U.S. Customs and Border Protection

Slip Op. 14–83

DONGGUAN SUNRISE FURNITURE CO., LTD., TAICANG SUNRISE WOOD INDUSTRY CO., LTD., TAICANG FAIRMONT DESIGNS FURNITURE CO., LTD., AND MEIZHOU SUNRISE FURNITURE CO., LTD., Plaintiffs, LONGRANGE FURNITURE CO., LTD., Consolidated Plaintiff, COASTER COMPANY OF AMERICA AND LANGFANG TIANCHENG FURNITURE CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE AND VAUGHAN-BASSETT FURNITURE COMPANY, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 10–00254
Public Version

[Antidumping remand results regarding AFA rate remanded to Commerce.]

Dated: July 18, 2014

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Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Rebecca Cantu*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

J. Michael Taylor, *Joseph W. Dorn*, *Daniel L. Schneiderman*, and *Mark T. Wasden*, King & Spalding, LLP, of Washington, DC, for defendant-intervenors.

OPINION

Restani, Judge:

This matter comes before the court following the court's decision in *Dongguan Sunrise Furniture Co. v. United States*, 931 F. Supp. 2d 1346, 1348 (CIT 2013) ("*Dongguan III*"), in which the court remanded Commerce's second redetermination in *Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 75 Fed. Reg. 50,992, 50,992 (Dep't Commerce Aug. 18,

2010) ("*Final Results*"), to the U.S. Department of Commerce ("Commerce") to reconsider its four partial adverse facts available ("AFA") rates assigned to Fairmont's unreported sales of dressers, armoires, chests, and nightstands. For the reasons stated below, the court finds that Commerce's selected AFA rates are not supported by substantial evidence, and thus Commerce's third remand results are remanded.

BACKGROUND

The facts of this case have been documented in the court's previous opinions. *See generally Dongguan III*, 931 F. Supp. 2d at 1348–49. The court presumes familiarity with those decisions but summarizes the facts as relevant to this opinion. In the *Final Results*, Plaintiffs Dongguan Sunrise Furniture Co., Ltd., Taicang Sunrise Wood Industry Co., Ltd., Taicang Fairmont Designs Furniture Co., Ltd., and Meizhou Sunrise Furniture Co., Ltd. (collectively "Fairmont" or "Plaintiff") received a rate of 43.23%, which was calculated based on a rate of approximately 34% for reported sales and a partial adverse facts available ("AFA") rate of 216.01% for unreported sales. *Final Results*, 75 Fed. Reg. at 50,997; *Dongguan Sunrise Furniture Co. v. United States*, 865 F. Supp. 2d 1216, 1234 (CIT 2012) ("*Dongguan I*"). In *Dongguan I*, the court sustained Commerce's application of a partial AFA rate to calculate the overall dumping margin, but held that Commerce's selected AFA rate of 216.01% was not supported by substantial evidence. 865 F. Supp. 2d at 1232–34. Commerce failed to demonstrate that the 216.01% rate, which was calculated in a new shipper review for a different entity during a different period of review ("POR"), was relevant and reliable for Fairmont. *Id.* at 1233.

On remand, Commerce grouped the unreported sales into four categories based on general product type: armoires, chests, nightstands, and dressers. *Dongguan Sunrise Furniture Co. v. United States*, 904 F. Supp. 2d 1359, 1362 (CIT 2013) ("*Dongguan II*"). Commerce then determined an AFA margin for each of the four general product types by selecting the single highest CONNUM-specific[1] margin below 216.01% from Fairmont's reported sales that fell within

[1] A control number, or "CONNUM," is a number assigned to each unique reported product based on a set of physical characteristics identified in the questionnaire issued to respondents.

the corresponding general categories.[2] *Id.* Fairmont received a rate of 39.41%, which included partial AFA rates of 182.15% for the unreported armoires, 215.51% for the unreported chests, 134.42% for the unreported nightstands, and 183.52% for the unreported dressers. *Id.*; *Dongguan III*, 931 F. Supp. 2d at 1348. The court again remanded to Commerce, stating that Commerce had failed to demonstrate "a rational relationship between the AFA rates chosen and a reasonably accurate estimate of Fairmont's actual rate," because the AFA rates were based on minuscule percentages of Fairmont's actual sales. *Dongguan II*, 904 F. Supp. 2d at 1363–64. The court also noted that the weighted-average margin for the reported sales, which constituted the vast majority of Fairmont's sales during the POR, indicated that Fairmont's actual rate was much lower than the selected AFA rates. *Id.* at 1364.

During the second remand proceedings, Commerce calculated partial AFA rates of 189% for the unreported armoires, 161% for the unreported chests, 140% for the unreported nightstands, and 161% for the unreported dressers, which resulted in an overall rate of 41.75%.[3] *Dongguan III*, 931 F. Supp. 2d at 1349. Commerce arrived at the partial AFA rates by selecting the single-highest CONNUM-specific margin below 216% where at least 0.04% of the total reported sales in that product category were dumped at or above the selected margin. *Id.* Once again, the court remanded to Commerce. *Id.* at 1356. The court noted that "Commerce ignored the majority of the reported and verified information" regarding the sales data for the four general product types at issue "and instead relied on an extremely small percentage of [those] sales." *Id.* The court held that because "Commerce declined to consider the very evidence it identified as most indicative of Fairmont's actual rate for the unreported sales, and given that the disregarded record evidence suggests a reasonably accurate estimate of Fairmont's actual rate would be much lower, Commerce's determinations are not supported by substantial evidence." *Id.*

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[2] The four general categories of merchandise encompass widely varying models. Each category covers numerous CONNUMs, most of which were reported fully. *See* Final Results of Third Redetermination Pursuant to Ct. Order, Attach. II.A, ECF No. 192–2 (confidential). The AFA rates apply only to the small volume of sales within each category that were unreported.

[3] The increase in some of the AFA rates from those selected in the first remand results was the result of excluding certain financial statements from the financial ratio calculations, which increased all of Fairmont's margins. *Dongguan III*, 931 F. Supp. 2d at 1349 n.2.

In the remand proceedings currently challenged before the court, Commerce calculated new partial AFA rates for each of the four types of unreported sales.[4] Final Results of Third Redetermination Pursuant to Ct. Order, ECF No. 193–1, 2 ("*Third Remand Results*"). Commerce based these partial AFA rates on the weighted-average dumping margins of the 15% of reported sales with the highest dumping margins within each of the four general product categories. *Id.* at 12–13. This resulted in an overall dumping margin of 44.64%. *Id.* at 34. Fairmont contends that the partial AFA rates are not supported by substantial evidence. Pl. Fairmont Cmts. on Third Remand Results, ECF No. 204, 1–10 ("Pl.'s Cmts."). Defendant-Intervenors continue to argue that 216.01% was the appropriate AFA rate, but otherwise do not object to the *Third Remand Results*. AFMC's Cmts. Concerning Commerce's Final Results of Third Redetermination Pursuant to Ct. Order, ECF No. 195, 1–2. Defendant argues that the partial AFA rates are in compliance with the court's remand order in *Dongguan III* and supported by substantial evidence. Def.'s Resp. to Fairmont's and AFMC's Remand Cmts., ECF No. 213, 2–11 ("Def.'s Resp.").

Discussion

Fairmont makes several arguments in support of its contention that the partial AFA rates are not supported by substantial evidence. First, Fairmont notes that the selected partial AFA rates are impermissibly excessive because these rates are very close to or even higher than the rates before the court in *Dongguan II* and *Dongguan III*. Pl.'s Cmts. 1–2. Thus, the rates have the same flaw of unconnectedness to Fairmont's true commercial behavior, as the court previously found. *See id.* Fairmont also argues that Commerce acted unreasonably in comparing the volume of sales relied upon by Commerce to calculate the AFA rates to the volume of unreported sales in determining what constitutes a significant portion of the available evidence. *Id.* at 3. Fairmont further contends that Commerce impermissibly focused on the quantity of reported sales used to calculate the AFA rates without properly considering whether those sales were representative of Fairmont's commercial reality with respect to its unreported sales.[5] *Id.* at

[4] The partial AFA rates were [[ ]] for armoires, [[ ]] for chests, [[ ]] for nightstands, and [[ ]] for dressers. Final Results of Third Redetermination Pursuant to Ct. Order, ECF No. 192–1, Attach. I, Table 2 ("*Confidential Third Remand Results*").

