U.S. Customs and Border Protection

Slip Op. 12–80

JINXIANG HEJIA CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, AND VESSEY and COMPANY, INC., Defendant-Intervenors.

Before: Judith M. Barzilay, Senior Judge
Court No. 09–00471

[Second remand results sustained.]

Dated: June 11, 2012

deKieffer & Horgan (*John J. Kenkel*, *Gregory S. Menegaz*, and *J. Kevin Horgan*), for Plaintiff Jinxiang Hejia Co., Ltd.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Reginald T. Blades, Jr.*, Assistant Director, *Richard P. Schroeder*, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *George Kivork*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Kelley Drye & Warren LLP (*Michael J. Coursey* and *John M. Herrmann*), for Defendant-Intervenors Fresh Garlic Producers Association, Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

OPINION

BARZILAY, Senior Judge:

I.
Introduction

This case returns to the court following the second remand ordered in *Jinxiang Hejia Co. v. United States*, Slip Op. 11–112, 2011 WL 3915675 (CIT Sept. 7, 2011) ("*Jinxiang Hejia*").[1] In that opinion, the court addressed the normal value the U.S. Department of Commerce ("Commerce" or "the Department") calculated for Plaintiff Jinxiang Hejia Co.'s ("Plaintiff" or "Hejia") entry of single-clove garlic from the People's Republic of China. *See Final Results of Redetermination Pursuant to Court Order*, No. 09–00471 (Dep't of Commerce Jan. 14,

[1] The court presumes familiarity with the procedural history and background of this case.

2011) ("*First Remand Results*").[2] The court sustained the Department's conversion to pounds per kilogram of a sales offer – from Indian exporter Sundaram Overseas Operations ("SOO") – that it placed on the record for use as surrogate value data. *See Jinxiang Hejia*, 2011 WL 3915675, at *6–7. However, the court remanded for further consideration Commerce's weight-averaging of the SOO offer (at 50%) and four sales offers for single-clove garlic that Hejia timely submitted (each at 12.5%). *Id.* at *9–12. Specifically, the court found that

> Commerce fail[ed] to connect its reasoning regarding the probative nature of the four sales to the decision to assign them, collectively, 50 percent of the weighted-average. Nothing inherent in the justifications discussed [in the *First Remand Results*] would warrant treating the four offers as one quarter as probative as the SOO offer.

Id. at *11.

Now before the court is Commerce's second remand determination, issued under protest. *See Final Results of Redetermination Pursuant to Remand*, A-570–831 (Dep't of Commerce Dec. 9, 2011) ("*Second Remand Results*"). On remand, Commerce removed from its calculation one of the Hejia-submitted sales offers after determining that it originated from Nepal and not India, the applicable surrogate country. *Second Remand Results* at 9. Commerce thereafter took a simple average of the SOO sales offer and the three remaining sales offers that Hejia submitted and reached a revised dumping margin of zero. *Second Remand Results* at 8, 13.

Plaintiff does not contest this amended determination. Defendant-Intervenors Fresh Garlic Producers Association and its individual members, Christopher Ranch LLC, the Garlic Company, Valley Garlic, and Vessey and Company, Inc. (collectively, "Defendant-Intervenors"), however, challenge the determination as unsupported by substantial evidence, arguing that Commerce failed to address the purportedly inferior probative nature of the sales offers that Hejia placed on the record. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). For the reasons below, the court sustains the *Second Remand Results*.

[2] Commerce issued this first redetermination after the court granted its request for a voluntary remand. *See Jinxiang Hejia Co. v. United States*, No. 09–00471 (Oct. 25, 2010) (ordering remand and denying Rule 56.2 motion).

I. Standard of Review

The court must sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record" or "otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence constitutes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citation omitted). The court reviews the entire record when reviewing a determination, including anything that "'fairly detracts from the substantiality of the evidence.'" *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (citation omitted). Commerce must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and quotation marks omitted).

II. Discussion

"The process of constructing foreign market value for a producer in a non-market economy country is difficult and necessarily imprecise." *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001) (citation omitted). Typically, Commerce calculates "the normal value of the subject merchandise on the basis of the value of the factors of production" using the "best available information." 19 U.S.C. § 1677b(c)(1)(B). If factors of production data prove inadequate, however, Commerce determines normal value based upon the price of "comparable . . . merchandise . . . produced in one or more market economy countries that are at a level of economic development comparable to that of the non-market economy country." § 1677b(c)(2). "When there are no better alternatives, however, Commerce may use price quotes." *Vinh Quang Fisheries Corp. v. United States*, 33 CIT __, ___, 637 F. Supp. 2d 1352, 1358 (2009).

Resurrecting arguments addressed in *Jinxiang Hejia*, Defendant-Intervenors contend that Commerce failed to account for the inferiority of the offers Hejia submitted when compared with other data on the record. First, Defendant-Intervenors note that these three offer prices are far lower than those on record for actual sales of single-clove garlic in Japan, Germany, and Great Britain. Def.-Intervenor's

Br. 5–7. Defendant-Intervenors conclude that they are thus less probative of the normal value of single-clove garlic and should not be afforded equal weight as the SOO offer in the averaging. Def.-Intervenor's Br. 5–7.

In the *First Remand Results*, Commerce relied on the same contrast to justify assigning the Hejia-submitted offers less weight. *See Jinxiang Hejia*, 2011 WL 3915675, at *9–10. The court rejected the utility of this unadorned reasoning, however, absent any explanation of how prices in these disparate markets would reflect on surrogate value data from India. *Id.* at *10. More importantly, as noted, the court found that none of Commerce's reasoning, as articulated, supported the particular weighted-average it used. *Id.* at *11. On remand, Commerce has chosen to abandon this methodology rather than more fully explain how the comparison justifies the previous weighted-average, *see Second Remand Results* at 12, and it is not the court's role to question this decision. Defendant-Intervenors have failed to demonstrate that the Japanese, German, and British prices for single-clove garlic – which are higher than the SOO offer as well and themselves differ greatly, Def.-Intervenor's Br. 4 – render the methodology in the *Second Remand Results* unreasonable.

Defendant-Intervenors next argue that the inferiority of the sales offers Hejia submitted is evident given their low price compared to the surrogate value prices Commerce calculated for the more common multi-clove garlic. Def.-Intervenor's Br. 7–9. Defendant-Intervenors note that Hejia itself argued at the administrative level that single-clove garlic demands a higher price as it is a specialty product. Def.-Intervenor's Br. 8, 11. The court previously found that, while this contrast was noticeable, Commerce failed to demonstrate how it supported the weighted-average. *See Jinxiang Hejia*, 2011 WL 3915675, at *10. If Commerce had provided a more complete explanation in the *Second Remand Results*, this comparison might indeed have justified treating the Hejia offers with less (or even no) weight in the surrogate valuation. Commerce opted not to, however, and the court did not, nor could it, restrict Commerce on remand merely to explaining the methodology it used in the *First Remand Results*. Faced with a limited record of four usable sales offers for single-clove garlic, Commerce relied on a simple average of these imperfect data to calculate surrogate value – a reasonable approach given the record as a whole.

Finally, Defendant-Intervenors argue that the *Second Remand Results* fail to account for the fact that the Hejia sales offers are lower than the SOO offer that Commerce placed on the record. Def.-Intervenor's Br. 9. As Commerce aptly puts it, however, "this argu-

ment begs the question." Def.'s Resp. 5. One could just as easily ask why the SOO offer is priced so much higher than the other Indian sales offers for single-clove garlic.

The issue before the court is not, as Defendant-Intervenors suggest, whether Commerce could have adequately supported the weighted-average used in the *First Remand Results* or whether it could have otherwise treated the Hejia-submitted offers with less weight in the surrogate valuation. Instead, the court must ask whether it was reasonable for Commerce to do what it did – use a simple average of the four sales offers. It was. Commerce was presented with two sets of imperfect data, the SOO offer and the three usable sales offers that Hejia submitted. Neither contained prices from actual transactions and neither was contemporaneous with the period of review. *Second Remand Results* at 13. The court's opinion in *Jinxiang Hejia* reflected the requirement that Commerce provide a rational explanation linking the available data to its chosen methodology. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc.*, 463 U.S. at 43; *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005) ("[I]t is well settled that an agency must explain its action with sufficient clarity to permit 'effective judicial review.'" (citation omitted)). It did not, however, limit the broad discretion the agency retains when calculating surrogate value, particularly when confronted with limited data. Defendant-Intervenors fail to show that Commerce exceeded this discretion.

III. Conclusion

For the foregoing reasons, the *Second Remand Results* are therefore sustained. The court will enter judgment accordingly.

Dated: June 11, 2012
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE

Slip Op. 12–81

MACLEAN-FOGG COMPANY, et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 11–00209

[Plaintiffs' motion for reconsideration granted in part and denied in part.]

