

ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT & EXPORT CORP.,
ET AL., v. UNITED STATES
Court No. 02-00057
Slip Op. 06-85 (June 6, 2006)

**RESULTS OF REDETERMINATION
PURSUANT TO REMAND**

SUMMARY

The U.S. Department of Commerce (the Department) has prepared this redetermination pursuant to the remand order from the United States Court of International Trade (CIT) and the decision of the United States Court of Appeals for the Federal Circuit (CAFC) in Zhejiang Native Produce & Animal By-products Import & Export Corp., et al., vs. United States, Slip Op. 06-85 (CIT June 6, 2006) (Zhejiang).

For reasons explained below, we have reversed our finding of critical circumstances for this proceeding.

BACKGROUND

On October 4, 2001, the Department published its final determination of sales at less-than-fair-value in the investigation of honey from the People's Republic of China (PRC). In it, the Department found that substantial record evidence supported an affirmative critical circumstances determination for three of the Chinese exporters that were respondents in the investigation and the non-participating exporters, i.e., the "China-wide entity." See Notice of Final Determination of Sales at Less Than Fair Value; Honey from the People's Republic of

China, 66 FR 50608 (Oct. 4, 2001). The three Chinese exporters, their U.S. importers, and other parties opposed to the antidumping duty order (the plaintiffs) brought suit at the CIT, challenging several of the Department's decisions, including the critical circumstances finding. In Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States, Ct. No. 02-00057, Slip Op. 03-151 (CIT Nov. 21, 2003), the Court remanded to the Department its determination of the surrogate value of raw honey, but affirmed the Department on all other issues. The Court upheld the Department's final results pursuant to remand in Zhejiang, Slip Op. 04-109 (CIT Aug. 26, 2004) and dismissed the case. Plaintiffs appealed to the CAFC only one aspect of the critical circumstances findings, namely that the relevant U.S. importers knew or had reason to know that the massive imports were dumped. The CAFC reversed the CIT and the Department on this point, ruling that there is not substantial evidence to support the finding of critical circumstances and remanding the case for further proceedings. Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States, 432 F.3d 1363, 1368 (Fed Cir. 2005). The CIT remanded the matter to the Department for further consideration of its critical circumstances finding, "provided that in no event shall Commerce impute to plaintiffs any knowledge prohibited by the CAFC's decision" Zhejiang, Slip Op. 06-85 at 2 (CIT June 6, 2006).

On August 1, 2006, the Department invited interested parties to provide comments regarding ways of addressing the CIT's remand. The Department received comments and rebuttal comments from petitioners and plaintiffs in this proceeding on August 7 and 14, 2006. The Department's summary of these comments is below.

SUMMARY

Petitioners argue that because the CAFC has ruled that when the period of investigation (POI) coincides with the last six months of a suspension agreement, the Department may not use its normal practice of imputing knowledge of dumping to the U.S. importers of any exporter whose dumping margin for the POI is 25 percent or more (the 25 percent rule). Instead, the critical circumstances analysis must focus on the period after the filing of the antidumping petition when the suspension agreement was terminated. Petitioners urge the Department to seek additional time from the Court to reopen the record to gather information about post-petition sales in the critical circumstances period. Petitioners cite ICC Industries v. United States, 10 CIT 181, 632 F. Supp. 36 (CIT 1986), aff'd, 812 F.2d 694 (CAFC, 1987) (ICC Industries), as upholding the Department's range of discretion in finding that the U.S. importers from the PRC knew or should have known that they were purchasing the relevant imports at dumped prices during the time period when the investigation was being conducted because they were at least 22 percent below the prices of imports from Spain. Petitioners argue that the CIT made clear that the Department had appropriately focused on the importers' knowledge with regard to importations while the investigation was proceeding, instead of the POI, because the administrative scrutiny of a dumping investigation cannot begin until after the POI has been completed. Petitioners cite the CIT's observation that "a considerable allowance to the discretion of the agency" was warranted "in view of the possibility that otherwise the law could not cope with the first occurrence of massive, dumped imports from a state controlled economy." 10 CIT at 10, 632 F. Supp. at 39. Petitioners further argue that the CAFC agreed with the Department and the CIT in ICC Industries that the Department's appropriate focus in a

knowledge-of-dumping analysis is on the importer's knowledge regarding sales made during the dumping investigation, not during the POI.