[5] Defendant argues that Fairmont has failed to exhaust its administrative remedies regarding whether the transactions relied upon by Commerce were sufficiently representative because this argument was not presented to Commerce on remand. Def.'s Resp. 7–8. The court rejects this contention, at least as it pertains to the general argument that the sales relied upon to calculate the partial AFA rates were not representative of the unreported sales. Although Fairmont argued specifically before Commerce that the comparison

3–8. Finally, Fairmont argues that the AFA rates are far higher than necessary to deter future non-compliance. *Id.* at 8–10.

Commerce provides several justifications to support the partial AFA rates. First, Commerce defends its conclusion that the 15% of sales with the highest dumping margins for the four categories constitute a meaningful portion of the available data by noting that this volume of sales is several times larger than the volume of unreported sales and by comparing it to the 15% of sales used to support the AFA rate upheld in *Lifestyle Enterprise, Inc. v. United States*, 896 F. Supp. 2d 1297, 1301–02 (CIT 2013), *aff'd in part, rev'd in part on other grounds*, 751 F.3d 1371 (Fed. Cir. 2014). *Third Remand Results* at 12–14. Commerce also reasons that because many of Fairmont's transactions deviated greatly from the overall dumping margin, the 15% of sales relied upon reflect Fairmont's commercial reality, even though the AFA rates appear to be high when compared to the overall dumping margin. *Id.* at 13.[6] Commerce further states that AFA rates based on the sales with the highest margins are necessary to ensure that sales with high dumping margins are reported in the future. *Id.* at 15–16.

When a party has failed to act to the best of its ability, Commerce, "in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). Commerce's chosen AFA rates must be "a *reasonably accurate estimate* of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010). The built-in increase, however, cannot go beyond the amount sufficient to

of *net* U.S. prices, rather than the *gross* U.S. prices, showed that the 15% of sales relied upon by Commerce were not representative, the argument that the sales relied upon were not representative of the unreported sales because of the differences in U.S. prices was presented to the agency. *See* Fairmont's Cmts. on Commerce's Initial Remand Results at 6, TRCD 8 at bar code 3169420–01 (Dec. 20, 2013), ECF No. 212–1 (June 5, 2014) (confidential). The court agrees that the particular alternative calculation methodology proposed by Fairmont in its comments to the court was not presented to Commerce on remand, and therefore the court will not consider it at this time.

[6] Commerce also notes that the weighted-average dumping margin of the [[ ]] of all Fairmont sales with the highest dumping margins equaled the weighted-average dumping margin of all of the sales used to calculate the four AFA rates. *Confidential Third Remand Results* at 13–14. As the court stated in *Dongguan III* in response to reasoning based on similar statistics, "Commerce concluded that more accurate rates are reached when it determines the four rates, one for each product type. Thus, the reliability of statistics based on the average of all four product types is unclear. If Commerce determines four separate AFA rates, it must support each rate with substantial evidence related to each selected rate." 931 F. Supp. 2d at 1353–54 n.9 (citation omitted).

deter respondents from future non-compliance. *See id.* at 1324. "Substantial evidence requires Commerce to show some relationship between the AFA rate and the actual dumping margin." *Id.* at 1325. In any case, there is no finding that respondents were willfully avoiding reporting sales. Rather, the scope of the antidumping order was misunderstood by Fairmont, or its employees were not properly instructed in how to identify in-scope sales. *See Dongguan I*, 865 F. Supp. 2d at 1229–30. Thus, Commerce did not use total AFA but used AFA for the unreported sales only, presumably to encourage greater care on the part of respondents, not to deter intentional uncooperative conduct. As explained below, the partial AFA rates still are not supported by substantial evidence because they are not reflective of Fairmont's commercial reality and are higher than necessary to encourage careful compliance.

1. *Commercial Reality*

Although Commerce has now relied on a greater number of sales in calculating the partial AFA rates, the record continues to show that these rates are not reflective of Fairmont's commercial reality. The court in *Dongguan II* stated that "[a] calculated rate of 34% for Fairmont's reported sales suggests that rates ranging from 134% to over 215% are not reflective of Fairmont's commercial reality, especially when there is no indication that Fairmont failed to report certain sales for strategic reasons." 904 F. Supp. 2d at 1364. Similarly, the court in *Dongguan III* stated that the "record evidence suggests a reasonably accurate estimate of Fairmont's actual rate would be much lower" than the AFA rates ranging from 140% to 189% calculated by Commerce. 931 F. Supp. 2d at 1349, 1356. As Fairmont rightfully points out, these same concerns apply in force when two of the four rates are even higher than the AFA rates at issue in *Dongguan III*, the other two rates are not substantially lower, and the overall dumping margin has increased as a result of the change in AFA rates.

The fact that Commerce relied on the 15% of reported sales with the highest margins in each of the four broad categories to support these rates, rather than, as previously, picking a specific margin representing a smaller percentage of sales, does not change the court's prior analysis of whether the partial AFA rates are reflective of Fairmont's actual rates. First, the court rejects Commerce's justification for relying on 15% of sales by comparing this volume to the volume of unreported sales. This logic seemingly would allow Commerce to rely on less evidence as the volume of unreported sales declines and consequently the level of compliance increases. The court will not

endorse such dubious logic. Similarly, Commerce's reliance on *Lifestyle* to support its contention that using the 15% of sales with the highest margins is supported by substantial evidence is misplaced. The respondent against whom the AFA rate was applied in *Lifestyle* did not challenge the AFA rate calculated by Commerce using this methodology. *Lifestyle*, 896 F. Supp. 2d at 1302. Rather, a domestic party argued that the rate should have been even higher, a claim which the court held lacked legal support. *Id. Lifestyle* did not hold that 15% of some body of sales will always constitute substantial evidence for an AFA rate.

Ultimately, the AFA rates must be supported by substantial evidence on the record and reflective of Fairmont's actual rates. *See Gallant Ocean*, 602 F.3d at 1325. Here, the transactions relied upon by Commerce to calculate the AFA rates had per-unit U.S. sales prices far lower than the U.S. prices for the unreported sales. Pl.'s Cmts. 4–5; Fairmont's Cmts. on Commerce's Initial Remand Results at 6, TRCD 8 at bar code 3169420–01 (Dec. 20, 2013), ECF No. 212–1 (June 5, 2014) (confidential). Although Commerce determined that these low U.S. prices were not the result of an erroneous calculation methodology, it did not address the issue of whether the sales it used were representative of the unreported sales. *See Third Remand Results* at 28–30. Commerce does argue that because Fairmont experienced a wide range of margins and made transactions at or above the selected AFA rates, the rates are reflective of Fairmont's commercial reality. *Id.* at 13–15. Although the record does show individual transactions at margins at or above the selected AFA rates, Fairmont's overall dumping margin is a fraction of the partial AFA rates, which indicates that the vast majority of Fairmont's sales are at margins far lower than the rates relied upon by Commerce in selecting the AFA rates. Furthermore, there is no evidence indicating that Fairmont failed to report the unreported sales in an attempt to hide sales with high margins. *Dongguan II*, 904 F. Supp. 2d at 1364. In short, nothing in the record indicates that the unreported sales were made at average margins remotely close to the ones relied upon by Commerce in calculating the partial AFA rates, and the fact that some individual transactions were made at margins even higher than the partial AFA rates selected does not constitute substantial evidence in the light of the contradictory evidence suggesting a much lower average rate. *See id.* at 1363–64 (rejecting same argument). The AFA rates thus remain untied to Fairmont's commercial reality.

