

UNITED STATES COURT OF INTERNATIONAL TRADE

PAPIERFABRIK AUGUST KOEHLER AG and
KOEHLER AMERICA, INC.,

Plaintiffs,

- and -

mitsubishi int'l corp., mitsubishi
hi-tec paper flensburg GmbH, and
mitsubishi hi-tec paper bielefeld
GmbH,

Plaintiff-Intervenors,

v.

THE UNITED STATES and the UNITED
STATES INTERNATIONAL TRADE
COMMISSION,

Defendants,

- and -

APPLETON PAPERS INC.,

Defendant-Intervenor.

Before: Donald C. Pogue,
Chief Judge
Court No. 08-00430

OPINION

[Commission's remand determination affirmed.]

Dated: January 10, 2012

William Silverman and Richard P. Ferrin, Drinker Biddle &
Reath LLP, of Washington, DC, for the Plaintiffs,

Eric C. Emerson and Jamie B. Beaber, Steptoe & Johnson LLP,
of Washington, DC, for the Plaintiff-Intervenors,

David F. D'Alessandris, Trial Attorney, Commercial

Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendants. With him on the briefs were Tony West, Assistant Attorney General; Jeanne E. Davidson, Director; and Patricia M. McCarthy, Assistant Director.

Marc A. Bernstein, Office of General Counsel, United States International Trade Commission, of Washington, DC, for Defendant United States International Trade Commission. With him on the briefs were James M. Lyons, General Counsel, and Neal J. Reynolds, Assistant General Counsel for Litigation.

Joseph W. Dorn, Gilbert B. Kaplan, Brian E. McGill, and Daniel L. Schneiderman, King & Spalding LLP, of Washington, DC, for the Defendant-Intervenors.

Pogue, Chief Judge: This case returns to court following remand ordered by the Court of Appeals for the Federal Circuit in Papierfabrik August Koehler AG v. United States, 413 F. App'x. 227 (Fed. Cir. 2011) ("Koehler II").¹ On remand, the International Trade Commission (the "ITC" or "Commission") found - after obtaining and taking into consideration intermediate calculation worksheets from the Department of Commerce showing that a specific subset of lightweight thermal paper ("LWTP") was not dumped on the United States market - that the domestic LWTP industry is still threatened with material injury by way of subject imports from Germany.

Plaintiffs ("Koehler") challenge the Commission's remand determination. The court has jurisdiction pursuant to 28 U.S.C.

¹ Koehler II vacated and remanded this court's previous judgment. See Papierfabrik August Koehler AG v. United States, ___ CIT ___, 675 F. Supp. 2d 1172 (2009) ("Koehler I").

§ 1581(c).

After a brief discussion of the background and applicable standard of review, the court will explain why it concludes that the Commission's remand determination is free of legal error and based on a reasonable reading of the record.

BACKGROUND

In October, 2008, the Department of Commerce ("the Department" or "Commerce") issued a finding that imports of LWTP from Germany were being or were likely to be sold in the United States at less than fair value. Lightweight Thermal Paper from Germany, 73 Fed. Reg. 57,326 (Dep't Commerce Oct. 2, 2008) (notice of final determination of sales at less than fair value) ("Commerce Final Determination").² Shortly thereafter, pursuant to 19 U.S.C. § 1673d(b), the Commission conducted a separate injury investigation and determined that the domestic LWTP industry was threatened with material injury by way of imports from Germany, including imports from Plaintiffs. Certain Lightweight Thermal Paper from China and Germany, 73 Fed. Reg.

² Commerce defined the LWTP subject merchandise as "thermal paper with a basis weight of 70 grams per square meter . . . or less." Commerce Final Determination, 73 Fed. Reg. at 57,327.

Koehler was a mandatory respondent in Commerce's investigation, Id. at 57,327 n.4. In its investigation, Commerce found that imports of the subject merchandise from Koehler were being dumped at a margin of 6.50 percent. Id. at 57,328.

70,367 (ITC Nov. 20, 2008) (final determinations).³

LWTP is sold in a variety of weights, including 48 grams per square meter ("48g LWTP") and 55 grams per square meter ("55g LWTP"), which, together, comprise the bulk of LWTP sold in the United States. ITC Original Determination, USITC Pub. 4043 at 16. During the Commission's period of investigation, domestic production of LWTP was "overwhelmingly concentrated" in 55g LWTP. Remand Results 23, Sept. 30, 2011, ECF No. 123 (citing ITC Original Determination, USITC Pub. 4043 at 16). Similarly, the majority of imported LWTP during the same time period was 55g.⁴ ITC Original Determination, USITC Pub. 4043 at 16. However, the Commission also found that domestic production of 48g LWTP was highly likely to increase in the future. Id. at 38, 42. Likewise, German producers, including Plaintiffs, reported increased imports of 48g LWTP as a "significant change in product range" during the pertinent time period. Id. at 17.

During the original ITC proceedings, Plaintiffs argued that a series of worksheets from Commerce's investigation showed that

³ The views of the Commission are contained in Certain Lightweight Thermal Paper from China and Germany, USITC Pub. 4043, Inv. Nos. 701-TA-451 & 731-TA-1126-1127 (Final) (Nov. 2008), Admin. R. Pub. Doc. 285 ("ITC Original Determination").

⁴ The Commerce period of investigation was from July 1, 2006 through June 30, 2007. The ITC's threat analysis, however, focused on the imminent future after October 2008. See Remand Results 22.

48g LWTP was not dumped in the United States market during Commerce's period of investigation and therefore the Commission should completely disregard the increase in imports of 48g LWTP in its separate injury investigation and final determination. The Commission declined to do so based in part on the Federal Circuit's decision in Algoma Steel Corp. v. United States, 865 F.2d 240 (Fed. Cir. 1989), which, under the Commission's interpretation, did not "compel or even authorize the Commission to examine individual sales or model transactions considered by Commerce." ITC Original Determination, USITC Pub. 4043 at 31 n.201.⁵ Because Commerce also had not issued a separate dumping margin for 48g LWTP, the Commission concluded it was not permitted to consider individual sales of 48g and 55g LWTP in its injury determination.

Plaintiffs appealed to this court which affirmed the Commission's determination. Koehler I, __ CIT at __, 675 F. Supp. 2d at 1191-92. The Court of Appeals, however, vacated Koehler I, holding that the Commission's refusal to consider intermediate 48g dumping margins "was premised on a divergent

⁵ The Commission also declined to disregard the increased 48g LWTP shipments based on 19 U.S.C. § 1677(35)(C)(ii), which states that the dumping margin used by the Commission "shall be . . . the dumping margin or margins most recently published by [Commerce] prior to the closing of the Commission's administrative record." ITC Original Determination, USITC Pub. 4043 at 31 n.201; 19 U.S.C. § 1677(35)(C)(ii).

reading of Algoma, and a misunderstanding of Koehler's request." Koehler II, 413 F. App'x. at 231. The Court stated that "Algoma specifically allows for consideration of raw data in computer print outs 'by reasons specific to the particular case'" Id. (quoting Algoma, 865 F.2d at 242). It reasoned that the statute requires that Commerce make available to the Commission all of the information upon which its determination was based, see 19 U.S.C. § 1673d(c)(1)(A), including the sales prices of a "subset of dumped goods," here the 48g LWTP. Koehler II, 413 F. App'x. at 231-32. With regard to the Plaintiffs' request, the Court of Appeals interpreted it as a request for the Commission to make decisions "based on the price, measured as a dumping margin, of a subset of dumped goods" and to analyze data that is available to the Commission. Id.⁶

The Court of Appeals further held that while the ITC may not change Commerce's determination that all of Plaintiffs' products were being dumped at a rate of 6.50 percent, it was permitted to examine and consider Commerce's intermediate calculations and

⁶ "Commerce analyzed seven of Koehler's LWTP products, distinguished by weight . . . [and] found that six of the seven Koehler products had positive dumping margins—meaning they are being sold at [less than fair value]. As calculated by Commerce, and reflected in Commerce's intermediate calculations, the only Koehler product without a positive dumping margin was Koehler's 48 gsm LWTP product. The 48 gsm product constituted 38.15 percent of Kohler's quantity of sales in the United States and made up 40.28 percent of the value of sales in the United States." Koehler II, 413 F. App'x. at 229-30

subsets of the subject merchandise when making an injury determination. Id. at 231 (citing Cleo Inc. v. United States, 501 F.3d 1291, 1295 (Fed. Cir. 2007)).⁷

Following the Appeals Court order and mandate, this court remanded the matter to the Commission with instructions to reconsider and revise its decision in accordance with the decision of the Court of Appeals, indicating how any decision is in accordance with Algoma Steel.

Following the remand order, the Commission re-opened its record to obtain additional material from the record of Commerce's investigation. Noting that neither the Appeals Court opinion nor this court's remand order called into question the Commission's findings or conclusions regarding domestic like product, industry, or conditions of competition, the Commission focused on "whether the information from the Commerce dumping investigation warrants modification of the prior analysis that there is a threat of material injury by reason of the subject imports." Remand Results 5.

In affirming its finding of threat of material injury, the Commission concluded that different weights of LWTP are or will be dumped on the United States market in direct response to

⁷ The court emphasized that the Commission, not Commerce, "determines whether all articles in the subject merchandise are 'like products,' which in turn make up an 'industry' for the purposes of a dumping determination." Id. at 231.

market competition. See Id. at 23. Specifically, importers respond to increased domestic production of and/or demand for a particular weight of LWTP by dumping the same weight of LWTP on the United States market.

STANDARD OF REVIEW

The Department, in its remand redetermination, must comply with the terms of the court's remand order. Jinan Yipin Corp. v. United States, ___ CIT ___, 637 F. Supp. 2d 1183, 1185 (2009). In addition, the court "shall hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); Koyo Seiko Co. v. United States, 20 F.3d 1160, 1164 (Fed. Cir. 1994).

The substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'" Nippon Steel Corp. v. United States, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (alteration in original) (quoting SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n, 718 F.2d 365, 381 (Fed. Cir. 1983)); Daewoo Elecs. Co. v. Int'l Union, 6 F.3d 1511, 1520 (Fed. Cir. 1993) ("The specific determination we make is 'whether the evidence and reasonable inferences from the record support' [the agency's] findings."). Moreover, the possibility of drawing two inconsistent conclusions from the evidence does

not render the agency's determination unreasonable, Consolo v. Fed. Maritime Comm'n, 383 U.S. 607, 620 (1966), and where "[s]ubstantial evidence exists on both sides of the issue[,] . . . the statutory substantial evidence standard compels deference to the [agency]." Nippon Steel, 458 F.3d at 1354.

DISCUSSION

While Commerce is charged with investigating whether merchandise is being dumped on the domestic market and if so, determining the dumping margin for such imports, the ITC is responsible for determining whether an industry in the United States is or will be threatened with material injury by reason of these imports. See 19 U.S.C. § 1673d(b). The Commission's analysis is, by its nature, of a different character and also covers a different time period than the Commerce investigation. See 19 U.S.C. § 1677(7)(F) (charging the ITC with the forward-looking task of determining actual and potential effects of imports of subject merchandise on the domestic industry). The governing statute requires that the Commission consider all "relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to actual and potential decline in output, sales, [and] market share" when making its threat analysis. 19 U.S.C.

§ 1677(7)(C)(iii).⁸

In order to find a causal nexus between the subject imports and the domestic industry's condition, the Commission must find that the subject imports will have more than a tangential, trivial, or incidental effect on the industry,⁹ and that further dumped imports are imminent. 19 U.S.C. § 1677(7)(F)(ii). It is the Commission's charge to make findings of fact and, if it finds that there is injury to the domestic market, "explain, in a

⁸ In relevant part, the statute states that "the Commission shall consider, among other relevant economic factors . . . any . . . substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States . . . and any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports" 19 U.S.C. § 1677(7)(F)(i)(II) & (IX).

⁹ Under the "by reason of" standard of causation, subject imports must have more than an "incidental, tangential or trivial" effect on the industry. See Nippon Steel Corp. v. Int'l Trade Comm'n, 345 F.3d 1379, 1381 (Fed. Cir. 2003); see also Gerald Metals, Inc. v. United States, 132 F.3d 716, 721-22 (Fed. Cir. 1997); Mittal Steel Point Lisas Ltd. v. United States, 542 F.3d 867, 873 (Fed. Cir. 2008).

Nonetheless, in making its determination, the Commission "need not isolate the injury caused by other factors from injury caused by unfair imports . . . [r]ather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103-316, 156 (1994) reprinted in 1994 U.S.C.C.A.N. 4040, 4185 ("SAA"). The SAA accompanied the Uruguay Round Agreements Act ("URAA") and was approved by Congress as an "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding . . . concerning" the interpretation or application of the URAA. 19 U.S.C. § 3511(a)(2) and § 3512(d).

meaningful way," the causation of such injury. Bratsk Aluminum Smelter v. United States, 444 F.3d 1369, 1376 (Fed. Cir. 2006); Mittal Steel, 542 F.3d at 874-75. The Commission "must examine the relevant data and articulate a satisfactory explanation for its action." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Here, pursuant to the directive from the Court of Appeals, and the remand order of this court, the Commission considered Commerce's intermediate dumping margin calculations and provided a reasonable explanation for continuing to find a positive threat of injury to the domestic industry. First, the Commission reopened the record to request further information from Commerce regarding the interpretation of the Commerce data. Remand Results 9-10 (citing "Final Analysis Memorandum for Sales - Koehler" Sept. 25, 2008, and "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination" Sept. 25, 2008, EDIS Doc. 454291). The Commission noted that it was required to weigh this information while conducting its overall statutory directives. Id. at 18. In this context, and responding to the court's remand order that it articulate how its decision is consistent with Algoma Steel, the Commission found that Commerce's intermediate calculations were "of limited utility in an analysis of threat of material injury by reason of subject imports" because they were not probative with respect to

the focal point of the Commission's threat analysis. Id. at 19.¹⁰

The Commission recognized "undisputed changes in conditions of competition between the time covered by Commerce's dumping investigation and the time period we have considered in analyzing threat of material injury." Id. at 22. It further noted that market participants anticipated growing demand for 48g LWTP, indicated in part by Defendant-Intervenor's construction of a facility in August 2008 with the intent to increase production of 48g LWTP. Plaintiffs, the predominant German exporters of LWTP, ceased bringing 55g LWTP into the United States in March 2008 and indications are that future imports will be "heavily concentrated" in 48g LWTP. ITC Original Determination, USITC Pub. 4043 at 37.

In addition, the Commission recognized that "where competition was most concentrated during the periods both Commerce and the Commission investigated, Commerce calculated much higher rates of dumping than the 6.50 percent weighted average dumping margin it published in its final determination."

¹⁰ The Commission acknowledges that there is data from Commerce's first administrative review showing that 48g LWTP from Germany was sold at less than fair value after Commerce's initial period of review. However, because the data pertaining to Commerce's review was not available during the Commission's original investigation, the Commission has not considered it. Remand Results 26 n.85.

