

UNITED STATES COURT OF INTERNATIONAL TRADE

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RAOPING XINGYU FOODS CO., LTD., :

Plaintiff, :

v. :

UNITED STATES, : Court No. 02-00550

Defendant, :

-and- :

COALITION FOR FAIR PRESERVED MUSHROOM :

TRADE, :

Intervenor-Defendant. :

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Memorandum

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

Decided: August 31, 2004

DeKieffer & Horgan (John J. Kenkel and J. Kevin Horgan) and Lee & Xiao (Yingchao Xiao) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (A. David Lafer); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (Peter J.S. Kaldes), of counsel, for the defendant.

Collier Shannon Scott, PLLC (Michael J. Coursey and Adam H. Gordon) for the intervenor-defendant.

AQUILINO, Judge: According to the Trade Agreements Act of 1979, as amended, in determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than fair value, a comparison shall be made between the export (or con-

structed export) price and "normal value." 19 U.S.C. §1677b(a). And when such merchandise is produced in a nonmarket-economy country, the act authorizes the International Trade Administration, U.S. Department of Commerce ("ITA") to

determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . [T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [it].

19 U.S.C. §1677b(c)(1). The list of those factors in the statute includes "amounts of energy and other utilities consumed". 19 U.S.C. §1677b(c)(3)(C). And the act further provides:

(4) Valuation of factors of production

The [ITA], in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are--

(A) at a level of economic development comparable to that of the nonmarket economy country, and

(B) significant producers of comparable merchandise.

19 U.S.C. §1677b(c)(4).

I

The complaint filed in this action alleges that the above-named plaintiff is a privately-held company organized under

the laws of the People's Republic of China ("PRC"), which country is still considered to have a nonmarket economy. See, e.g., Coalition for the Preservation of American Brake Drum & Rotor Aftermarket Mfrs. v. United States, 28 CIT ___, 318 F.Supp.2d 1305 (2004). Certain mushrooms produced and preserved there and exported to the United States have become subject to an ITA antidumping-duty order published at 64 Fed.Reg. 8,308 (Feb. 19, 1999). The petitioner for that relief, the above-encaptioned intervenor-defendant herein, requested an agency administrative review of exports of such merchandise subject to that order emanating from some 28 named PRC enterprises, including the plaintiff company now at bar.

That process resulted in a weighted-average dumping margin for it of 161.57 percent for the period of review ("POR") per the ITA's Certain Preserved Mushrooms From the P[RC]: Final Results of Third New Shipper Review and Final Results and Partial Rescission of Second Antidumping Duty Administrative Review, 67 Fed.Reg. 46,173, 46,175 (July 12, 2002). The plaintiff seeks relief from this determination via a motion for judgment upon the record compiled by the agency in connection therewith.

The court's jurisdiction to hear and decide this motion that has been proffered pursuant to USCIT Rule 56.2 is based upon 28 U.S.C. §§ 1581(c), 2631(c).

A

The sum and substance of plaintiff's complaint is that the ITA

used a surrogate value for the wrong type of fuel in calculating the dumping margin for Raoping. Raoping argued and submitted supporting data for Commerce to use a value for the actual type of fuel it uses, namely "heavy" fuel oil. Rather, Commerce decided to use a value for "furnace oil," a different product. Such an apples-to-oranges comparison is unsupported by substantial evidence on the record and otherwise not in accordance with law.

Count I, para. 13. Its motion takes the position that the otherwise-not-in-accordance-with-law element of the court's standard of review per 19 U.S.C. §1516a(b)(1)(B)(i) governs relief in this matter in that the "use of a value for a factor of production not utilized by Raoping Xingyu is unlawful", to borrow the words (but not the printed emphasis) of its statement of the sole issue, plaintiff's memorandum, page 1.

Of course, counsel must recognize that the resolution of an issue of law often depends on the underlying facts. Here, they include ITA issuance to Raoping Xingyu of a dumping questionnaire on or about March 30, 2001, section D of which, pursuant to 19 U.S.C. §1677b(c)(1), supra, was concerned with the company's factors of production. Part IIA thereof, for example, requested a "description of . . . [it]s productional process for the merchandise under consideration" to include:

. . . 5. . . . **all** inputs used to produce the merchandise . . . , including specific types of raw materials, labor, energy, subcontractor services, research and development, etc.

Boldface in original. The court has reviewed *in camera* Raoping Xingyu's initial response¹ to that part of the agency's questionnaire and found reference to many such inputs, including, for example, electricity², water³, and coal⁴, but no reference to the input, liquid fuel, still at issue. A subsequent response on behalf of the company and "its supplier Raoping Yucan Canned Foods Factory . . . submit[ted] minor corrections to Raoping Yucan's factors of production data."⁵ Among other things, that submission refers to "industrial heavy oil"⁶.

That submission was followed by an ITA letter to company counsel, apprising them of the agency's "first resort to the use of publicly available published information from surrogate countries" and offering an "opportunity to submit any such information which they believe the Department should consider when valuing the factors of production". Defendant's Memorandum, Appendix 3, p. 1.

¹ Defendant-Intervenor's [Confidential] Response Brief, Appendix 3.

² See id., pp. D-17 to D-18.

³ See id., p. D-18.

⁴ See id., pp. D-18 to D-19.

⁵ Ibid., Appendix 4, first page.

⁶ See, e.g., id., fifth page.

Counsel were thereafter admonished by the ITA for "deficiencies, omissions and areas where further clarification is needed"⁷ purportedly found in the Raoping Xingyu response(s) to its questionnaire. Whatever the precise nature thereof, the court has reviewed the company's response⁸ to that agency letter dated October 3, 2001 and its responses⁹ to supplemental ITA questionnaires¹⁰. The responses dated January 11, 2002 and May 10, 2002 each have line items labelled "Heavy Oil". The January 11 submission explains that, once washed and then sliced, Raoping's mushrooms are blanched in a stainless steel tank heated by steam produced by a boiler, which burns "heavy oil". Plaintiff's [Confidential] Memorandum, Appendix 4, eighth page, para. 3.

The ITA's Preliminary Results of its administrative review, which were published at 67 Fed.Reg. 10,128 et seq. (March 6, 2002), stated, in pertinent part, that, to

value furnace oil, we used price data contained in Hindustan Lever Limited's . . . 1999-2000 financial report because no other data was available from the other financial reports on the record.

67 Fed.Reg. at 10,132, col. 2. The reference to that firm in India was the result of the agency's reaffirmance of its position that

⁷ Defendant's Memorandum, Appendix 5.

⁸ Defendant-Intervenor's [Confidential] Response Brief, Appendix 5.

⁹ Id., Appendix 14; Plaintiff's [Confidential] Memorandum, Appendixes 4, 5.

¹⁰ Defendant's Memorandum, Appendixes 7, 10.

the PRC continue to be treated as a nonmarket-economy country¹¹ and its determination that

India is among the countries comparable to the PRC in terms of overall economic development In addition, based on publicly available information placed on the record, India is a significant producer of the subject merchandise. Accordingly, we considered India the primary surrogate country for purposes of valuing the factors of production because it meets the Department's criteria for surrogate country selection.

Id. at 10,131, col. 3.

This selection precipitated the filing of a case brief with the ITA on behalf of Raoping, to wit:

The furnace oil that Hindustan Lever used is of different quality from the heavy fuel (which was translated literally into "heavy oil" in Raoping's questionnaire response) that Raoping used for its canned mushroom production during the POR. First, the huge difference between the prices of Hindustan Lever's and Raoping's fuel indicates that the qualities of the two fuels are different. We understand that as in a non-market economy, Raoping's fuel price cannot be used for such a comparison. However, the heavy fuel price that the Department used for China in a different proceeding is just a fraction of that of Hindustan Lever's furnace oil. . . . [T]he only heavy fuel price . . . used was in the Persulfates case (A-570-847), which is \$0.12337 per kilogram. In the current review the furnace oil that the Department used is USD 0.45 per kilogram, 3.6 times of that in the Persulfates case, and it is even more expensive than the diesel oil which is a purer and better quality fuel than heavy fuel. . . . The dramatic difference of the prices indicates that the two fuels are of different quality. The heavy fuel that Raoping used is the last residual of oil refining process and it was so cheap that Raoping actually reduced its production cost by using it. . . . Raoping's boiler is also specially designed to use cheap fuel. While we have no information

¹¹ See 67 Fed.Reg. at 10,131, col. 3.

in the record regarding how and for what products . . . Hindustan Lever used the furnace oil, we know that canned mushroom is a small portion of Hindustan Lever's production, and it is very likely that Hindustan used the fuel in the production of the products that require a higher quality oil. Even [if] Hindustan Lever uses the furnace oil for its canned mushroom production, it may be of a higher quality and more efficient oil than that of Raoping's. Before we know that the two fuels are of similar quality, using . . . Hindustan Lever's oil price to calculate Raoping's cheap heavy fuel cost is not proper. For these reasons, we urge the Department to find a surrogate price of a fuel that is close to what Raoping used during the POR, or continue its past practice to use the heavy fuel price in the Persulfates case with adjustments.