2. *Deterrence*

Commerce's attempts to justify the partial AFA rates by invoking the need for deterrence is unavailing. Commerce expresses a concern that selecting a lower rate based upon a greater portion of the available data would entice respondents to game the system by declining to report transactions with high dumping margins with the expectation that the ultimate AFA rate will be lower than the rate they otherwise would have received. *Third Remand Results* at 15–17. That concern might in fact justify a relatively greater increase in the rate in order to ensure compliance in other cases, but that justification does not appear to apply in this case because there is no evidence that Fairmont engaged in such strategic behavior. *Dongguan II*, 904 F. Supp. 2d at 1364. Rather, Fairmont's failure to train its employee in how to identify in-scope sales resulted in a "perfunctory evaluation of its own records" that led to some in-scope sales going unreported. *Dongguan I*, 865 F. Supp. 2d at 1229–30. Commerce, in exercising its discretion in calculating the AFA margins here, should focus on its legitimate concern with deterring this type of carelessness. Furthermore, Commerce's logic would dictate using the highest margin available as the AFA rate, which the court already has rejected. *See Dongguan II*, 904 F. Supp. 2d at 1364 (rejecting Commerce's use of the highest reported CONNUM-specific margin below 216.01% in each of the four product groups containing unreported sales).

The court likewise rejects Commerce's reliance on *Gallant Ocean* to support its determination that the rates do not go beyond what is necessary to ensure compliance. Commerce takes the statement in *Gallant Ocean* "that a rate over five times the highest rate imposed on similar products is far beyond an amount sufficient to deter . . . future noncompliance," 602 F.3d at 1324, and reasons that the AFA rates here are acceptable because they are less than five times the overall rate of Fairmont's reported sales of the products at issue. *Third Remand Results* at 19. But the Court of Appeals for the Federal Circuit did not set any bright-line rule. It stated only "that a rate over five times the highest rate imposed on similar products is *far beyond* an amount sufficient to deter . . . future non-compliance." *Gallant Ocean*, 602 F.3d at 1324 (emphasis added). The court also notes that the AFA rate of 57.64% at issue in *Gallant Ocean* was markedly lower than the AFA rates at issue in this case. *See id.* Although the AFA rates here are less than five times the overall margin for the reported sales, they are still several times higher, and the AFA rates are all well over 100%. The court already has stated that the fact that "the selected AFA margins are many times higher than the weighted-

average margin for the reported sales . . . indicates that the deterrence factor applied is far beyond the amount necessary to deter future non-compliance." *Dongguan III*, 931 F. Supp. 2d at 1355 (citing *Gallant Ocean*, 602 F.3d at 1324). Commerce has not meaningfully lowered the AFA rates, and the court remains of the view that Commerce's methodology is flawed in that the selected AFA rates are far beyond the amount necessary to deter future non-compliance.

CONCLUSION

For the reasons stated above, Commerce's four partial AFA rates are not supported by substantial evidence. To assist Commerce in finally bringing this case to an end, the court will explain further what is required for the rates to be supported by substantial evidence. The evidence here shows that the product categories Commerce chose to correspond to the unreported sales encompass a wide variety of specific products, with dramatically differing dumping margins. In order to account for these variations, Commerce must use a much greater portion of the reported sales in order to achieve an AFA rate consistent with Fairmont's commercial reality. Alternatively, Commerce may use some other reasonable methodology for tying the unreported sales here to the reported sales used to calculate the AFA rates (such as through a comparison of the U.S. prices), avoiding the problem created by these fluctuations altogether. Commerce shall file its remand determination with the court before or on September 17, 2014. The parties shall have until October 17, 2014, to file objections, and the government will have until October 31, 2014, to file its response.

Dated: July 18, 2014
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI JUDGE

Slip Op. 14–84

CERRO FLOW PRODUCTS, LLC, MUELLER COPPER TUBE PRODUCTS, INC., MUELLER COPPER TUBE COMPANY, INC., AND WIELAND COPPER PRODUCTS, LLC, Plaintiffs, v. United States, Defendant, GOLDEN DRAGON PRECISE COPPER TUBE GROUP, INC., HONG KONG GD TRADING CO., LTD., GOLDEN DRAGON HOLDING (HONG KONG) INTERNATIONAL, LTD., AND GD COPPER (U.S.A.), Defendant-Intervenors.

Before: Jane A. Restani, Judge
Court No. 13–00237
Public Version

[Plaintiffs' motion for judgment on the agency record regarding U.S. price determination in antidumping duty review is denied.]

Dated: July 18, 2014

Jack A. Levy, *Thomas M. Beline*, and *Jonathan M. Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for plaintiffs.

Jennifer E. LaGrange, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendants. With her on the brief were Stuart F. Delery, Assistant Attorney General, Jeanne E. Davidson, Director, and Claudia Burke, Assistant Director. Of counsel on the brief was Daniel J. Calhoun, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Kevin M. O'Brien, *Christine M. Streatfeild*, and *Yi Fang*, Baker & McKenzie, LLP, of Washington, DC, for defendant-intervenors.

OPINION

Restani, Judge:

This action challenges the U.S. Department of Commerce's ("Commerce") final results rendered in the first administrative review of the antidumping duty order on seamless refined copper pipe and tube from the People's Republic of China ("PRC"). *See* Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Results and Partial Revocation of 2010/11 Antidumping Duty Administrative Review, 78 Fed. Reg. 35,251 (Dep't Commerce June 12, 2013) ("*Final Results*"). Plaintiffs Cerro Flow Products, LLC, Wieland Copper Products, LLC, Mueller Copper Tube Products, Inc., and Mueller Copper Tube Co., Inc. (collectively "Cerro Flow") seek remand of the *Final Results*, contending Commerce erred in not adjusting defendant-intervenor Golden Dragon Precise Copper Tube Group, Inc.'s ("Golden Dragon") U.S. sales prices and not applying adverse facts available ("AFA") to Golden Dragon. Rule 56.2 Br. in Supp. of Mot. for J. on the Agency R. Filed by Pls., ECF No. 29 ("Pls. Br."). Defendant United States ("the government") refutes the challenge to Commerce's U.S. price determination and, along with Defendant-

Intervenor Golden Dragon, argues that the *Final Results* are based on substantial evidence and in accordance with law. Def.'s Opp'n to Pls.' Mot. for J. upon the Agency R., ECF No. 40 ("Def. Br."); Def.-Intvnr.'s Resp. Br. in Opp'n to Pls.' Mot. for J. on the Agency R., ECF No. 43 ("Def. Intvnr. Br."). For the reasons stated below, Commerce's Final Results are sustained.

BACKGROUND

Following an antidumping duty order on certain copper pipes and tubes from the PRC, Commerce initiated an administrative review of the order with a period of review from November 22, 2010, to October 31, 2011. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 76 Fed. Reg. 82,268, 82,273 (Dep't Commerce Dec. 30, 2011); *Seamless Refined Copper Pipe and Tube from Mexico and the People's Republic of China: Antidumping Duty Orders and Amended Final Determination of Sales at Less than Fair Value From Mexico*, 75 Fed. Reg. 71,070 (Dep't Commerce Nov. 22, 2010). In the *Final Results*, Commerce concluded that an adjustment to Golden Dragon's U.S. sales prices due to an agreement related to antidumping duties[1] between Golden Dragon and some of its U.S. customers was unwarranted. *See Memorandum Regarding Golden Dragon's U.S. Sales Listing and Alleged Price Adjustment* at 5, CD 71 at bar code 3139214–01 (June 5, 2013), ECF No. 42–1 (May 14, 2014) ("*BPI Memorandum*").

Prior to the antidumping order, Golden Dragon had an agreement with some of its U.S. customers, the contents of which are business proprietary information. Id. at 5–6. The central dispute in this case is whether the agreement covers entries subject to the dumping order.

