Slip Op. 09–65

THAI I-MEI FROZEN FOODS CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 05–00197

[Affirming the redetermination of an amended final determination of sales at less than fair value following court-ordered remands]

Dated: June 24, 2009

Steptoe & Johnson LLP (*Eric C. Emerson* and *Michael T. Gershberg*) for plaintiff.
Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); *Nithya Nagarajan*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

The court has reviewed the Final Results of Redetermination Pursuant to Court Remand ("Second Remand Redetermination"), as filed by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") on March 20, 2009. The court concludes that the Second Remand Redetermination is in accordance with the opinions and orders issued in this case. *See Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 31 CIT ___ , 477 F. Supp. 2d 1332 (2007) ("*Thai I-Mei I*"); *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 32 CIT ___ , 572 F. Supp. 2d 1353 (2008) ("*Thai I-Mei II*"); *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 33 CIT ___ , Slip. Op. 09–6 (Jan. 21, 2009) ("*Thai I-Mei III*").

Commerce issued the Final Results of Redetermination Pursuant to Court Remand (June 11, 2007) ("First Remand Redetermination") in response to the court's decision in *Thai I-Mei I*, 31 CIT ___ , 477 F. Supp. 2d 1332, in which the court reviewed the *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final De-*

termination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 Fed. Reg. 76,918 (Dec. 23, 2004), as amended by the *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 Fed. Reg. 5145 (Feb. 1, 2005). In *Thai I-Mei II*, 32 CIT at ___ , 572 F. Supp. 2d at 1371–72, the court remanded the First Remand Redetermination to Commerce with the instruction that Commerce calculate a constructed value profit rate for Thai I-Mei that is in accordance with law. The Second Remand Redetermination assigns to Thai I-Mei a final dumping margin of 1.88%, which is a *de minimis* margin. Second Remand Redetermination 28; *see* 19 U.S.C. §§ 1673b(b)(3), 1673d(a)(4) (2006).

Commerce issued its draft version of the Second Remand Redetermination on February 18, 2009, and plaintiff submitted comments to the Department on February 25, 2009. Second Remand Redetermination 2. On April 20, 2009, following issuance of the Second Remand Redetermination, plaintiff timely filed comments with the court. Pl.'s Comments Regarding Final Results of Redetermination Pursuant to Ct. Remand ("Pl.'s Comments"). In its comments filed with the court, plaintiff declined to challenge the Second Remand Redetermination, stating that it found flaws with the Department's analysis but believed those Court No. 05-00197 Page 3 flaws to constitute harmless error. *Id*. at 1, 3. Thai I-Mei explained that it "agreed with the [constructed value] profit calculation methodology used in Commerce's draft, but disagreed (as it does with the final Remand Results) with Commerce's failure to calculate a [constructed value] profit cap and its evaluation of certain factual information submitted by Thai I-Mei." *Id*. at 2. According to Thai I-Mei, the recalculated constructed value profit rate is "reasonable, supported by substantial evidence on the record, and in accordance with this Court's previous decisions." *Id*. at 2–3. Thai I-Mei urges the court to affirm the Second Remand Redetermination. *Id*. at 1, 3.

In addition to urging affirmance of the Second Remand Redetermination, plaintiff requests that the court specify in its order that Commerce is to (1) revoke the antidumping duty order as to Thai I-Mei *ab initio*; (2) instruct United States Customs and Border Protection to lift the suspension on all of Thai I-Mei's unliquidated entries made since August 4, 2004, the date of the preliminary less-than-fair-value determination, and liquidate the entries without regard to antidumping duties with appropriate refunds and interest; and (3) terminate all antidumping duty administrative reviews of Thai I-Mei under the antidumping duty order. *Id*. at 11; *Notice of Prelim. Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp From Thailand*, 69 Fed. Reg. 47,100 (Aug. 4, 2004). Thai I-Mei argues that "[i]n

this case, all entries of subject merchandise made on or after August 4, 2004, the date of the preliminary determination of sales at less than fair value, must be liquidated without regard to antidumping duties." Pl.'s Comments 11. According to Thai I-Mei, the court should specify these obligations in an order "to avoid any misunderstanding or need to return to this Court for further enforcement of its judgment." *Id.*

Defendant timely submitted its reply to plaintiff's comments on May 20, 2009, in which it objected to plaintiff's request that the court specify the various obligations. Def.'s Resp. to Thai-I-Mei's Remand Comments 2–4. Defendant maintains that a court order is unnecessary because the statute and regulations govern the Department's actions upon the exhaustion of all appeals and an entry of final and conclusive judgment. *Id.* at 2–3. Defendant states that "upon a final and conclusive judgment, Commerce will comply with its statutory and regulatory requirement to exclude Thai I-Mei from the order and terminate suspension of its entries." *Id.* at 3. Defendant interprets Thai I-Mei's request as akin to a writ of mandamus and argues that mandamus is inappropriate for various reasons. *Id.* Defendant submits that plaintiff has an adequate remedy under the statute and regulations governing the matter, that Thai I-Mei does not have an indisputable right to the issuance of a writ of mandamus, and that there is no basis from which to conclude that the United States will not follow the law. *Id.* at 3–4.

The court does not construe plaintiff's request as a motion or application for a writ of mandamus. Nevertheless, the court concludes that an order or judgment containing the various directives that plaintiff advocates is unnecessary and unwarranted in this case. The disposition of this case requires a judgment that affirms the Second Remand Redetermination, which is the determination that Commerce issued in these proceedings and that is now before the court. The judgment the court is about to enter will not become final until all appeals, or opportunities for appeal, have been exhausted. Any consequences of the *de minimis* margin determination that Commerce assigned to Thai I-Mei that ensue at that time, including possible revocation of the antidumping duty order as to Thai I-Mei, will be governed by various statutory provisions, including, but not limited to, 19 U.S.C. §§ 1516a(c) and (e), 1673d(a)(4) and (c), and 1673e(a)(1). *See* 19 U.S.C. § 1516a(c), (e) (2006) (governing liquidation of entries during and after judicial review of antidumping duty determinations); *id.* § 1673d(a)(4) (governing final determinations and referencing § 1673b(b)(3) with respect to the effect of a *de minimis* margin); *id.* § 1673d(c) (governing the effect of final determinations); *id.* § 1673e(a)(1) (2006) (governing the assessment of duties). The future application of the various statutory provisions to Thai I-Mei's unliquidated entries is not affected by any issue or controversy of which the court is aware. The court has no basis to con-

clude that the Department will act otherwise than in accordance with all applicable statutory and regulatory requirements.

For the foregoing reasons, the court concludes that it will suffice for the court to enter a judgment that affirms the Second Remand Redetermination and provides that all entries of merchandise that are affected by the Second Remand Redetermination shall be liquidated in accordance with the final court decision in this action.

Slip Op. 09–66

SEYLINCO, S.A., Plaintiff, v. UNITED STATES, Defendant, –and– AMERICAN HONEY PRODUCERS ASSOCIATION AND SIOUX HONEY ASSOCIATION, Intervenor-Defendants.

Court No. 07–00200

[Plaintiff's motion for judgment on the agency record denied; action dismissed.]

Decided: June 26, 2009

deKiefer & Horgan (*Gregory S. Menegaz* and *John J. Kenkel*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Richard P. Schroeder*); and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Matthew D.Walden*), of counsel, for the defendant.

Kelley Drye & Warren LLP (*Michael J. Coursey* and *R. Alan Luberda*) for the intervenor-defendants.

Memorandum & Order

AQUILINO, Senior Judge: The plaintiff has commenced this action and interposed a motion for judgment on the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA"), *sub nom. Honey from Argentina: Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 72 Fed.Reg. 25,245 (May 4, 2007), which state that the agency had been requested to revoke its underlying antidumping-duty order

> in regard to Seylinco pursuant to 19 CFR § 351.222 based on three consecutive zero margins. We preliminarily determined not to revoke the order with respect to Seylinco because it did not ship in commercial quantities during each of the three years forming the basis of its request. . . . For these final results, the Department has relied upon Seylinco's sales activity during the 2002–2003, 2003–2004, and 2004–2005 PORs in making its decision with respect to Seylinco's revocation re-

> quest. Although Seylinco had three consecutive years of sales at not less than normal value (NV), Seylinco did not sell subject merchandize in commercial quantities in each of these three years forming the basis of the request for revocation. Thus, Seylinco is not eligible for consideration for revocation pursuant to 19 CFR 351.222(d)(1). Accordingly, we have determined not to revoke the antidumping duty order with respect to Seylinco.[1]

I

The court's subject-matter jurisdiction is pursuant to 28 U.S.C. §§ 1581(c), 2631(c), and the standard of review of defendant's foregoing determination is whether it is unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1561a(b)(1)(B). And, as the determination indicates, that law includes an ITA regulation with regard to revocation of antidumping-duty orders, namely, 19 C.F.R. § 351.222(b), which sets forth the factors to be considered, including:

> (A) Whether one or more exporters or producers covered by the order have sold the merchandise at not less than normal value for a period of at least three consecutive years; . . . and . . .
>
> (C) Whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.
>
> (ii) If the Secretary determines, based upon the criteria in paragraphs (b)(2)(i)(A) through (C) of this section, that the antidumping duty order as to those producers or exporters is no longer warranted, the Secretary will revoke the order as to those producers or exporters.

19 C.F.R. § 351.222(b)(2)(i)(A), (C) and (2)(ii).

> . . . However, . . . before revoking an order or terminating a suspended investigation, the Secretary must be satisfied that, during each of the three . . . years, there were exports to the United States in commercial quantities of the subject merchandise to which a revocation or termination will apply.

19 C.F.R. § 351.222(d)(1). Hence, there is a requirement that an exporter or producer requesting revocation certify that,

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[1] 72 Fed.Reg. at 25,245. "PORs" are the particular periods of ITA review, during which the plaintiff claims honey "containers . . . fully loaded, although the number of drums could fluctuate slightly from container to container", totalled 25, four, one, and 24. Plaintiff's Rule 56.2 Memorandum, p. 5.

> during each of the consecutive years referred to in paragraph (b) of this section, [it] sold the subject merchandise to the United States in commercial quantities[.]

19 C.F.R. § 351.222(e)(1)(ii). Whereupon, the requirement of "commercial quantities" is the rub in this action.

Counsel for the plaintiff explain that one fully- loaded container

> holds approximately 60 drums weighing approximately 330 kilograms – in retail terms, the equivalent of approximately 60,000 12-ounce honeybear jars. Seylinco submits that these quantities were commercial quantities per se. Indeed, Seylinco submits that the parties are in agreement that bulk honey is typically, if not exclusively, sold in fully loaded containers – as are most bulk items transported by ocean freight – so the record cannot support the Department's finding that a fully loaded shipping container is not a "commercial quantity."

Plaintiff's Rule 56.2 Memorandum, p. 3. The summary of their argument is that

> Seylinco sold at de minimis margins in three consecutive reviews. By petitioners' own admission, Seylinco sold commercial quantities – at least one container – at not less than fair value in three consecutive PORs. The regulations do not qualify "commercial quantities" so it is arbitrary and capricious for the Department to determine that an unspecified level of commercial quantities now is required to qualify for revocation.[2]

The defendant responds that the commercial-quantities standard

> is evaluated on a case-by-case basis. . . . That is, there is no magic number or magic level of sales that would indicate sales in commercial quantities; rather, each revocation request must be evaluated based upon its own facts, and the circumstances of the companies and industry in question.

Defendant's Memorandum, p. 20. It proceeds to point out that the ITA generally uses the original period of investigation as its benchmark, but Seylinco did not ship honey to the United States during that time frame, whereupon it looked to the company's shipments during the period of first administrative review for a benchmark. *See id*. at 20–21. That turned out to be 25 containers, followed, as indi-

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[2] Plaintiff's Rule 56.2 Memorandum, p. 8. Moreover, the plaintiff

> does not concede that the minimum commercial quantity is a container. A full 20 foot container of honey drums contains approximately 60 . . . weighing approximately 20,000 kgs in total. Even half a container would contain 30 drums and 10,000 kgs of honey.

Id. at 8–9.

cated above, by shipments of four, one, and 24 in the next three years. *See id.* at 21.

If, as the plaintiff explains, a scare of possible contamination of its honey "drastically curtailed"[3] exports to the United States during the two years of but five total Seylinco containers, followed by the 24, this court cannot conclude that the chosen agency benchmark of 25, on its face, is out of order. And, this being the case, the court also cannot conclude that it was arbitrary and capricious and an abuse of discretion for the ITA to have determined not to count the single, third POR container as "commercial quantities" of Seylinco merchandise. That is, it was in accordance with law to have so determined. *See, e.g., Shandong Huarong Machinery Co. v. United States*, 31 CIT ___ , Slip Op. 07–169 (Nov. 20, 2007).

II

In view of the foregoing, plaintiff's motion for judgment upon the agency record must be denied.[4] Judgment will enter accordingly.

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[3] *Id.* at 5.

[4] Given the quality of the written submissions on all sides, plaintiff's motion for oral argument can be, and it also hereby is, denied.