Remand Results 23 (citing EDIS Doc. 454291). In this context, the Commission gave weight to data indicating that "Koehler was inclined to sell types of LWTP that competed directly with the domestic like product in dumped transactions, while non-dumped transactions tended to focus on a product type that was not at the time produced domestically in significant quantities." Id. at 24.¹¹

The Commission emphasized that "the focus of competition between LWTP from Germany and the domestic like product [is] not static, but in fact changed after Commerce's period of investigation," and concluded that the imminent future would be "characterized by more intense competition between domestically produced and German 48 gram LWTP" Id. Therefore, in light of the evidence that dumping transactions occurred for products in direct competition, the Commission continued to find that there is a threat of material injury to the domestic market by way of imports of 48g LWTP. Id. at 23 ("In the circumstances of this investigation, viewing Commerce's calculations for 48 gram LWTP as conclusive of likely conduct during the imminent future is particularly inappropriate."). This conclusion is one that has reasonably taken into consideration and explained the "relevant economic factors" which have a bearing on the LWTP

¹¹ Plaintiffs do not challenge this aspect of Commerce's reading of the record. See Plaintiff's Comments, ECF No. 127.

industry in the United States. See 19 U.S.C. § 1677(7)(C)(iii).

Plaintiffs concede that "the Commission is not required to tie each bit of injury to a dumped sale." Plaintiff Comments 27. Nonetheless, the Commission's analysis does not ignore the role of dumping in causing injury to the domestic industry. As noted above, the Commission concluded that imports entering in the imminent future would be heavily concentrated in 48g LWTP. Faced with evidence that Koehler's pricing practices indicated much higher rates of dumping "where competition was most concentrated during the periods both Commerce and the Commission investigated," Remand Results at 23, the Commission concluded that it was unlikely that sales of the 48g LWTP will be at normal value. Id. at 26.

The Plaintiffs raise two challenges to the remand determination. First, Plaintiffs contend that the remand determination violates the mandate of the Federal Circuit. The Plaintiffs correctly argue that "the Federal Circuit has already decided, either expressly or by necessary implication, that the computer printout showing a negative dumping margin for Koehler's sales of 48-gram [LWTP] is factually relevant and legally germane" Plaintiff Comments 3. Relevance, however, does not determine weight, and the Appeals Court did not supplant the Commission's role to weigh the evidence and, on remand, determine its effect. Had the Appeals Court intended otherwise, no remand

would have been necessary.

Plaintiffs also argue that the following language in Koehler II precludes the Commission from making an affirmative finding of material injury:

Instead, [the worksheet data] allows the Commission to take those calculations and apply its expertise to make a fair and equitable injury determination. When the threat determination is based almost exclusively on one product within the subject merchandise, and that one product is not being sold at [less than fair value], the Commission should be able to use all materials at its disposal to make an equitable determination. The Commission incorrectly denied Koehler's request, and incorrectly interpreted this court's holding in Algoma, when refusing to consider potentially dispositive intermediate data.

Id. at 7 (quoting Koehler II, 413 F. App'x. at 231-32). However, Plaintiffs' reliance is misplaced. The Court of Appeals ordered that the Commission examine the data that is required by statute to be available to it and conduct a "thoughtful consideration" of this data. Koehler II, 413 F. App'x. at 231. While recognizing that the data was "potentially dispositive," the Court of Appeals does not, either expressly or impliedly, hold that such data is dispositive. This is in keeping with the Court's prior holdings that the Commission, not the courts, is the finder of facts in injury proceedings. Mittal Steel, 542 F.3d at 875; Nippon Steel, 458 F.3d at 1352. Thus it was for the Commission to evaluate all "relevant economic factors." Its affirmative threat finding is based on a reasonable reading of the record.

CONCLUSION

Because the Commission took into consideration the data submitted by Commerce and adequately explained its rationale for not giving them weight in its positive threat assessment and because the Commission's finding that the domestic market for 48g LWTP is threatened by way of imports from Germany is not unreasonable, its determination is affirmed.

Judgment will be entered accordingly.

 /s/ Donald C. Pogue
Donald C. Pogue, Chief Judge

Dated: January 10, 2012
New York, New York