In a new shipper review covering Golden Dragon's sales of copper tubes from Mexico that were also subject to an antidumping order, Commerce examined a Golden Dragon "sales agreement" and "financial statement." *See* Issues and Decision Memorandum for the Final Results of the New Shipper Review of Seamless Refined Copper Pipe and Tube from Mexico, A-201–838, at 4–5 (Sept. 20, 2012), *available at* http://enforcement.trade.gov/frn/summary/mexico/2012–23686–1.pdf (last visited July 11, 2014) ("*New Shipper I&D Memo*"). Commerce determined an adjustment to Golden Dragon's U.S. price was

[1] "Agreement" in this opinion refers to the business proprietary agreement between Golden Dragon and some of its U.S. customers, [[ ]] The nature and terms of the agreement, as well as the identity of the customers, are business proprietary. During the period between the International Trade Commission's ("ITC") threat of injury determination and the antidumping order, Golden Dragon [[ ]] to some of its U.S. customers for pre-dumping order entries. *BPI Memorandum* at 5.

warranted to reflect "what the U.S. customer actually paid." *Id.* at 5. The new shipper period of review, from November 22, 2010 through April 30, 2011, overlapped with the first five months of the period of review of the administrative review at hand. Seamless Refined Copper Pipe and Tube from Mexico: Final Results of Antidumping Duty New Shipper Review, 77 Fed. Reg. 59,178 (Dep't Commerce Sept. 26, 2012) ("New Shipper Review").

At Commerce's request to provide documentation of certain agreements related to antidumping duties with U.S. customers, following the parties' submissions of briefs and comments to the agency, Golden Dragon submitted its 2010 financial statement, a supply agreement between Golden Dragon and one of its U.S. customers, and a statement and declaration from that U.S. customer. *Golden Dragon's Apr. 24, 2013 Submission*, CD 66 at bar code 3131681–01 (Apr. 24, 2013), ECF No. 42–1 (May 14, 2014). Golden Dragon also submitted its 2011 financial statement as part of its Supplemental Section C Questionnaire response. Golden Dragon Supplemental Section C Questionnaire Response, Ex. SC-12, CD 38 at bar code 3076043–02 (May 18, 2012), ECF No. 42–1 (May 14, 2014) ("*2011 Financial Statement*"). In response to whether Golden Dragon's U.S. customers were parties to a then-in-force agreement regarding antidumping duties, Golden Dragon stated in its second supplemental questionnaire that no such agreement existed. Golden Dragon Second Supplemental Section C Response at 2, CD 49 at bar code 3083848–01 (June 29, 2012), ECF No. 42–1 (May 14, 2014) ("*Golden Dragon Second Supplemental Section C Response")*.

Cerro Flow challenges two aspects of the *Final Results* and asserts: (1) Commerce's decision not to adjust Golden Dragon's U.S. prices is unsupported by substantial evidence and contrary to law because there was clear evidence of relevant agreements between Golden Dragon and its customers during the period of review, and Commerce's decision is inconsistent with the results in *Seamless Refined Copper Pipe and Tube from Mexico: Final Results of Antidumping Duty New Shipper Review*, 77 Fed. Reg. 59,178 (Dep't Commerce Sept. 26, 2012) ("*New Shipper Review*"); and (2) Commerce's decision not to apply AFA is unsupported by substantial evidence and contrary to law because, in response to Commerce's information requests, Golden Dragon delayed providing an agreement regarding its U.S. prices and Commerce failed to explain why adverse inferences were not appropriate as a result of this delay. Pls. Br. 9–32.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012), which grants the court authority to review actions contesting the final determination in an administrative review of an antidumping order. Such determinations are upheld unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Determination Not to Adjust Golden Dragon's U.S. Price

Cerro Flow contends that Commerce erred in failing to make a downward adjustment to Golden Dragon's U.S. prices because Golden Dragon continued to have agreements related to antidumping duties with its U.S. customers and because Commerce determined a price adjustment was warranted in the New Shipper Review, which in Cerro Flow's view had the same factual record as this administrative review. Pls. Br. 9–13. The government argues that Commerce supported with substantial evidence its determination that Golden Dragon did not have an agreement with its U.S. customers during the period of review affecting the actual U.S. price, and that Commerce is not bound by its determination in the *New Shipper Review*. Def. Br. 12, 25. The court will address each of these issues in turn.

A. *Commerce reasonably found that Golden Dragon did not have an agreement with its customers that affected the U.S. price paid or payable during the period of review.*

Commerce determined that Golden Dragon did not continue its agreement related to antidumping duties with its U.S. customers for period-of-review sales. *BPI Memorandum* at 5. Commerce relied on four documents on the record to support its finding: 1) a pre-antidumping duty order memo between Golden Dragon and one of its U.S. customers ("the Memo");[2] 2) Golden Dragon's 2010 and 2011 financial statements; 3) a supply agreement between Golden Dragon and one of its U.S. customers;[3] and 4) statements from one of Golden

[2] The Memo refers to the pre-antidumping duty order, [[ ]]. *Memo*, bar code 3131681–01 (June 3, 2010), ECF No. 42–1 (May 14, 2014).

[3] "Supply agreement" in this opinion refers to the supply agreement effective [[ ]] between Golden Dragon and [[ ]]. *Supply Agreement*, bar code 3065670–01 (July 1, 2011), ECF No. 42–1 (May 14, 2014).

Dragon's U.S.customers.[4] *Id.* at 5–7. Commerce found particularly determinative the absence of any relevant provision related to U.S. prices in the 2011 financial statement and supply agreement, when such a provision existed in the 2010 financial statement and the Memo. *Id.*

The burden of substantial evidence demands "more than a mere scintilla" of evidence; the burden is met when there exists "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). Commerce's determination may be supported by substantial evidence "[e]ven if it is possible to draw two inconsistent conclusions from evidence in the record." *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001) (citing *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996)).

The record before Commerce includes evidence that a reasonable mind might accept as adequate to support Commerce's determination that Golden Dragon did not maintain an agreement related to antidumping duties with its U.S. customers during the period of review. Although Commerce and Cerro Flow drew two inconsistent conclusions from the record, Commerce's determination is supported by substantial evidence.

1. The Memo

Cerro Flow contends the Memo, which dealt with preliminary antidumping duty cash deposits, applied to sales during the period of review based on the plain language of several clauses in the Memo.[5] Pl. Br. 19–21. Commerce found that the Memo does not reveal the existence of an agreement related to antidumping duties during the period of review.[6] *See BPI Memorandum* at 6–7. Commerce based its determination on the fact that the Memo is ambiguous at best and does not state explicitly that the increased prices and other aspects of the agreement are to remain effective during the period of review. *Id.*;

[4] The statements are the confirmation letter and declaration from [[ ]]. *See* Letter, bar code 3131681–01 (June 6, 2012), ECF No. 42–1 (May 14, 2014); Declaration, bar code 3131681–01 (Oct. 31, 2012), ECF No. 42–1 (May 14, 2014).

[5] Cerro Flow relies on the differences between clause seven and clauses eight, nine, and ten of the Memo to show the [[ ]] between Golden Dragon and [[ ]] is not altered by any events coinciding with the end of the provisional measures period and was still in effect during the period of review of this administrative review. Pls. Br. 19–20. Clause seven states [[ ]], but Cerro Flow contends that the other clauses do not specify that [[ ]]. Memo at 1.

[6] The Memo, [[ ]], states in part: [[ ]] Memo at 1–2.

Memo at 1. Although the Memo does not define its effective period, Commerce reasonably interpreted it to apply to the provisional measures period, because under 19 U.S.C. § 1673e(b)(2), after an affirmative ITC finding based only on a threat of material injury, U.S. Customs and Border Protection must refund cash deposits on sales during the provisional measures period. Commerce reasonably concluded that the agreement covered only deposits made during the provisional measures period and not cash deposits made during the period of review. *See BPI Memorandum* at 7.