Plaintiff's Memorandum, Appendix 6, third-fourth pages (citations omitted). This plea was rejected by the ITA in its Issues and Decision Memorandum as follows:

. . . First, we find that the price of Hindustan's financial report is more contemporaneous to the POR than the price from Energy, Prices and Taxes. In addition, after examining information contained in Hindustan's financial report, we find no basis which supports Raoping Xingyu's contention that the furnace oil Hindustan uses is not comparable to the furnace oil Raoping Xingyu uses in its production process. The mere fact that there is a difference in the price of furnace oil contained in Hindustan's financial report and in Energy, Prices and Taxes does not necessarily indicate that there is an issue with regard to the quality of the furnace oil contained in either resource, especially when one recognizes that the price from Energy, Prices and Taxes is at least four years older than the price from Hindustan's financial report. Absent any supporting documentation or resources, we find that we cannot agree with Raoping Xingyu's claim that it uses furnace oil which is vastly different from that used by Hindustan. Thus, we are continuing to value this input using data from Hindustan's financial report.

Id., Appendix 3, pp. 6-7. The agency's subsequently-published Final Results that are now before the court adopted this reasoning. See 67 Fed.Reg. at 46,175, col. 1.

B

That adoption, and that of defendant's counsel in their memorandum, pages 9-10, seem somewhat incongruous. If the court's understanding is correct that *Energy Prices & Taxes* is a continuing, quarterly publication of statistics by the Organisation for Economic Cooperation and Development's International Energy Agency ("IEA"), then Hindustan Lever's past fuel prices are not "more contemporaneous to the POR than the price from Energy, Prices and Taxes." *Ibid*. Indeed, independent of the IEA, the U.S. government is or should be awash in oil data gathered and published by its own Energy Information Administration.

Be that as it may, the ongoing, world-wide phenomenon that is the flighty pricing of petroleum in all of its combinations and permutations has made contemporaneity a most-fleeting element of any related equation. Spot price is what counts. In this matter, however, as the court reads the record, the plaintiff failed to proffer any price paid for, or understood-grade of, its fuel oil.¹² Belatedly, it pleaded for reference, as quoted above, to an oil factor listed in the ITA's Index of Factor Values for Use

¹² Its counsel concede the timely "opportunity to submit any such information which they believe the [ITA] should consider when valuing the factors of production". Plaintiff's Memorandum, p. 10, quoting Appendix 8 thereto, p. 1. Cf. Tianjin Machinery Import & Export Corp. v. United States, 16 CIT 931, 936, 806 F.Supp. 1008, 1015 (1992)("the burden of creating an adequate record lies with respondents and not with Commerce"), citing Chinsung Indus. Co. v. United States, 13 CIT 103, 705 F.Supp. 598 (1989).

in Antidumping Duty Investigations Involving Products from the P[RC]: Memorandum from Richard Moreland to All Reviewers (April 1997). Cf. Plaintiff's Memorandum, Appendix 6, Exhibit 1, p. 2. While that factor may well have been of moment during the period indicated, October 1994 to March 1995, to require the ITA now to resort thereto would reduce the requirement of 19 U.S.C. §1677b(c)(1) of "the best available information regarding the values of such factors" to a degree certainly not contemplated by Congress or countenanced by the courts. Given the record, such as it is herein, this court cannot find that the Hindustan Lever data are not the best available, nor can this court conclude that the agency's reliance thereon was not in accordance with the law recited hereinabove.

II

In view of the foregoing, plaintiff's motion for judgment upon the agency record must be denied and this action dismissed. Judgment will enter accordingly.

Decided: New York, New York
August 31, 2004

Thomas J. Aquilino, Jr.
Judge