Petitioners point out that the statute does not specify the period covered by the two-pronged findings required before the Department can make an affirmative determination of critical circumstances. However, the Department's regulations provide that "the Secretary normally will consider a 'relatively short period' as the period beginning on the date the proceeding begins and ending at least three months later" in making a finding that "there have been massive imports of the subject merchandise over a relatively short period" pursuant to 19 U.S.C. § 1673b(e)(1)(B) (preliminary determinations) and 19 U.S.C. § 1673d(a)(3)(B) (final determinations). Petitioners argue that just as the Department is required to focus on imports entered over at least the three-month period following the filing of the petition in determining whether imports have been "massive over a relatively short period," it would be consistent for the Department to focus on imports made after the petition was filed in performing the analysis of whether importers knew or should have known that the merchandise was being sold at less than fair value.

Petitioners cite the legislative history of the critical circumstances provisions at H.R. Rep. 96-317 at 63 (1979) to elucidate Congressional intent. As the CIT noted in Tak Fat Trading Company v. United States, 26 CIT 46, 185 F. Supp. 2d 1358:

Congress promulgated the critical circumstances provision in order 'to provide prompt relief to domestic industries suffering from large volume of, or a surge over a short period of, imports and to deter exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing

their exports to the United States during the period between initiation of an investigation and a preliminary determination by {ITA}.

Petitioners conclude that both the language of the statute's critical circumstances provisions and their legislative history show Congress' intent that the Department examine the volume of imports during the period between the filing of the petition and the preliminary determination in analyzing knowledge of dumping. However, petitioners deny that their argument means that the Department's 25 percent rule for imputing knowledge of dumping is unlawful because it focuses on POI imports. Petitioners contend that the POI imports are a surrogate for imports during the investigation's proceedings. They conclude that because the 25 percent rule is not available to the Department in this remand proceeding, the Department should focus on post-petition sales in determining knowledge of dumping. Finally, petitioners urge the Department to reopen the record to consider evidence of the three relevant exporters' sales between the petition's filing and the preliminary determination.

Petitioners argue that the Department must decide what it would have done in the original investigation if it had known that it could not use its standard critical circumstances analysis, and that the Department must provide the interested parties an opportunity to submit evidence relevant to the post-petition imports. Petitioners cite the CIT's decision in Sugiyama Chain Co. v. United States, 18 CIT 423, 436-37, 852 F. Supp. 1103, 1115 (1994), as holding that interested parties have a legitimate claim to due process in remedy proceedings. Petitioners argue that it would be unfair and a denial of petitioners' procedural rights if the Department did not reopen the record for the narrow purpose of giving the parties the opportunity to submit evidence on this point. Further, petitioners argue that for this remand investigation, the Department should

require the three exporters to respond to a questionnaire designed to obtain information on the extent to which the exporters' U.S. sales between the filing of the petition and the preliminary determination were dumped. Petitioners point out that the 90-day period preceding the preliminary determination was included in the first administrative review of the antidumping duty order on honey from the PRC, in which Zhejiang participated. Petitioners argue that Zhejiang could simply give its consent to have its sales information for the 90-day critical circumstances period entered into the record of this remand proceeding, and that this methodology would result in little or no burden to Zhejiang. The Department assigned an adverse facts available rate to the two other exporters based on their failure to cooperate during the first administrative review. Petitioners state that they would not object to the Department giving these exporters another chance to cooperate regarding the 90-day critical circumstances period. Petitioners argue that a sufficiently high margin of dumping on sales during the period between the filing of the petition and the preliminary determination will be evidence that the importers should have known that the price was "too good to be true" and too low to escape from administrative scrutiny, citing ICC Industries, 632 F. Supp.at 39.

Plaintiffs argue that the CAFC's decision leaves the Department with no choice but to render a negative determination of critical circumstances. Plaintiffs contend that during the investigation petitioners were aware that the Chinese respondents believed that the investigation was inherently unfair and inappropriate due to the fact that "the Chinese producers and exporters under the suspension agreement sold at volumes and reference prices established by the Department of Commerce itself." Akin, Gump, Strauss, Hauer & Feld, letter to Department dated March 15, 2001, at 3. Plaintiffs argue that in ICC Industries, both the Department and the

courts recognized that non-market economy dumping margins did not constitute evidence that importers should have known they were purchasing dumped merchandise, and that the courts upheld the Department's determination to impute knowledge of dumping to an importer from the PRC where the Department had carefully analyzed the peculiar market conditions applicable to the subject merchandise and found sufficient objective evidence to support its conclusion. Plaintiffs cite the CIT's reasoning that the Department's imputation of knowledge to the importer was "done with attention to the structure of the international market, the nature of the commodity and the magnitude of the price differential." ICC Industries, 632 F. Supp. at 39. Further, plaintiffs contend that the judicial decisions were at least partly based on the fact that the Department had reasoned that its calculation of dumping margins was not relevant to its "should have known" analysis. In rejecting petitioners' arguments for reopening the record, plaintiffs argue that petitioners chose not to place evidence on the investigation record regarding "the structure of the international market, the nature of the commodity and the magnitude of the price differential" between Chinese honey imports and imports from other countries that could have led the Department to impute knowledge to importers of Chinese honey. Instead, plaintiffs argue, petitioners chose to rely solely on the 25 percent rule, although at the time they made their claim of critical circumstances, no one knew what the final margins in the investigation would be. Accordingly, plaintiffs argue, petitioners' failure to exercise their right in a timely manner did not create an obligation on the part of the Department to avail them of a "second bite of the apple," citing Peer Bearing Company v. United States, 182 F. Supp. 2d 1285, 1302 (CIT 2001).

Plaintiffs argue that the CAFC's opinion invalidated the Department's 25 percent rule, and that it requires the Department to make its imputed knowledge determinations on a case by

case basis. Plaintiffs point out that the court's opinion quoted with approval the Department's statement in Final Determination of Sales at Less Than Fair Value: Potassium Permanganate From the People's Republic of China, 48 FR 57347, 57349 (Dec. 29, 1983) that it was required to develop tests for determining imputed knowledge that did not depend on its calculation of surrogate values. Plaintiffs conclude that the CAFC has already expressly rejected the analysis that petitioners request the Department to conduct upon reopening the record, arguing that it would apply a standard that the CAFC has already decided is contrary to law.

CONCLUSION

In determining whether there is a reasonable basis to believe or suspect that an importer knew or should have known that the exporter was selling honey at less than fair value, the Department normally considers margins of 25 percent or more for export price sales sufficient to impute knowledge of dumping. In the less-than-fair-value investigation of honey from the PRC, we determined that the margins for the three mandatory respondents, Inner Mongolia, Kunshan, and Zhejiang, were 57.13, 49.75, and 25.88 percent, respectively, and that the margin for each of the four cooperative respondents for which we examined only the separate rates portion of the questionnaire, (High Hope, Shanghai Eswell, Anhui, and Henan), was 45.51 percent. Furthermore, the final margin for the PRC-wide entity (all remaining exporters) was 183.80 percent. Therefore, in the original investigation, we imputed knowledge of dumping to importers of honey from each of the seven exporters cooperating in the investigation, and to importers of honey from all other producers/exporters in the PRC.

Based on the CAFC's holding that the determination to impute knowledge of dumping while a suspension agreement was in place was not supported by substantial evidence, and the

CIT's instruction to the Department not to impute to plaintiffs any knowledge prohibited by the CAFC's decision, the Department finds that critical circumstances do not exist with respect to the antidumping investigation of honey from the PRC.

Petitioners argue that the Department should examine the period of time after the filing of the petition to determine whether the importers knew, or should have known, that the honey was being dumped. Petitioners urge the Department to seek additional time from the Court to reopen the record and allow for the submission of information to address the issue of knowledge during this time period.

The Department's practice is to examine sales made during the POI to determine whether the importers knew, or should have known, that the subject merchandise was being dumped. See, e.g., Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 FR 29303 (May 22, 2006), and accompanying Issues and Decision Memorandum, at Comment 10; Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil, 71 FR 2183, 2186 (January 13, 2006). We note that neither the CIT nor the CAFC called into question the Department's practice with regard to the time period used to analyze the issue of knowledge. Rather, the CAFC held that because a suspension agreement was in place during the period of investigation, the Department's determination to impute knowledge of dumping based on margins in excess of 25 percent was not supported by substantial evidence.

Because the CAFC did not hold that the Department's methodology of using the POI to determine whether importers knew, or should have known, that the subject merchandise was

being dumped was incorrect or unreasonable, we do not believe that we have the authority to reopen the record and change the time period on which the original finding of knowledge was based in this remand proceeding.

However, if the court considers that the remand order is sufficiently broad for the Department to consider the merits of the petitioners' argument concerning the time period used to analyze the issue of knowledge, and remands the proceeding to the Department to re-open the record for the submission of information on alternative time periods, we request that the Department be given six months time to complete that remand, as such time would be necessary in order for the Department to request additional information from the parties on alternative time periods, analyze and verify such information, issue a draft redetermination to the parties for comment, and submit a final redetermination to the Court.

Based on the record now before the Department, we find that there is no evidence demonstrating that the importers knew, or should have known, that honey from the PRC was being sold at less than its fair value, and thus, find that critical circumstances do not exist.

David M. Spooner
Assistant Secretary
for Import Administration

Date