Dated: June 13, 2012

Thomas M. Keating, and *Lisa M. Hammond*, Hodes, Keating and Pilon, of Chicago, IL, for Plaintiffs Maclean-Fogg Co. and Fiskars Brands, Inc.

Mark B. Lehnardt, Lehnardt & Lehnardt LLC, of Liberty, MO, for the Plaintiff-Intervenors Eagle Metal Distributors, Inc. and Ningbo Yili Import and Export Co., Ltd.

Craig A. Lewis, *Theodore C. Weymouth*, and *Brian S. Janovitz*, Hogan Lovells US LLP, of Washington, DC, for the Plaintiff-Intervenor Evergreen Solar, Inc.

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for the Defendant. With her on the briefs were *Stuart F. Delery*, Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Reginald T. Blades Jr.*, Assistant Director. Of counsel on the briefs were, *Joanna Theiss*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, and

Stephen A. Jones, *Christopher T. Cloutier*, *Daniel L. Schneiderman*, *Gilbert B. Kaplan*, *Joshua M. Snead*, and *Patrick J. Togni*, King and Spalding LLP, of Washington, DC, for the Defendant-Intervenor Aluminum Extrusions Fair Trade Committee.

MEMORANDUM AND ORDER

Pogue, Chief Judge:

INTRODUCTION

In prior proceedings in this matter, joint Plaintiffs, four domestic importers and one exporter of extruded aluminum, challenged the 374.15% all-others countervailing duty ("CVD") rate set by the Department of Commerce ("the Department" or "Commerce") in its investigation of their goods imported from the People's Republic of China. The court held that the Department's applicable regulation was permitted by ambiguity in the statute governing the all-others rate, but it also found the rate unreasonable and remanded it to Commerce for reconsideration. *MacLean-Fogg Co. v. United States*, Slip Op. 12–47, 2012 WL 1129374 (CIT Apr. 4, 2012)("*MacLean-Fogg I*").[1]

Despite the court's remand order, Plaintiffs, pursuant to USCIT Rule 59, now seek reconsideration of the court's opinion.[2] Plaintiffs assert that there was legal error in the court's 1) decision not to address Commerce's preliminary provisional rate determination and 2) failure to conclude that statutory term "individually investigated" is unambiguous when considered in the light of the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1 (1994) *reprinted in* 1994 U.S.C.C.A.N. 4040 ("SAA").

As explained below, Plaintiffs' first assertion is partially correct, while Plaintiffs' second assertion is not. Accordingly, Plaintiffs' motion is granted in part.

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[1] Familiarity with the court's April 4, 2012 opinion is presumed. Commerce's remand redetermination is due June 25, 2012.

[2] USCIT Rule 59 provides that a "rehearing may be granted. . . for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court."

STANDARD OF REVIEW

The court will grant a rehearing when there has been: "1) an error or irregularity, 2) a serious evidentiary flaw, 3) the discovery of new evidence which even a diligent party could not have discovered in time, or 4) an accident, unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case." *See, e.g.*, *Target Stores v. United States*, 31 CIT 154, 156, 471 F. Supp. 2d 1344, 1347 (2007). However, the court does not grant a motion for rehearing merely to permit the losing party another chance to relitigate the case. *USEC, Inc. v. United States*, 25 CIT 229, 230, 138 F. Supp. 2d 1335, 1336–37 (2001). Rather, the moving party must show that the court committed a "fundamental or significant flaw" in the original proceeding. *Id.*

DISCUSSION

Plaintiffs first assert that the court erred in failing to address Plaintiffs' challenge to the 137.65% preliminary or provisional all-others rate set by the preliminary determination, *Aluminum Extrusions from the People's Republic of China*, 75 Fed. Reg. 54,302 (Dep't Commerce Sept. 7, 2010) (preliminary affirmative CVD determination) ("*Preliminary Determination*"). That provisional rate was later replaced by the final 374.15% rate, published in *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (final affirmative CVD determination) ("*Final Determination*") and accompanying *Issues and Decision Memorandum*, (Mar. 28, 2011), Admin. R. Pub. Doc. 465, available at http://ia.ita.doc.gov/frn/summary/PRC/2011–7926–1.pdf (last visited on June 12, 2012) ("*I&D Memo*"), the rate remanded for reconsideration. Nonetheless, Plaintiffs argue that, in addition to the court's review and remand of the final rate, the preliminary provisional all-others rate must also be subject to judicial review.

In *MacLean-Fogg I*, the court declined to address Plaintiffs' challenge to the preliminary rate, noting that "the court's jurisdiction under 28 U.S.C. § 1581(c) is to review final agency action." *MacLean-Fogg*, 2012 WL 1129374 at n.11. While the court's statement is correct, it is insufficient. Rather, review of a temporary provisional rate may be appropriate in the circumstances here. *See* 19 U.S.C. § 1516a(a)(2)(A); 19 U.S.C. § 1516a(b)(1)("The court shall hold unlawful any determination, finding or conclusion found . . . ."); H.R. Rep. NO. 1235, 96th Cong., 2d Sess. 48 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759–60. Here Plaintiffs properly preserved their request for review of Commerce's preliminary rate determination by raising the

issue for decision in the *Final Determination*. *See I&D Memo* at 54, Comment 12 ("Whether the Department Should Retroactively Revise the All Others Rate from the *Preliminary Determination* . . . ."); *see also* 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."). Such review is appropriate where the statute so provides. *Id.* ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). Here the applicable statute, 19 U.S.C. § 1516a(a)(2)(A), provides for review.

Nonetheless, considered in light of the court's remand of the *Final Determination*, Plaintiffs' request for review of the temporary provisional rate is, in part, moot. In *MacLean-Fogg I*, Plaintiffs asserted the same substantive challenge to both the preliminary rate and the final rate, claiming that the statute unambiguously prohibited Commerce's rate determination methodology and thus prohibited Commerce's reliance on the regulation utilized to determine the Plaintiffs' CVD rate. *MacLean-Fogg*, 2012 WL 1129374 at 4. As noted above, the court denied this claim. *Id.* Thus, this aspect of Plaintiffs' challenge is moot. However, *MacLean-Fogg I* also found the final rate unreasonable and remanded it for consideration. Id. at 6. As the court did not decide the reasonableness of the temporary provision rate, that aspect of Plaintiffs' challenge may not be moot.

Specifically, although the final determination sets the on-going cash deposit rate for Plaintiffs' goods, the provisional rate carries some force.[3] Tariff Act of 1930, § 705, as amended, 19 U.S.C. § 1671d(c)(1)(B)[4]; 19 C.F.R. § 351.210(d); *Final Determination*, 76 Fed. Reg. at 18,523. Plaintiffs may request an administrative review, in which Commerce adjusts (or "caps") the actual payments owed to the lesser of either 1) the cash deposit rate (set by the *Preliminary Determination*) or 2) the final rate determined upon review. 19 C.F.R. § 351.212(d); *Final Determination*, 76 Fed. Reg. at 18,523.

Because of its continued applicability as a "cap," Commerce's preliminary provisional rate determination may qualify for reasonable-

[3] The preliminary provisional rate functions as the cash deposit rate for goods entered between the publication of the preliminary and final determinations. It is unlikely that this aspect of Plaintiffs' claim would support a request for reasonableness review because any amounts that prove, upon court or administrative review, to be overpayments would be refunded with interest. 19 U.S.C. § 1505. Plaintiffs make no claim that the statutory interest provision is inadequate for entries made between the preliminary and final determinations.

[4] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

ness review. Accordingly, the court will consider this aspect of Plaintiffs' request for consideration when it reviews Commerce's remand determination.

Plaintiffs next argue that the court failed to consider language in the SAA when it held that the term "individually investigated" is ambiguous. Specifically, Plaintiffs claim that the use of the word, "investigate," throughout the SAA demonstrates that it must consistently apply to voluntary respondents. This argument is unavailing.

The section of the SAA upon which Plaintiffs rely states that "Commerce . . . will endeavor to investigate all firms that voluntarily provide timely responses in the form required." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201. But this section is titled "Treatment of Voluntary Respondents." *Id.* Thus, in this particular section of the SAA, "investigate" does refer to voluntary respondents, but it does not follow that a neutral verb such as "investigate" therefore subsequently always includes voluntary respondents in its scope.[5]

CONCLUSION

For the forgoing reasons, Plaintiffs' motion for reconsideration is **GRANTED** in part and **DENIED** in part.

It is **SO ORDERED**.

Dated: June 13, 2012
New York, New York

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE

[5] Plaintiffs also assert that the court overlooked the meaning of the word, "all," in its prior opinion. However, because a motion for rehearing is not intended to provide litigants an opportunity to re-argue their case, and because Plaintiffs' arguments in this regard do not identify any serious error, this assertion fails. *USEC*, 25 CIT at 230, 138 F. Supp. 2d at 1336.