Cerro Flow argues that one phrase of the Memo[7] can apply only to the period of review as Commerce can reduce antidumping margins only following an administrative review. Pls. Br. 20–21. Commerce found the clause to be ambiguous at best. *BPI Memorandum* at 7. Because the language of the Memo appears ambiguous, as Commerce could reduce antidumping margins in proceedings other than administrative reviews, such as between the preliminary and final determinations in the investigation, Commerce's interpretation of the Memo is not unreasonable. Commerce had an adequate basis for interpreting the Memo to apply solely to the provisional measures period.

2. Financial Statements

Cerro Flow argues that Golden Dragon's 2010 and 2011 financial statements establish that Golden Dragon continued an agreement related to antidumping duties with some of its U.S. customers and that its U.S. customers continued to benefit from the agreement during the period of review. Pls. Br. 15–16. Cerro Flow contends that a note in the 2010 financial statement refers to an agreement related to antidumping duties. *Id.* at 15. Cerro Flow further contends that the agreement was still in place in 2011, even though no corresponding note was in the 2011 financial statement. *Id.* Commerce found that Golden Dragon's 2011 financial statement demonstrated no agreement on antidumping duties between Golden Dragon and its U.S. customers existed during the period of review. *BPI Memorandum* at 6–8. Commerce primarily relied on the absence of any disclosure of existing or future agreements in the 2011 financial statement, as compared to the 2010 note, which in Commerce's view referred only to an agreement during the provisional measures period. *Id.* at 8. Additionally, Commerce relied on the fact that Golden Dragon's statements were audited, and therefore, such an agreement was required

[7] Cerro Flow relies on the phrase [[
]] Pls. Br. 20 (emphasis added).

to have been disclosed in the statement, as it would materially affect Golden Dragon's financial position, and would constitute significant information for potential investors and lenders. *Id.* at 7–8.[8]

The 2010 note[9] is a broad statement that does not specify a time period. In isolation, it could be read to apply broadly and state the existence of an ongoing agreement. *See* Pls. Br. 15–17. When read in the light of the 2011 financial statement, however, the note also could be read to have described an agreement related to antidumping duties that was effective solely during the provisional measures period. In reviewing the note, the court finds it to be a broad statement that could support either of the parties' two inconsistent interpretations and that Commerce's conclusion, thus, is adequately supported.

3. Supply Agreement

Golden Dragon submitted a supply agreement[10] with one of its U.S. customers. Although the supply agreement impacts U.S. prices, Commerce distinguished it from the Memo in that the supply agreement does not alter prices in the same way. *BPI Memorandum* at 6. Cerro Flow contends that the supply agreement does not change Golden Dragon's practice that would require an adjustment to its U.S. prices. Pls. Br. 17–20. Commerce reasoned that the supply agreement was ambiguous.[11]

Although the record evidence is ambiguous and two inconsistent conclusions could be drawn from it, Commerce's conclusion is reasonable and supported by substantial evidence because although the supply agreement discusses U.S. prices in the context of the anti-

[8] Contrary to Cerro Flow's argument, audited statements may have weight even if a company is not publicly held.

[9] [[ ]] 2010 Financial Statement, bar code 3131681–01 (July 22, 2011), ECF No. 42–1 (May 14, 2014).

[10] The supply agreement was [[ ]]. *Supply Agreement* at 1. Although the supply agreement includes a [[ ]]. *Id.* at 7; *see BPI* Memorandum at 6.

[11] Cerro Flow justifies its conclusion by relying upon the inclusion of the phrase that all goods in [[ ]], [[ ]] in the supply agreement. Pls. Br. 17–18 (quoting *Supply Agreement* at 8). Commerce's reasoning is based on the words [[ ]] not being defined in the supply agreement. Def. Br. 23. The government clarifies that even assuming [[ ]], the Memo's agreement related to antidumping duties only referred to [[ ]] during the provisional measures period. *Id.* Commerce, therefore, reasonably concluded [[ ]] referred to Golden Dragon's current practice of not having a [[ ]] agreement in place with its customers, or in the alternative, that it referred to Golden Dragon's practice of [[ ]] only during the provisional measures period.

dumping order, there is no clause similar to the relevant clause contained in the Memo. The court therefore will sustain Commerce's conclusion.

4. Letter and Declaration from a U.S. Customer

Golden Dragon submitted a letter[12] and declaration[13] from one of its U.S. customers, which appears to support its position, but which Cerro Flow contends does not alter its interpretation of the Memo that expressly contradicts Commerce's conclusion that the Memo applied only to the provisional measures period. Pls. Br. 21–22. Because Commerce did not rely directly on the customer letter and declaration for its determination, but instead supported its determination with other evidence that the letter and declaration corroborate, the court need not decide whether relying on these documents alone would amount to substantial evidence supporting Commerce's conclusion. *BPI Memorandum* at 7.

In reviewing the evidence on the record, it appears that much of the evidence is ambiguous and might be construed to support either Commerce's or Cerro Flow's conclusions. Although perhaps inconsistent conclusions could be drawn from the record, there is no clear evidence in Cerro Flow's favor, and imposing additional duties in such a situation is neither required nor necessarily desirable. The court concludes that Commerce's determination that Golden Dragon no longer has any agreements related to antidumping duties with its U.S. customers is supported by substantial evidence and is a reasonable conclusion based on this record.

B. *The New Shipper Review determination does not require a similar result here.*

Cerro Flow contends that Commerce failed to provide a rationale for not following its *New Shipper Review* determination that an adjustment to Golden Dragon's U.S. sales prices was warranted. Pls. Br. 22. According to Cerro Flow, the public *New Shipper I & D Memo* indicates that Commerce determined that Golden Dragon's U.S. sales prices had to be adjusted, based on "an agreement" and Golden Dragon's 2010 financial statement, which Cerro Flow claims were

[12] The letter states Golden Dragon's customer agreed to [[ ]]. See Letter at 1. The letter stipulates the agreement to [[ ]] is only [[ ]]. Id.

[13] The declaration expressly states that Golden Dragon and its U.S. customer did not have a [[ ]] agreement in effect for sales from November 22, 2010, through October 31, 2011, and that the customer in question would not, nor had an expectation to, receive [[ ]] based on the final results of the first administrative review of the antidumping duty order. *See Declaration* at 1.

also part of the record of this administrative review. *Id.* at 22–23. Cerro Flow concluded that Commerce must reach the same determination here as in the *New Shipper Review*, at least for the six-months overlap between the *New Shipper Review* and the administrative review at issue, or explain the differences between the two records that made Commerce reach different findings. *Id.* at 23–24. Commerce rejected Cerro Flow's contentions, explaining that it cannot review evidence from the *New Shipper Review* that is not part of the record of this administrative review. *BPI Memorandum* at 5. The government contends that Commerce's reasoning for adjusting Golden Dragon's U.S. prices in the *New Shipper Review* is contained in a proprietary memorandum that is not part of the record in this proceeding, and that it cannot be confirmed that all of the information that formed the basis for Commerce's decision in the *New Shipper Review* was also available to Commerce in this administrative review. Def. Br. 7, 27–28; *see* New Shipper I & D Memo at 4–5.[14]

Commerce enjoys considerable discretion in conducting investigations and reviews under the antidumping statute, particularly in defining the scope of its inquiry and in making decisions regarding relevant evidence. *See E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 19, 32 (1998). Commerce's longstanding practice, upheld by the court, is to treat each segment of an antidumping proceeding, including the antidumping investigation and the administrative reviews that may follow, as independent proceedings with separate records, which lead to independent determinations. *See id.*; *Outokumpu Copper Rolled Prods. AB v. United States*, 17 CIT 848, 854, 829 F. Supp. 1371, 1377 (1993) (stating that it is well-established that antidumping investigations and administrative reviews are wholly independent proceedings).

Commerce, however, may not shroud its determinations with blanket assertions that certain facts on the record are business proprietary in order to come to different determinations on identical facts. That is, under the proper restraints, the same evidence may be submitted in different proceedings in order to prevent arbitrariness. Although it often will be the case that records in different proceedings are dissimilar, Commerce must treat similarly situated parties consistently. *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("[A]n agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently."). If

[14] Golden Dragon contends the two records are "notably different." Def. Intvnr. Br. 17. Golden Dragon maintains that the administrative review record contains more information than the record of the New Shipper Review, including: 1) Golden Dragon's 2011 financial statements, 2) statements from [[ ]] indicating it does not expect any [[ ]], and 3) the supply agreement. Id.

Commerce can't explain its action upon judicial review, remand for such a purpose may be required. The two records at issue in this case, however, are clearly different.

Although Commerce failed to explain fully why the new shipper and administrative review records were not similar, the record makes clear that Commerce considered additional evidence here that could not have been part of the *New Shipper Review*, as the documents are dated or became effective after the new shipper period of review. *2011 Financial Statement* (Mar. 4, 2012); *Letter* (June 6, 2012); *Declaration* (Oct. 31, 2012); *Supply Agreement* (July 1, 2011).

Commerce properly reviewed the evidence on the present record and was not bound by its determination based on a different record in the *New Shipper Review* that an adjustment to Golden Dragon's U.S. prices was warranted. Commerce supported its independent determination not to adjust Golden Dragon's price in this administrative review with substantial evidence. Therefore, Cerro Flow has not demonstrated that Commerce's determination was arbitrary.

II. Commerce's Determination Not to Apply AFA

Cerro Flow argues that Commerce's decision not to apply AFA is unsupported by substantial evidence and contrary to law. Pls. Br. 27. Cerro Flow contends the application of AFA was warranted because Golden Dragon withheld information Commerce explicitly requested on multiple occasions and did not cooperate to the best of its ability. *Id.* Cerro Flow focuses on Golden Dragon's submission of the Memo and its 2010 financial statement four weeks before the expiration of the extended deadline. In Cerro Flow's view, these documents are evidence of an agreement with customers regarding antidumping duties and refute Golden Dragon's assertions to the contrary in its questionnaire responses. *Id.* at 3, 27–28. Furthermore, Cerro Flow argues that Commerce's failure to provide its reasoning for not applying AFA is sufficient to require remand. *Id.* at 27.

Commerce exercises discretion in deciding whether or not to make an adverse inference against a party. *Cf. Timken U.S. Corp. v. United States*, 28 CIT 62, 84–85, 310 F. Supp. 2d. 1327, 1346 (2004) (analyzing International Trade Commission's ("ITC") discretion under same statute authorizing Commerce to apply adverse inferences). Section 1677e of Title 19 of the U.S. Code states that Commerce "*may* use an inference that is adverse to the interests of [a] party" that "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) (emphasis added). The statute explicitly states Commerce "may," not must or should, apply

adverse facts when a party fails to cooperate. *Id.* In *Timken*, the court held that neither section 1677e's plain language nor its legislative history obligated the ITC to make adverse inferences in any situation. *See Timken*, 28 CIT at 85. Likewise, Commerce has no obligation to draw such inferences.

Commerce generally has a duty to explain the grounds for its determination. *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009); *Timken Co. v. United States*, Slip Op. 14–51, 2014 WL 1760033, at *7 (CIT May 2, 2014); *see also* 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to include an explanation of the basis for its determination). If an agency's explanation is not perfectly presented, a court may find that the agency adequately explained its determination if the agency's line of reasoning is "reasonably discernable." *NMB Sing. Ltd.*, 557 F.3d at 1319. Additionally, Commerce is not required to affirmatively prove a party's cooperation. *See AK Steel Corp. v. United States*, 28 CIT 1408, 1417, 346 F. Supp. 2d 1348, 1355 (2004) (rejecting the argument that Commerce must prove that a party cooperated to the best of its ability every time that the agency decides not to apply adverse facts available).

Commerce apparently found that Golden Dragon complied with all of Commerce's requests for information concerning Golden Dragon's agreement with its customers. *See* Def. Br. 30. Cerro Flow argues that Golden Dragon misrepresented that it had no agreement related to antidumping duties with its U.S. customers when it first answered Commerce's two requests and only later submitted evidence of such an agreement in the Memo and 2010 financial statement.[15] Pls. Br. 27–28. The government, however, notes that Commerce used the present tense in its requests for information regarding agreements, and that at the time of Golden Dragon's answers, Golden Dragon did not have any relevant agreements in place with its U.S. customers. Def. Br. 32. The government also noted there was no indication that Golden Dragon had submitted false evidence. Id.

Golden Dragon answered every request from Commerce, and its responses were timely. See Pls. Br. 3 (summarizing responses). Commerce therefore reasonably found that Golden Dragon cooperated to the best of its ability and submitted accurate information about the existence of relevant agreements at that time based on the narrow questions asked by Commerce.

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[15] In its Second Supplemental Questionnaire C Response submitted on April 19, 2012, Golden Dragon answered that "[t]here is no such agreement between [[ ]] and its customers establishing an [[ ]]." Golden Dragon Second Supplemental Section C Response at 2. The response also stated that Golden Dragon "did not [[ ]]," and [[ ]]. *Id.* at 1–2.

Although, Commerce's explanation of its determination not to apply AFA was not presented perfectly, the agency's line of reasoning is reasonably discernable. The *Final Results* and *BPI Memorandum* state Golden Dragon placed additional evidence on the record at Commerce's request only one day after Commerce, using more expansive questions, requested it. *Final Results*, 78 Fed. Reg. at 35,251; *BPI Memorandum* at 6. Consequently, Commerce's determination not to apply AFA in this administrative review was well within its discretion and is sustained.

CONCLUSION

As discussed above, Commerce supported with substantial evidence its determination not to adjust Golden Dragon's U.S. sales prices based on its conclusion that Golden Dragon had no agreements related to antidumping duties with its customers during the period of review. Commerce's decision not to apply AFA was reasonable and within its discretion. Accordingly, both decisions are in accordance with law. For the reasons stated above, the court sustains Commerce's *Final Results*. Plaintiffs' motion for judgment on the agency record is denied. Judgment will issue accordingly.

Dated: July 18, 2014
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI
JUDGE

Slip Op. 14–85

GOLDEN DRAGON PRECISE COPPER TUBE GROUP, INC.; HONG KONG GD TRADING CO., LTD.; GOLDEN DRAGON HOLDING (HONG KONG) INTERNATIONAL, LTD.; AND GD COPPER (U.S.A.) INC., UNITED STATES, Plaintiffs, v. Defendant, and CERRO FLOW PRODS., LLC; WIELAND COPPER PRODUCTS, LLC; MUELLER COPPER TUBE PRODUCTS, INC; AND MUELLER COPPER TUBE CO., INC., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 14–00116

[Granting defendant's motion for leave to consider ministerial error allegations.]

Dated: July 18, 2014

Kevin M. O'Brien and *Yi Fang*, Baker & McKenzie, LLP, of Washington DC, for the plaintiffs.

Jennifer E. LaGrange, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of Counsel on the brief was *Daniel J. Calhoun*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Thomas M. Beline, *Jack A. Levy*, and *Jonathan M. Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington DC, for the defendant-intervenors.

MEMORANDUM & ORDER

Musgrave, Senior Judge:

Before the court in this consolidated action is a motion submitted by the defendant United States Department of Commerce, International Trade Administration ("Commerce" or "the Department") seeking leave to issue and publish an amended determination that incorporates corrections to certain alleged "ministerial errors"[1] in the dumping margin calculation in *Seamless Refined Copper Pipe and Tube From the People's Republic of China*, 79 Fed. Reg. 23324 (Apr. 28, 2014) (final admin. rev. results) ("*Final Results*"). *See* USCIT R. 7(b).

After publication of the *Final Results*, the plaintiffs ("Golden Dragon") timely submitted comments to Commerce the same day (April 28, 2014) pursuant to 19 U.S.C. § 1675(h) and 19 C.F.R. § 351.224(c). Golden Dragon alleged that Commerce ministerially erred in calculating freight costs used in determining the foreign market value of their products, and that Commerce should have applied a different distance cap for the freight value of copper cathode input used to produce subject merchandise. The specific allegation was that (a) Commerce should adjust import surrogate values by adding the shorter of (i) the reported distance from domestic suppliers of copper cathode to Golden Dragon's factory or (ii) the reported distance from the nearest port to Golden Dragon's factory; (b) Commerce had in fact adjusted import surrogate values by adding the reported distance from the nearest sea port (rather than inland port) to Golden Dragon's factory; and (c) Commerce should have used the distance to the nearest inland port.

Responding to this allegation, the domestic petitioners ("Cerro Flow") argued to Commerce on May 1, 2014 that Golden Dragon's alleged error was methodological, not ministerial, and that Commerce should therefore reject it. At the same time, Cerro Flow's

[1] The term "ministerial error" is defined in both statute and regulation as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." 19 U.S.C. § 1673d(e) (2006); 19 C.F.R. § 351.224(f) (2009). They "are by their nature not errors in judgment but merely inadvertencies." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995).

submission raised an additional ministerial error, albeit beyond the time specified in 19 C.F.R. §351.224(c)(2) for raising such an allegation.[2] Cerro Flow's specific allegation, according to the government, is that Golden Dragon's freight value claim revealed a different ministerial error: Commerce had announced it would use a distance cap for the freight value of copper cathode input based on the distance between Golden Dragon's factory and the nearest sea port in instances where the weighted-average distance from Golden Dragon's factory to its copper cathode suppliers was greater than the distance between Golden Dragon's factory and the nearest sea port, and Cerro Flow argued Commerce had not applied this cap for copper cathode purchases from nonmarket economy sources.

Prior to investigating these alleged ministerial errors (or implementing any corrections), Commerce was divested of jurisdiction when Golden Dragon filed the present action challenging the *Final Results*. *See Zenith Elecs. Corp. v. United States*, 884 F.2d 556, 561–62 (Fed. Cir. 1989).

Discussion

Congress intended Commerce to consider and correct appropriate ministerial errors promptly. *See*, *e.g.*, *NTN Corp. v. United States*, 32 CIT 1283, 1285, 587 F. Supp. 2d 1313, 1315 (2008) (citing 19 U.S.C. §1675(h)). But as this motion illustrates, a regulatory policy of "normally" correcting ministerial errors "within 30 days" after publication of final results, *see* 19 C.F.R. §351.224(e), is rendered problematic (along with other aspects of these types of international trade proceedings) by a separate policy that insists upon issuance of liquidation instructions to U.S. Customs and Border Protection 15 days after publication of the final results of administrative review. *See*, *e.g.*, 79 Fed. Reg. at 23325.

A. Arguments

Commerce avers that the court's discretion on a motion for leave to correct ministerial errors and publish amended final results in accordance with 19 U.S.C. §1675(h) should focus upon whether allowing the motion would prejudice either party or result in undue delay or expense. *See, e.g., NTN Corp. v. United States*, 32 CIT 1283, 1285, 587 F. Supp. 2d 1313, 1316–17 (2008); *SGL Carbon LLC v. United States*, 36 CIT ___, ___, 819 F. Supp. 2d 1352, 1363 (2012). Commerce contends the parties "all agree" that it should have, but did not, impose

[2] *See* 19 C.F.R. § 351.224(c) (2): "A party to the proceeding must file comments concerning ministerial errors within five days after the earlier of: (i) The date on which the Secretary released disclosure documents to that party; or (ii) The date on which the Secretary held a disclosure meeting with that party."

a distance cap for the freight value of copper cathode input, as demonstrated by the comments received to date, and it takes the position that it wishes to consider this allegation as well as allegations regarding the amount of the freight distance cap to determine whether the allegations raised constitute methodological decisions (which must remain unchanged) or ministerial errors (which would be corrected through amended final results). Commerce also takes the position that Cerro Flow's allegation "would be implicated were Commerce to correct for the ministerial error alleged by Golden Dragon." Def's Mot. for Leave at 3. Accordingly, Commerce argues for leave to allow it to: (a) finish investigating the parties' ministerial error allegations; and (b) if necessary, publish amended final results pursuant to 19 U.S.C. § 1675(h) and 19 C.F.R. § 351.224(e).

Corrections that are made will affect the results of review with respect to the margin calculation for Golden Dragon. Commerce argues, nonetheless, that neither Golden Dragon nor Cerro Flow will be prejudiced by allowing consideration of the allegations and amendment of the *Final Results* if necessary: both parties have already had a full opportunity to review and comment on the *Final Results*, and they may still challenge the *Final Results* by amending their complaints in the above-captioned actions or filing separate actions challenging the amended *Final Results*. Commerce contends that granting this motion will promote judicial efficiency and conserve resources, because it will improve the accuracy of the *Final Results*, and it will allow the parties and the Court to focus on methodological inquiries rather than simple mathematical mistakes.

Golden Dragon opposes the motion for leave. It explains that it filed the present action with the court on May 12, 2014 in part to prevent the premature liquidation of the covered entries because Commerce had taken no action on its request for ministerial-error correction after it filed that request with Commerce on April 28, 2014, and that Commerce itself has therefore "caused" the timing of the filing of the present action with the court by stating that it intended to issue assessment instructions within 15 days of publication of the *Final Results* in the Federal Register. Golden Dragon argues the issue of ministerial errors in this review only arose because it was the only party that raised the issue on a timely basis, and that the petitioners used its (Golden Dragon's) submission to introduce "new" allegations of ministerial errors raised after the deadline required by 19 C.F.R. §351.224 for alleging ministerial errors. As such, Golden Dragon does not believe Commerce's motion represents a proper process to resolve such alleged errors or that any of the arguments advanced by Com-

merce warrant sending the issues raised in the motion for leave back to the agency at this stage of the proceeding. Golden Dragon emphasizes that the petitioners do *not* agree that the error raised by Golden Dragon in its April 28, 2014 submission is a ministerial error, and by the same token Golden Daragon does not agree that the alleged error cited by the petitioners should be considered at all at this stage of the case in view of the fact that deadline for alleging ministerial errors by Commerce expired on April 28, 2014. Golden Dragon further emphasizes that Commerce itself does not take a position in its motion as to whether any error has been made, and if so, which error or errors require correction, but rather it seeks leave to "consider these allegations" to determine whether they constitute methodological errors (which the government states "must remain unchanged") or ministerial errors.

Regarding Commerce's case support, Golden Dragon contends that *SGL Carbon* and *NTN Corp.* are distinguishable. In *SGL Carbon*, the government had already investigated the allegations and had agreed with the respondents therein that ministerial errors had been made and should be corrected, whereas in the present case no such conclusion has been reached. *SGL Carbon,* 36 CIT at ___, 819 F. Supp 2d at 1358. Similarly, Golden Dragon contends, in *NTN Corp.* the court was presented with a level of certainty far greater than that of the present case. In that case, "all parties . . . appear to agree that the packing expense adjustment is in need of some type of recalculation". *NTN Corp.*, 32 CIT at 1286, 587 F. Supp. 2d at 1316. Here, Golden Dragon and the petitioners each alleged a different ministerial error and do not agree with each other, a fact the government notes in its motion. See, *e.g.*, Def's Mot. for Leave at 4 (the petitioners "contended that Golden Dragon's freight value claim unveiled a different ministerial error regarding the freight factor of production"). Golden Dragon also points out that *NTN Corp*. reasoned that potential delay caused by granting the government's motion would not be significant because the government had already been prepared to publish the amended final results with a very specific timeframe (*i.e.*, within 17 calendar days of the court's order). *See* 32 CIT at 1287, 587 F. Supp. 2d at 1316–17.

Lastly, Golden Dragon contends the government's final argument -- that there will be no prejudice or undue delay because the parties will have an opportunity to challenge any amended final results, should Commerce decide to make a change -- misses the point of the administrative review process. Commerce published its preliminary results in this review on November 21, 2013, and, as such, has had five months to consider the proper methodology to use as part of the final

determination. Golden Dragon contends now is "long past the time" for Commerce to be considering whether errors are methodological or ministerial:

> This case is now before this court to resolve all issues in dispute, methodological or otherwise. If this Court sends this case piecemeal back to the Department, one of four outcomes would likely result. First, the Department might conclude that no errors occurred, in which case there would have been introduced undue delay since those issues will be litigated before this Court. Second, the Department might conclude that errors occurred, but the errors were methodological and will not be corrected by the Department, in which case there would have been introduced undue delay since those issues will be litigated before this Court. Third, the Court might correct Golden Dragon's alleged errors, which is the only proper result since Golden Dragon was the only party to properly raise ministerial errors within the Department's deadline. While this has some benefit, Golden Dragon is prepared to resolve those issues in the context of this Court proceeding and not take the further time required by the Department's motion. Finally, the Department could decide to correct Petitioners alleged ministerial errors, in which case the parties will not only litigate the errors *per se*, but also the correctness of the Department's actions given that Petitioners' allegations of error were raised well after the deadline set forth in 19 C.F.R §351.224. In other words, the only result that is procedurally correct and does not introduce undue delay is the correction of Golden Dragon's alleged ministerial errors. Given that Golden Dragon raised these errors on April 28, 2014 and the Government still has not even decided whether they are methodological or ministerial, Golden Dragon submits that this Court is the proper forum to decide this issue as part of the overall disposition of the dispute.

Pls' Response at 7–8.

However that may be, Cerro Flow also disagrees that the error alleged by Golden Dragon is ministerial as the term is defined in 19 U.S.C. § 1675(h) and 19 C.F.R. § 351.224(e) and instead believes that the only ministerial error that exists is the one it identified to Commerce. Thus Cerro Flow believes that Commerce should be permitted to conclude its analysis of whether a ministerial error occurred, and if one did, to correct it by publishing amended final results of administrative review.

The basis for Cerro Flow's position is two-fold. First, it agrees with the government that no party will be prejudiced by its motion because either party may still challenge any amended final results of administrative review that Commerce may issue; despite there being no such motion to amend a complaint (as yet), the government's motion for leave appears to consent to such amendment if the need should arise for either party. *See* Def's Mot. for Leave at 4. Thus, Cerro Flow contends, even though, Golden Dragon may be "procedurally barred" from raising their claim on appeal by the application of exhaustion, both parties will still be free to amend their complaints to include their claims should Commerce disagree with their ministerial error allegations.

Second, Cerro Flow contends the fact that Commerce may need additional time to determine whether a ministerial error occurred is not a reason for not granting the motion for leave, because if Commerce had not timely moved for leave, under the appellate court's decision in *American Signature, Inc. v. United States*, 598 F. 3d 816 (Fed. Cir. 2010), Commerce may have been precluded from ever correcting the ministerial error, because *American Signature* affirmed Commerce's interpretation of its regulations that it "may not correct ministerial errors in final results of administrative reviews . . . if those errors are discovered after the expiration of the 30-day deadline for seeking judicial review of those results." 598 F. 3d 827.

B. Analysis

Considering the parties' arguments and the point of this whole "exercise", the court is guided by several general principles. First and foremost is the court's jurisdiction and the reviewing standard of substantial evidence on the record. *See* 28 U.S.C. §1581(c); 19 U.S.C. §1516a(b)(1)(B)(i). Contrary to Golden Dragon's argument, it is questionable whether the court at this stage would have jurisdiction to decide ministerial error allegations on a record with respect to which there has been no "final" determination. *Cf. Diamond Sawblades Manufactuers' Coalition v. United States*, Slip Op. 10–23 at 11–12 (Mar. 11, 2010) (considering argument that ministerial error allegation is outside the scope of pleadings on the case). The allegations may or may not concern mere ministerial errors. In the event administrative consideration of the parties' allegations of ministerial error veers into consideration of substantive matter(s) and winds up with substantive alteration of the "final" published results here being challenged, then it becomes arguable whether the results presently before the court are to be considered "final" within the meaning of 19 U.S.C. §1516a(a)(2)(A)(i)(I) and 19 U.S.C. §1516a(a)(2)(B)(iii).

Second, even if the court is technically now possessed of jurisdiction over the case, these ministerial error allegations are not "originally cognizable"[3] at this stage, as exhaustion cautions against usurping administrative functions by not affording Commerce the first opportunity to consider the ministerial error allegations. *McKart v. United States*, 395 U.S. 185, 194–95 (1969). Although Rule 60(a) of the rules of the court allow for correction of a clerical mistake or a mistake arising from oversight or omission whenever one is found in a part of the record for review, the court is not in the best position to decide the question in the first instance of whether the parties' ministerial error allegations to Commerce are, in fact, errors ministerial.

Third, the primary basis for Golden Dragon's opposition to the defendant's motion for leave appears to be with respect to the allegedly "new" or out-of-time ministerial allegation raised by Cerro Flow. Golden Dragon's "concern," to the extent it is legally cognizable at this stage,[4] is premature and not in itself a basis for denying the defendant's motion. Such concern will need to abide the due course of Commerce's consideration of the process by which Cerro Flow's allegation was raised, as well as, if necessary as a result of due course, the allegation itself.

Fourth, "the antidumping law's underlying purpose of using the best available information to determine the most accurate dumping margins is furthered by the correction of the ministerial error." *Shandong Huarong General Corp. v. United States*, 25 CIT 834, __ 159 F.Supp.2d 714, 729 (2001).

Conclusion

For the above reasons, the defendant's motion for leave to consider the parties' ministerial error allegations and, if necessary, to publish amended final results will be, and hereby is, granted. Commerce may

[3] *See United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63–64 (1956) ("'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views"); *Borlem S.A. - Empreedimentos Industriais v. United States*, 13 CIT 231, 234, 710 F. Supp. 797, 799 (1989).

[4] *Cf. American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970) ("[i]t is always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it") (internal quotes and citations omitted).

have until August 8, 2014 to complete its analysis of the ministerial allegations and may thereafter publish any amended final results in the ordinary course of business.

It is further ordered hereby that if amended final results are issued, the parties, pursuant to USCIT Rule 3(e), are hereby granted leave to file any amended summonses and, pursuant to USCIT Rule 15(a), any amended complaints, by no later than 30 days after Federal Register publication of any amended final results, and any such amended summonses and/or complaints shall be treated as within the confines of this consolidated action, such that the parties shall retain their nominally-captioned statuses following issuance of any amended final results.

That said, the court also finds, as above-intimated, that the "necessity" of this motion is the direct result of the 15-day liquidation instruction issuance policy. Uncertainty can result in waste of institutional and litigant resources, and even one instance of this type of motion seems one too many. *Cf.*, *e.g.*, *Vietnam Association of Seafood Exporters and Producers v. United States*, 38 CIT ___, Slip Op. 14–75 (June 26, 2014) (after receipt of ministerial error allegations, agency's response thereto issued two days after filing of summons). On remand, therefore, in addition to addressing the parties' ministerial error allegations, Commerce is requested to clarify whether, for so long as its current liquidation instruction issuance policy remains in effect, it does, or will, treat its 15-day period prior to issuance of such instructions as tolled upon the filing with it these types of post-final-determination ministerial error allegations until such time as a proper administrative determination on such allegations can be made, and/or amended results, if any, issued.

So ordered.

Dated: July 18, 2014
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE