvention of the [AD] Order, while at the same time allowing for adjustment to the remedy if" MFVN is able to demonstrate to Commerce "in a future segment that none of its tissue paper exported to the United States was produced using Chinese-origin jumbo rolls and/or cut sheets." *Id.*

Commerce's determination is remedial and not punitive. It reasonably and lawfully addresses the past circumvention of the AD order while allowing for adjustment to the remedy if Max Fortune is able to demonstrate the merchandise has not circumvented the AD order.

B. The facts of this case do not require Commerce to allow MFVN to certify the origin of its imports

Max Fortune argues that Commerce must follow its past practice and allow MFVN to certify the Vietnamese origin of its product instead of requiring a deposit of the estimated AD duties. Pls.' Br. at 39. Max Fortune claims that "the appropriate remedy under the [AD] law was to require that MFVN's exports to the United [S]tates be accompanied with certifications of the origin of the merchandise based upon the origin of the jumbo rolls from which the tissue paper was produced." Pls.' Br. at 35.

Max Fortune relies heavily on Commerce's determination to allow a certification program for Vietnamese tissue paper in *Certain Tissue Paper Products from the People's Republic of China*, 73 Fed. Reg. 57,591 (Dep't Commerce Oct. 3, 2008) (affirmative final determination of circumvention) ("*Quijiang* "). In *Quijiang,* Commerce allowed Quijiang to submit a certification, rather than cash deposit upon entry, notwithstanding the Department's conclusions that: (1) Quijiang had previously circumvented the Chinese AD order and that (2) some paper products Quijiang exported may have been made from Vietnamese-origin jumbo rolls. *See Certain Tissue Paper Products from the People's Republic of China,* 73 Fed. Reg. 21,580, 21,584 (Dep't Commerce Apr. 22, 2008) (affirmative preliminary determination of circumvention). Max Fortune claims that the underlying facts of the instant case are legally indistinguishable from those in *Quijiang* and that Commerce is "required by law" to follow its past practice in *Quijiang* and to allow MFVN to certify that its goods have not circumvented the AD order.

However, Max Fortune's reliance on *Quijiang* is inapposite. In *Quijiang*, unlike in the instant case, Commerce found that the respondent Quijiang had cooperated fully and provided reliable information. *I&D Mem.* at cmt. 1, p. 4. This case is more similar to another anti-circumvention review, in which Commerce "did not extend certification" to the respondent because it "failed to cooperate to the best of its ability in providing" Commerce with necessary information. *Id*. at cmt. 4, p. 24.

Moreover, here Commerce determined that, because MFVN was unable to distinguish tissue paper exports withdrawn from inventory from the 2005–2008 period from tissue paper that did not originate from that inventory, "there is no basis to conclude that in this instance a certification procedure would be a reliable means of addressing circumvention." *Id.* Therefore, Commerce properly determined that in accordance with its "obligation to administer the law in a

manner that prevents evasion of the order," it would require the collection of cash deposits from all merchandise exported by MFVN at the rate applicable to the exporter at entry. *Id.* at cmt. 4, p. 23; *see also Tung Mung Dev. Co. v. United States*, 26 CIT 969, 978–79, 219 F. Supp. 2d 1333, 1343 (2004) (noting that the Department has a responsibility to prevent the evasion of payment of AD duties).

C. Commerce Has Adequately Explained its Reason for Refusing to Institute a Certification Program

Finally, Max Fortune argues that for Commerce to depart from its past practice of allowing a certification program, it must adequately explain that decision, and that Commerce has failed to do so here. "[E]ven though Commerce may depart from its earlier determinations and its own prior precedent, 'whatever the ground for departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's actions and so may judge the consistency of that action with the agency's mandate.'" *Marine Harvest (Chile) S.A. v. United States*, 26 CIT 1295, 1311, 244 F. Supp. 2d 1364, 1380 (2002).

However, Commerce has fully explained why it refused to allow a certification program for MFVN's imports. Citing the presence of Chinese rolls in MFVN's inventory in 2010 and MFVN's inability to demonstrate the origin of the jumbo rolls in its inventory or the final destination of its products, Commerce reasonably concluded—fully explained—that "there is no basis to conclude that in this instance a certification procedure would be a reliable means of addressing circumvention." *I&D Mem*. at cmt. 4, p. 24. Commerce further explained that this is the third instance of circumvention under the relevant AD order, and therefore it did not believe that a certification program was an effective way to prevent circumvention of the order.

Plaintiffs have failed to demonstrate that Commerce's requirement of a cash deposit of estimated AD duties for Max Fortune imports is not in accordance with the law. Commerce's action is remedial, not punitive, and is a proper exercise of its charge to prevent evasion of the antidumping duty order. This determination is supported by substantial evidence, consistent with 19 U.S.C. § 1677j(b)(1)(E), and otherwise in accordance with law.

CONCLUSION AND ORDER

For the reasons discussed above, Plaintiffs' Motion for Judgment on the Agency Record pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade is **DENIED** and Commerce's *Final*

Results in the antidumping duty circumvention proceeding are **SUSTAINED.** Upon consideration of all papers and proceedings herein, it is hereby

ORDERED that Plaintiffs' Motion for Judgment on the Agency Record be, and hereby is, denied; and it is further

ORDERED that the final results of the antidumping duty circumvention proceeding published as *Certain Tissue Paper Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 76 Fed. Reg. 47,551 (Dep't Commerce Aug. 5, 2011) be, and hereby are, sustained.

Dated: April 15, 2013
New York, New York

/*s*/ *Richard W. Goldberg*
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 13–57

MUELLER COMERCIAL DE MEXICO, S. DE R.L. DE C.V., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00319

JUDGMENT

Upon consideration of the parties' joint status report dated May 1, 2013, and this case having been submitted for decision, and the court, after due deliberation, having rendered a decision; now in conformity with that decision, it is hereby

ORDERED that count two of the complaint is voluntarily dismissed by Plaintiffs with prejudice; it is further

ORDERED that the challenged decision of the United States Department of Commerce in *Certain Circular Welded Non-Alloy Steel Pipe From Mexico*, 76 Fed. Reg. 36,086 (Dep't of Commerce June 21, 2011), is sustained for the reasons set forth in *Mueller Comercial de Mexico v. United States*, 36 CIT ___, 887 F. Supp. 2d 1360 (2012); and it is further

ORDERED that the subject entries enjoined in this action, *see Mueller Comercial de Mexico v. United States*, Court No. 11–00139 (USCIT Sept. 1, 2011) (order granting amended preliminary injunction), ECF No. 16, must be liquidated in accordance with the final court decision, including all appeals, as provided for in Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C.§ 1515a(e) (2006).

Dated: May 2, 2013
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON