Slip Op. 08–80

CONSOLIDATED FIBERS, INC., STEIN FIBERS, LTD., BERNET INTERNATIONAL TRADING, LLC, AND BMT COMMODITY CORPORATION, Plaintiffs, v. UNITED STATES, Defendant.

Public Version
Before: Leo M. Gordon, Judge
Court No. 06–00134

OPINION

[Plaintiffs' motion for judgment on the agency record denied; Commission's sunset review results sustained.]

Dated: July 22, 2008

deKieffer & Horgan (*Gregory S. Menegaz*, *Merritt R. Blakeslee*, *J. Kevin Horgan*) for Plaintiffs Consolidated Fibers, Inc., Stein Fibers, Ltd., Bernet International Trading, LLC, and BMT Commodity Corporation.

James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel for Litigation, *Karl von Schriltz*, Attorney-Advisor, United States International Trade Commission, for Defendant.

Kelley Drye Collier Shannon (*Paul C. Rosenthal*, *Kathleen W. Cannon*, *David C. Smith, Jr.*) for Defendant-Intervenors Dak Fibers, LLC, Invista S.a.r.l., and Wellman, Inc.

Gordon, Judge: Plaintiffs move for judgment on the agency record pursuant to USCIT R. 56.2, challenging the final results of the United States International Trade Commission's ("Commission") five-year reviews of the antidumping duty orders on polyester staple fiber ("PSF") from Korea and Taiwan. *See Certain Polyester Staple Fiber from Korea and Taiwan*, Inv. Nos. 731–TA–825 and 826 (Final), USITC Pub. 3843 (Mar. 2006) ("*Sunset Reviews*").[1] The court has jurisdiction to review Plaintiffs' claims pursuant to Section

[1] The public views of the *Sunset Reviews* are cited as "Pub. Views" and the confidential views are cited as "Conf. Views."

516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000)[2] and 28 U.S.C. § 1581(c) (2000). For the reasons set forth below, the court sustains the *Sunset Reviews* and denies Plaintiffs' motion for judgment on the agency record.

I. Standard of Review

In a sunset review the Commission determines whether revocation of an antidumping duty order would likely lead to continuation or recurrence of material injury within a reasonably foreseeable time. 19 U.S.C. § 1675a(a)(1). Specifically, the Commission "consider[s] the likely volume, price effect, and impact of imports" on the subject merchandise if the order is revoked. *Id.* Additionally, the Commission takes into account its prior injury determinations, whether any improvement in the state of the industry is related to the order, whether the industry is vulnerable to material injury if the order is revoked, and any findings by Commerce regarding duty absorption pursuant to 19 U.S.C. § 1675(a)(4). *Id.*

When reviewing the final results of the Commissions's sunset reviews under 28 U.S.C. § 1581(c), the Court of International Trade sustains the Commission's determinations, findings, or conclusions 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). More specifically, when reviewing whether the Commission's actions are unsupported by substantial evidence, the court assesses whether the agency actions are reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

II. Discussion

In this action Plaintiffs specifically challenge: (1) the Commission's "refusal to conduct a thorough and impartial investigation" of the scope and effect of an alleged price-fixing conspiracy amongst the domestic industry, and of its implications for the Commission's original injury determinations, Pl.s' Mem. in Supp. of Mot. for J. on the Agency R. ("Pl.s' Mem.") at 6–18; (2) the Commission's alleged failure to review the original injury determinations as part of the analysis of the *Sunset Reviews*, *Id.* at 8–9 & 18; (3) the Commission's finding that revocation of the orders would likely result in significant increase in the volume of imports of the subject merchandise, *Id.* at 19–27; (4) the Commission's finding that revocation of the orders would result in adverse price effects, including underselling and price depression or suppression by the subject imports, *Id.* at 27–29; (5) the Commission's alleged failure to examine the causation be-

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[2] Further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code, 2000 edition.

tween future subject imports and continuation of material injury upon revocation, *Id.* at 30; and (6) the Commission's finding that imports of the subject merchandise would likely result in a significant adverse impact on the domestic industry, *Id.* at 30–31.

1. The Integrity of the *Sunset Reviews*

Plaintiffs question the integrity of the *Sunset Reviews*, alleging that certain domestic producers conspired to fix prices and allocate customers for the domestic like product during a period overlapping parts of the original investigations and the *Sunset Reviews*.[3] After examining Plaintiffs' allegations, the Commission determined that "any conspiracy [amongst the domestic industry] was primarily limited to nonsubject PSF, and that record evidence does not support the proposition that any conspiracy extended to certain PSF." Pub. Views at 22. The Commission concluded that the conspiracy did not affect the record of the *Sunset Reviews* and declined to discount pricing data and other information from the original investigations or the five year period following the publication of the orders ("period of review" or "POR"). Pub. Views at 18, 22–23.

Plaintiffs argue the Commission failed to conduct a reasonable inquiry into their allegations of price-fixing by not (1) drafting questionnaires that would elicit meaningful information regarding the effects of the conspiracy, (2) subpoenaing documents from the pending civil litigation regarding the conspiracy, (3) accepting two letter submissions detailing evidence of the conspiracy until late in the *Sunset Reviews*, and (4) extending the *Sunset Reviews* by 90 days to further gather and consider evidence regarding the conspiracy. Pl.s' Mem at 6–19.

The Commission maintains that it collected evidence relating to Plaintiffs' allegations, including purchasers' responses to the Commission's questions about the conspiracy, 1,823 pages of evidence submitted by the parties, hearing testimony, and certain information gathered from a confidential source connected with the civil antitrust litigation. Def's Resp. to Pl.s' Mot. for J. on the Agency R. ("Def.'s Resp.") at 20–23. The Commission contends that it had an ample evidentiary foundation on which to assess Plaintiffs' antitrust conspiracy allegations. *Id.* The court agrees.

The court previously heard Plaintiffs' arguments about the sufficiency of the Commission's inquiry into the alleged antitrust conspiracy in the court's review of the Commission's refusal to conduct a reconsideration proceeding. *See Consolidated Fibers II*, 32 CIT at ____ , 535 F. Supp. 2d at 1346–49 & 1352–59. In *Consolidated Fibers*

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[3] The court already heard Plaintiffs' separate claim involving the Commission's refusal to reconsider the original injury determinations in light of new evidence of an alleged antitrust conspiracy involving some members of the domestic industry. *Consolidated Fibers, Inc. v. United States*, 32 CIT ____ , 535 F. Supp. 2d 1345 (2008) ("*Consolidated Fibers II*").

II, Plaintiffs raised identical arguments that focused on the completeness of the record, none of which the court found persuasive. *Id.* Here, as there, the conclusion is the same; the Commission made " 'active, reasonable efforts to obtain relevant data.' " *Consolidated Fibers II*, 32 CIT at ___ , 535 F. Supp. 2d at 1356 (quoting *Allegheny Ludlum Corp v. United States*, 287 F.3d 1365, 1373 (Fed. Cir. 2002)).

2. Commission's Treatment of the Original Injury Determinations

Plaintiffs also claim that the Commission violated 19 U.S.C. § 1675a by not reviewing the validity of the original injury determinations as part of the analysis of the *Sunset Reviews*. Pls.' Mem. at 8–9 (citing 19 U.S.C. § 1675a(a)(1)(A)). This argument strikes the court as a thinly veiled attempt to continue to press for a reconsideration of the original injury determinations, arguments that the court has already addressed in *Consolidated Fibers II*. Here, it suffices to say that section 1675a(a)(1)(A) does not require a full blown reconsideration of the original injury determination underlying an antidumping duty order being considered in a sunset review. Instead, that provision simply requires the Commission take into account its findings as to volume, price, and the impact of subject imports before the order was issued. 19 U.S.C. § 1675a(a)(1)(A). As the Statement of Administrative Action accompanying the statute explains, the purpose of this inquiry is to examine the most recent period of time in which subject imports competed without the discipline of the order in place: "If the Commission finds that preorder . . . conditions are likely to recur, it is reasonable to conclude that there is likelihood of continuation or recurrence of injury." *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 884 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4209 ("SAA").

3. The Commission's Volume Analysis

In the *Sunset Reviews* the Commission determined that the volume of the subject imports were likely to increase significantly upon revocation. Pub. Views at 24, 27. The Commission found that subject foreign producers were highly export-oriented during the POR and that they maintained a significant presence in the U.S. market, even with the orders in place. *Id.* at 24. The Commission also found that subject foreign producers possessed substantial production capacity throughout the POR and ended the period with significant unused capacity that could be used to increase exports to the United States. Conf. Views at 35–37. Additionally, the Commission found that the subject producers' unused capacity in interim 2005 was equivalent to

a percentage[4] of U.S. apparent consumption in the same period. *Id.* at 37. Finally, the Commission noted that the record showed that a number of antidumping duty orders had been imposed in Asia and Europe during the POR, and that a rapidly expanding Chinese certain PSF industry was likely to push Korean and Taiwan exports out of the large Chinese market. Pub. Views at 26. Given these factors, the Commission concluded that the increasingly export-oriented Korean and Taiwan producers were likely to bolster their flagging capacity utilization by increasing their exports of subject PSF to the United States upon revocation. Pub. Views at 26–27.

a. Margins

As their first challenge to the Commission's likely volume analysis, Plaintiffs argue that the Commission's volume analysis was "fundamentally-flawed" because subject import volume over the POR was inversely related to the dumping margins found in the administrative reviews conducted by Commerce, suggesting, in Plaintiffs' view, that the orders had no effect. *See* Pls.' Mem. at 20–22. Plaintiffs' argument contains a number of legal and factual flaws. First, Plaintiffs' claim that the orders had no effect on the subject imports during the POR is incorrect. As Plaintiffs themselves concede, imposition of the orders had a disciplining effect on the dumping margins, nearly all of which fell significantly during the first administrative review of the orders. *Id.* at 21. Similarly, although the volume of the subject imports continued to increase during the first two years of the POR, these volumes eventually fell with the orders in place, *see* Pub. Views at 24, thus indicating that the subject producers were ultimately unable to continue selling the same volumes in the market at non-dumped prices. Given these two trends, the Commission concluded that the orders did have an effect on subject import pricing and volume during the POR, which is a reasonable conclusion.

Plaintiffs also claim that in analyzing likely import volume the Commission failed to properly weigh a trend of declining margins for subject PSF. Although such a trend may be relevant to the Commission's inquiry, the statute does not mandate that the Commission give such a trend controlling weight. *See* 19 U.S.C. §§ 1675, 1675a(a)(2). Rather, the Commission must also consider the margins Commerce calculates as likely to continue or recur upon revocation. 19 U.S.C. §§ 1675a(a)(6) & (c)(3), 19 U.S.C. § 1677(35)(C)(iv); *see also* SAA at 887, 1994 U.S.C.C.A.N. at 4211–12. Although Plaintiffs may contend that the low or *de minimis* dumping margins calculated during Commerce's administrative reviews would likely continue, Commerce itself determined that dumping was likely to continue or recur at margins of 7.91% for Korean producers and from 3.79% to

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[4] [[ ]]

11.50% for Taiwan producers, and the Commission properly considered Commerce's announced likely margins in its analysis. *See* Pub. Views at 29 n.207; SAA at 887, 1994 U.S.C.C.A.N. at 4212 ("The Commission shall not itself calculate or otherwise determine likely dumping margins. . . ."). Given this, the Commission's consideration of these margins, which were higher than those found in the administrative review results, was reasonable and consistent with the statute.

Moreover, despite Plaintiffs' claims, the Commission's finding that subject import volume was significant throughout the POR even with the orders in place is consistent with the Commission's finding that subject import volume will increase significantly upon revocation. *See* Pub. Views at 24. As the Commission found, the fact that subject imports maintained a significant presence in the market even with the orders in place suggests that revocation of the orders would allow the subject foreign producers to increase their presence in the U.S. market considerably once the orders and their disciplining effect no longer limited their ability to sell their products in the market at higher dumping margins. *Id.* at 24–27. In other words, the Commission reasonably relied on the subject imports' substantial presence in the market as one factor supporting its affirmative volume finding, even though the subject imports were sold at low margins during the POR.

b. PSF Capacity in Korea and Taiwan

Plaintiffs also argue that Korean and Taiwanese producers would be unlikely to increase their exports to the United States after revocation because there was likely to be strong global demand for PSF and there were different[5] average unit values ("AUVs") in third country markets as compared to the United States. *See* Pls.' Mem. at 23–26. The Commission, however, reasonably addressed and rejected each of these arguments. With respect to strong global demand for PSF, the Commission observed that Korean and Taiwanese producers had suffered declining capacity utilization rates during the POR, even though there had been strong global demand over this period. Pub. Views at 25–26 & n.189. The Commission found that Korean and Taiwanese producers were operating at certain capacity utilization rates[6] in interim 2005, and their unused capacity[7] was equivalent to a percentage[8] of U.S. apparent consumption. Conf. Views at 37. Under these circumstances, the Commission reasonably deter-

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[5] [[ ]]

[6] Korea's capacity utilization rate was [[ ]], while Taiwan's was [[ ]]. Conf. Views at 37.

[7] The combined unused capacity was [[ ]] million pounds. Conf. Views. at 37.

[8] [[ ]]

mined that growing unused capacity of this magnitude was likely to place pressure on the subject producers to increase exports to the United States upon revocation of the orders, despite strong demand in the global market. Conf. Views at 38–39; Pub. Views at 26–27.

With respect to the AUVs in other markets, the Commission noted that AUV comparisons were of little probative value for purposes of its analysis because there were differences in the product mix exported to different markets. Pub. Views at 26 n.189. As an example, the Commission cited the dramatic increase in the AUV of Korean and Taiwan exports to China over the POR that resulted from the expansion of Chinese producers taking market share of all but the highest-quality PSF sold in China. *Id.* The Commission found that the Korean and Taiwan producers' capacity utilization rates were declining, which suggested to the Commission that those producers would increase their exports to the U.S. market upon revocation. Pub. Views at 25–27 & n.189. On the issue of capacity, the court simply cannot discern any unreasonableness in the Commission's factual findings, or the conclusions that flow from them.

c. Third Country Barriers

Plaintiffs also argue that the existence of third county barriers, like antidumping duty orders, will not trigger an increase in subject imports to the United States upon revocation because Korean and Taiwan producers have been able to trade in those markets in spite of those barriers. Pl.s' Mem. at 23, 26. To illustrate their point, Plaintiffs argue that a certain export market[9] has become the most important for [[ ]] and there is no hard data record evidence of a barrier or restraint to this trend." *Id.* at 23.

The Commission did acknowledge that the subject producers' exports to that market had increased despite the imposition of an antidumping duty order. Pub. Views at 26; Conf. Views at 38–39. The Commission found, however, that this increase was more than offset by a substantial decline in the subject producers' exports to Asia, which were impeded both by new antidumping duty orders and the growth of the Chinese PSF industry. *Id.*[10]

The Commission found that the rapid expansion of Chinese PSF production had displaced Korean and Taiwan PSF exports from

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[9] [[ ]]

[10] The Commission also noted that although one Taiwan producer reportedly increased exports to [[ ]] to compensate for the antidumping duty orders under review, the producer was likely to redirect these exports to the United States were the orders to be revoked. Conf. Views at 38 n.188. Because this subject producer had reported that the antidumping duty order under review had forced it to redirect its exports of PSF from the United States to [[ ]], the Commission inferred that the producer would return to the *status quo ante*, exporting to the United States rather than [[ ]], were the order to be revoked. *Id.*

what had formerly been their largest export market. Pub. Views at 26. The record showed that subject foreign producer exports to Asia, including China, declined during the POR.[11] *See Conf. Staff Report* at Tables IV–6, 9, *Certain Polyester Staple Fiber from Korea and Taiwan*, Inv. Nos. 731–TA–825 and 826, (Feb. 15, 2006) ("*Conf. Staff Report*"), (CR[12] at Tables IV–6, 9 (2–240)). In response, Plaintiffs argue that the Commission failed to consider that Korean and Taiwan producers were displacing their own exports to China by constructing PSF facilities in China. Pls.' Mem. at 26–27. The Commission, however, looked at PSF production in China and found that additional Chinese production of PSF would likely displace Korean and Taiwan PSF exports to the China market. Pub. Views at 26.

The Commission ultimately determined that the imposition of these third country barriers and the rapidly expanding Chinese PSF industry had caused a significant decline in the subject producers' capacity utilization rates, and these producers would likely fill their unused capacity by increasing their U.S. shipments upon revocation. Pub. Views at 26–27. Such a conclusion, predicated on a detailed analysis of the effect of the growing Chinese production capacity and other obstacles in third markets, is reasonable.

4. Price Effects

Plaintiffs next challenge the Commission's finding of likely adverse price effects from subject imports if the orders are revoked. Plaintiffs object to the Commission's consideration of pricing data from the original investigations as this data was allegedly distorted by the inclusion of higher-priced virgin PSF and lower-priced regenerated PSF within the same pricing products. Pls.' Mem. at 28. Plaintiffs also argue that the Commission's mixed underselling findings from the *Sunset Reviews* were tainted by comparing high end virgin PSF with low end regenerated PSF. *Id.*

The Commission looked at the pricing behavior of the imports before the orders were imposed, and observed that pre-order subject imports undersold the domestic like product in 96.4% of pricing comparisons, by margins up to 78.2%, causing depression of U.S. prices. Pub. Views at 27. The Commission then observed that a substantial degree of substitutability exists between subject imports and the domestic like product, including between virgin and regenerated or recycled PSF, with price being an important factor in purchasing decisions. *Id.*

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[11] The decline was from a POR high of [[ ]] million pounds in 2001 to [[ ]] million pounds in 2004, and from [[ ]] million pounds in January-September 2004 to [[ ]] million pounds in January-September 2005.

[12] Citations to the confidential documents of the Administrative Record are cited "CR" followed by the document number.

Next, the Commission found that the pricing product data reflects a mixed pattern of subject import underselling and overselling during the POR, even with the antidumping duty orders in place. *Id.* at 28. The Commission noted that foreign producers are likely to increase their instances and margins of underselling if the orders are revoked as a means of recapturing U.S. market share. *Id.* Given the substitutability of the merchandise and the importance of price to purchasing decisions, the Commission found that this increased underselling would likely depress or suppress prices for the domestic like product. *Id.* Finally, the Commission observed that domestic producers would react to intensified subject import price competition by either lowering their prices or relinquishing market share, which would further depress the domestic industry's already low capacity utilization rates. *Id.* at 29.

Plaintiffs challenge the Commission's underselling findings from the original investigations as erroneous in mixing virgin and regenerated PSF in its price analysis. Pl.s' Mem. at 28. As an initial matter, this argument is not properly before the court; it challenges findings by the Commission in the original investigations, not in the *Sunset Reviews*. The court's jurisdiction over Plaintiffs' allegation of pricing errors is limited to reviewing the Commission's findings in the *Sunset Reviews*, and does not involve review of the Commission's findings from the original injury determinations. *See* 28 U.S.C. § 1581(c) (2000); 19 U.S.C. § 1516a(a)(2)(B)(iii). Moreover, Plaintiffs neglect to mention that the original Commission findings as to interchangeability of various types of PSF, including regenerated and virgin PSF, and the price effects of imports as set forth in its original injury determinations were already sustained by the Court of International Trade. *See Far E. Textile Ltd. v. U.S. Int'l Trade Comm'n*, 25 CIT 999, 1008 (2001) (sustaining Commission's findings on interchangeability of various types of subject PSF based on record data, and stating "the Commission's finding of a significant degree of interchangeably for both conjugate and regenerated fiber is supported by substantial evidence").

Plaintiffs further contend that the Commission's underselling findings in the *Sunset Reviews* were tainted by comparing "high end" virgin PSF with "low end" regenerated PSF. At the request of respondents, the Commission segregated PSF made from virgin inputs from PSF made from regenerated inputs in undertaking price comparisons in the *Sunset Reviews*. *See Conf. Staff Report* at V–7 (CR 2–240). Thus, the Commission did not compare prices of virgin PSF with prices of regenerated PSF in the *Sunset Reviews*. *Id.* Therefore, Plaintiffs are incorrect as a matter of fact in alleging that the Commission's finding of underselling is explained by attenuated competition between virgin and regenerated products.

5. Impact (Vulnerability of Domestic Industry)

The Commission found that the domestic industry was vulnerable to the recurrence or continuation of material injury according to numerous operational and financial performance indicators. Conf. Views at 44–45. Respondents conceded during the reviews that the domestic industry was vulnerable. Pub. Views at 31–32. Citing the domestic industry's condition and the substantial substitutability between subject imports and the domestic like product, the Commission concluded that if the antidumping duty orders were to be revoked, the likely significant increase in subject import volume and significant adverse price effects would have a significant adverse impact on the domestic industry within a reasonably foreseeable time. *Id.* at 31.

Plaintiffs challenge the Commission's finding that revocation of the orders would likely have a significant adverse impact on the domestic industry as not in accordance with law. Plaintiffs argue that "[j]ust as material injury must be caused by subject imports, the Commission is legally obligated to find 'probable' causation between future imports of Certain PSF and continuation of material injury or reoccurrence of material injury in the wake of the orders' removal," and that the Commission failed to establish this causation. Pl.s' Mem. at 30 (emphasis removed). The Commission argues that no such legal requirement exists and that Plaintiffs' argument is a misguided effort to impose the causation requirement from the material injury context on the Commission's consideration of domestic industry vulnerability in sunset reviews. Def.'s Resp. at 38.

Under section 1675a(a)(1)(C), the Commission considers whether the domestic industry is vulnerable to material injury in assessing the likely effects of revocation. 19 U.S.C. § 1675a(a)(1)(C). The SAA recognizes that industry vulnerability may be caused by factors other than subject imports and instructs the Commission to consider the weakened condition of the U.S. industry in assessing whether injury will continue or recur if the orders are revoked. SAA at 885, 1994 U.S.C.C.A.N. at 4210.

> The likelihood of continuation or recurrence of material injury standard is not the same as the standards for material injury and threat of material injury, although it contains some of the same elements. Under the material injury standard, the Commission determines whether there is current material injury by reason of imports of subject merchandise. . . . By comparison, under the likelihood standard, the Commission will engage in a counter-factual analysis: it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo – the revocation or termination of a proceeding and the elimination of its restraining effects on volumes and prices of imports.

SAA at 883–84, 1994 U.S.C.C.A.N. at 4209.

The Commission's task is therefore to determine whether revocation of the antidumping duty orders would likely result in the recurrence or continuation of material injury by reason of the subject imports within a reasonably foreseeable time, not to determine whether the subject imports significantly contributed to the decline of the domestic industry during the POR. Because the antidumping duty orders under review imposed duties on subject imports equal to dumping margins over the POR, the existence of the orders generally makes it less likely that subject imports would be the source of any domestic industry vulnerability during the POR. *See* 19 U.S.C. § 1673. Thus, the Commission appropriately factored the domestic industry's vulnerability into its analysis of the likely impact of revocation in these reviews.

III. Conclusion

The Commission's determination that revocation of the antidumping duty orders would likely lead to continuation or recurrence of material injury to the domestic industry within a reasonablely foreseeable time is supported by substantial evidence and in accordance with law. Therefore, the court denies Plaintiffs' motion for judgment on the agency record on Counts 1 and 3 through 7 and will enter judgment in favor of Defendant sustaining the *Sunset Reviews*.

Slip Op. 08–81

Thomas J. Aquilino, Jr., Senior Judge

FORMER EMPLOYEES OF FAIRCHILD SEMICONDUCTOR CORP., Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 06–00215

J U D G M E N T

This case having been commenced to appeal the *Negative Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance And Alternative Trade Adjustment Assistance* of the Employment and Training Administration, U. S. Department of Labor, TA–W–58,624, 71 Fed.Reg. 14,954 (March 24, 2006); and the court in slip opinion 07–38, 31 CIT ___ (March 13, 2007), having determined to remand them to the defendant for reconsideration on the merits; and the defendant having published and filed a *Notice of Negative Determination on Remand*, 72 Fed. Reg. 24,613 (May 3, 2007), pursuant thereto; and the plaintiffs having continued to contest defendant's position with regard to certification of their eligibility for trade ad-

justment assistance, whereupon a hearing in open court was held; and the court having thereafter in slip opinion 08–43, 32 CIT ___ (April 18, 2008), ordered the defendant to conduct further investigation upon remand; and the defendant having filed herein a *Notice of Revised Determination on Remand* (July 22, 2008), reporting that it has done so and certifying now that

> All workers of Fairchild Semiconductor International, Mountain Top, Pennsylvania, who became totally or partially separated from employment on or after January 11, 2005, through two years from the issuance of this revised determination, are eligible to apply for Trade Adjustment Assistance under Section 223 of the Trade Act of 1974, and are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974;

Now therefore, after due deliberation, it is

ORDERED, ADJUDGED and DECREED that this certification of the defendant be, and it hereby is, affirmed.

Slip Op. 08–83

HUVIS CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and DAK FIBERS, LLC and WELLMAN, INC., Defendant-Intervenors.

NONCONFIDENTIAL VERSION

BEFORE: GREGORY W. CARMAN, JUDGE
Court No. 06–00380

August 5, 2008

[*Commerce's Remand Results sustained; Plaintiff's Motion for Oral Argument denied.*]

McDermott Will & Emery LLC (*Raymond P. Paretzky* and *Michael P. House*) for Plaintiff.

Gregory G. Katsas, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*) for Defendant.

Mark B. Lehnardt, of Counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Kelley Drye Collier Shannon (*David C. Smith, Jr.* and *Paul C. Rosenthal*) for Defendant-Intervenors.

OPINION

CARMAN, JUDGE: This case returns to the Court following a remand to the United States Department of Commerce pursuant to

the Court's order in *Huvis Corp. v. United States*, 31 CIT ___ , 525 F. Supp. 2d 1370 (2007). In that order, the Court remanded the final results of the fifth administrative review of the antidumping order on polyester staple fiber ("PSF") from Korea, covering the 2004-2005 period of review, in which Commerce applied facts available to fill in missing market price data for certain inputs purchased by Huvis. *See Certain Polyester Staple Fiber from Korea*, 71 Fed. Reg. 58,581 (Dep't Commerce Oct. 4, 2006) and the accompanying Issues and Decision Memorandum (Sept. 28, 2006) (collectively, "Final Results"). The Court held that, although Commerce's decision to use facts available was permissible under the applicable statute–called the "Major Input Rule"–and the facts selected were supported by substantial evidence on the record, Commerce did not adequately explain why it used facts available to fill in the missing market price data, when it had not done so in prior administrative reviews. On remand, Commerce gave a reasoned explanation for the change in treatment, and the Court therefore sustains the remand results.

BACKGROUND

This case involves Commerce's application of the Major Input Rule. The Major Input Rule provides that when a respondent purchases a major input from an affiliated supplier, as Huvis did here, Commerce will compare the price paid by the respondent to the affiliated supplier (called the "transfer price") to (a) the price at which the supplier sells the input to unaffiliated buyers ("market price"), and (b) the supplier's cost of producing the input. *See* 19 U.S.C. § 1677b(f)(2) and (3) (2000). The Major Input Rule is used to evaluate whether the sale of a major input between affiliated parties is made at arm's-length, and Commerce has interpreted the statute to allow the agency to select as the value of a major input the highest of transfer price, market price, or cost of production. 19 C.F.R. § 351.407(b) (2005); *see also NTN Bearing Corp. of Am. v. United States*, 368 F.3d 1369, 1376 (Fed. Cir. 2004) (affirming that Commerce's interpretation is reasonable).

In the administrative review underlying this case, market price data were not on the record for two of the major inputs purchased by Huvis and used to manufacture PSF during the period of review: qualified-grade terepthalic acid (QTA), and purified terepthalic acid (PTA).[1] Commerce therefore used the facts otherwise available on the record to fill in a market price for those two major inputs. To do that, Commerce added together for each major input the cost of production for that input and an amount for profit. The affiliated sup-

[1] Huvis explained to Commerce why it was unable to supply market price data: Huvis's affiliated supplier was not willing to provide Huvis with market price information because it considered the data proprietary, and Huvis could not force the supplier to provide the data because Huvis did not exercise control over the supplier.

plier's cost of production data were submitted by Huvis, and the amount for profit was derived from the affiliated supplier's submitted financial statements. Because the facts available market price for QTA and PTA was higher than each major input's transfer price, Commerce upwardly adjusted the value of each input to reflect the calculated market price.

Huvis filed suit challenging Commerce's decision to use facts available to fill in the missing market prices for QTA and PTA, arguing that Commerce's decision to use facts available was inconsistent with the agency's treatment of Huvis in prior administrative reviews. Huvis contended that market price data were not on the record in prior administrative reviews, and that, in those prior administrative reviews, Commerce, rather than applying facts available to fill in missing market prices, applied the Major Input Rule by comparing only transfer price and cost of production.

The Court agreed that Commerce treated Huvis differently than it had in prior administrative reviews, and concluded that because Commerce did not adequately explain why it had changed course here, the results of the administrative review were not in accordance with law. The Court therefore remanded the Final Results so that Commerce could explain the reasons for its change in treatment of Huvis. On remand, Commerce was forthcoming about the reason for the change in methodology. Commerce stated that during the fifth administrative review, the agency

> recognized, for the first time, that there was evidence on the record that could be used to construct a market price for QTA. Specifically, Commerce determined that it could construct a market price for QTA by addition an amount for profit, derived from the financial statements of Huvis's affiliated supplier, to the supplier's reported cost of producing QTA. Commerce determined that using this methodology would provide a more complete analysis under the major input rule, and result in a more accurate calculation of Huvis's dumping margin. . . . [In addition,] Commerce determined that the new methodology could and, for consistency, should be used to calculate a market price for PTA as well.

(Redetermination Pursuant to the Court Remand ("Remand Results") 8.)

DISCUSSION

The primary issue on remand is whether Commerce adequately explained its decision to use facts available in applying the Major Input Rule to Huvis, when the agency had not done so in prior administrative reviews. However, first, the Court will address Huvis's secondary argument that Commerce's use of facts available to fill in the missing market price is "demonstrably and significantly *less accu-*

rate" than Commerce's prior methodology, which was to compare only transfer price and cost of production to test the arm's-length nature of Huvis's purchases of QTA and PTA. (Comments of Pl. Huvis Corp. on Def.'s Redetermination Pursuant to Court Remand 13.) As proof that the new methodology is less accurate, Huvis states that "the record establishes (1) that QTA is the least pure–and thus least expensive and [least] valuable–of the three types, or grades of TPA [terepthalic acid], (2) that PTA is the purest and thus most expensive and valuable, and (3) that MTA . . . is in the middle." (*Id.* at 14.) However, Huvis continues, "Commerce's methodology resulted in a fictitious 'market price' for QTA that is substantially higher than the amount Huvis actually paid for *any* TPA input, even PTA, a grade verified as the highest quality and most valuable of all TPAs." (*Id.* at 16.)

In response, Commerce states that it believes "the calculation methodology used for the derived market prices for QTA and PTA [to be] outside the scope of this remand as the Court affirmed Commerce's methodology [in the first opinion]." (Remand Results 15.) Commerce is correct that–after considering an argument similar to the one made by Huvis here–the Court held in the first opinion that Commerce's use of facts available to fill in the missing market price data was supported by substantial evidence.[2] *See Huvis I*, 31 CIT

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[2] Huvis argued that the facts available market prices calculated by Commerce were "highly adverse." (Br. of Pl. Huvis Corp. in Supp. of Pl.'s Mot. for J. upon the Agency R. 33.) Huvis stated that, although "the record establishes that QTA . . . is the least expensive of the three types, or grades, of TPA ," the calculated market price of QTA "was *substantially higher* than the verified market price for MTA, a purer, more valuable grade." (*Id.* at 33, 35.) Huvis's challenge rests on the assumption that the lower level of impurities present in MTA as compared to QTA necessarily result in MTA having a higher market price than QTA.

In response, the Government stated that "Huvis identifie[d] no record evidence supporting the notion that MTA's lower level of impurities means that it must have a higher market price than QTA." (Defendant's Resp. to Pl.'s Mot. for J. upon the Admin. R., Confid. Version, 16.) The Government claimed that record evidence actually undermined Huvis's argument.

Specifically, Huvis reported the {
} This {
} Because {
}
(*Id.*) The Government offered a few characteristics of the inputs, other than impurity levels, that affect price: {
} (*Id.*)

Given the evidence cited by the Government, the Court was not persuaded by Huvis's claim that the facts available market prices for QTA and PTA were not supported by substantial evidence on the record. In affirming Commerce's authority to use the facts available market prices, the Court highlighted that the data used to calculate the market prices were contemporaneous to the period of review, and that the methodology of adding together the cost of production and a profit margin is analogous to that used to construct the value of merchandise pursuant to 19 U.S.C. § 1677b(e) (2000). *See Huvis I*, 31 CIT at ____ , 525 F. Supp. 2d at 1376.

at ___ , 525 F. Supp. 2d at 1376–77. As a result, the accuracy of Commerce's methodology was not remanded to Commerce, and is not properly before the Court now.

I. Commerce's Explanation is Sufficient.

With that issue disposed of, the Court turns to Commerce's explanation for its change in treatment of Huvis. As in prior administrative reviews, Huvis submitted transfer price and cost of production data, but not market price data, for its major inputs QTA and PTA. In prior administrative reviews, Commerce had tested the arm's-length nature of the sales from the affiliated supplier to Huvis by comparing the transfer price to the supplier's cost of production. During this administrative review, however, Commerce calculated a proxy market price for each major input using the facts otherwise available on the record. Commerce then compared the transfer price to both the cost of production and the calculated market price, and, finding the calculated market price higher than the other two values, upwardly adjusted the values of both inputs to reflect the higher market price.

To explain the change in treatment, Commerce said that it "recognized, for the first time, that there was evidence on the record that could be used to construct a market price for QTA [and PTA]. Specifically, Commerce determined that it could construct a market price for QTA [and PTA] by adding an amount for profit, derived from the financial statements of Huvis's affiliated supplier, to the supplier's reported cost of produc[tion]." (Remand Results 8.) Commerce stated that it "determined that using this methodology would provide a more complete analysis under the major input rule, and result in a more accurate calculation of Huvis's dumping margin." (*Id.*)

Commerce's explanation did not satisfy Huvis, who contends that there are no new circumstances in the fifth administrative review to justify treating Huvis differently: the same market price data absent from the record in the fifth administrative review were also missing in prior administrative reviews, and Commerce did not use facts available to fill in the values. Huvis essentially argues that because the facts did not change, neither can Commerce's methodology.

Huvis's argument, however, ignores the well-settled principal that an agency like Commerce is generally free to change its methodology to improve accuracy. *SKF USA Inc. v. United States*, 31 CIT ___ , ___ , 491 F. Supp. 2d 1354, 1362 (2007) ("[I]t is within Commerce's expertise and discretion to update its methodology for both increased accuracy and ease of use."); *Anshan Iron & Steel Co., Ltd. v. United States*, 28 CIT 1728, 1735, 358 F. Supp. 2d 1236, 1242 (2004) ("Commerce is generally at liberty to discard one methodology in favor of another where necessary to calculate a more accurate dumping margin . . . .") (citations omitted); *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1170, 178 F. Supp.

2d 1305, 1327 ("As a rule, Commerce is free to discard one methodology in favor of another, the better to calculate more accurate dumping margins.") (citation omitted); *cf.*, *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1085 (Fed. Cir. 2001) ("[W]hile various methodologies are permitted by statute, it is possible for the application of a particular methodology to be unreasonable in a given case where a more accurate methodology is available and has been used in similar cases.").

Huvis naturally disagrees with Commerce's assertion that the new methodology improves accuracy, but–in the face of the evidence cited by Commerce, *see* footnote 2, *supra*–its protestations will not carry the day. Commerce's regulations instruct that when applying the Major Input Rule, Commerce will compare all three values of transfer price, cost of production, and market price. 19 C.F.R. § 351.407(b). Commerce also made clear in the initial antidumping duty investigation on PSF from Korea that it would use its facts available authority to fill in missing values, so long as there was reasonable, non-adverse data on the record to do so. Issues & Decision Mem. for the Final Det. in the Antidumping Duty Investigation of Certain PSF from the Republic of Korea (Dep't Commerce Mar. 22, 2000), Comment 6, *available at* http://ia.ita.doc.gov/frn/summary/korea-south/00-7926-1.txt (last visited Aug. 4, 2008). It appears from Commerce's explanation in the Remand Results that the agency did not realize that there was such information on the record until this administrative review. But now that Commerce has realized that it is possible to calculate a proxy market price using the facts available on the record, the Court will not force Commerce to ignore that capability and use a less-preferable methodology. Accordingly, the Court holds that Commerce has adequately justified its decision to apply facts available to Huvis.

The situation might be different if Huvis could establish that it had detrimentally relied on Commerce's prior practice of using transfer price and cost of production data alone. This is because "Commerce may not make minor disruptive changes in methodology where a respondent demonstrates its specific reliance on the old methodology used in multiple preceding reviews." *Fujian Mach. & Equip.*, 25 CIT at 1169, 178 F. Supp. 2d at 1327. For example, in *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 795 F. Supp. 417 (1992), the court remanded Commerce's decision to use a new methodology that arguably slightly increased accuracy where Commerce had applied the previous methodology in multiple prior proceedings, and where the respondent had altered its business model in reliance on the previous methodology. *Shikoku*, 16 CIT at 386–89, 795 F. Supp. at 420–22. However, for the *Shikoku* rule to apply, the party claiming the benefit of it must show detrimental reliance on the previous methodology. *NSK Ltd. v. United States*, 21 CIT 617, 639, 969 F. Supp. 34, 56 (1997). Huvis's downfall is that it cannot show such

detrimental reliance. The reason that Huvis did not report market price data to Commerce was that Huvis was powerless to force its affiliated supplier to provide such data, or at least Huvis represented as much to Commerce. Therefore, the absence of market price data from the record was not the result of Huvis's reliance on Commerce's prior practice; rather, it was due to its affiliated supplier's intransigence. As a result, Huvis cannot rely on the *Shikoku* rule to prevent Commerce from changing course.

CONCLUSION

In the Remand Results, Commerce adequately explained its decision to change course and use its facts available authority to fill in the record with market price data. As a result, the Court sustains the Remand Results as being supported by substantial evidence and otherwise in accordance with law. In addition, the Court denies Huvis's motion for oral argument. The Court will issue judgment separately.