

UNITED STATES COURT OF INTERNATIONAL TRADE

AD HOC SHRIMP TRADE ACTION
COMMITTEE,

Plaintiff,

v.

UNITED STATES,

Defendant,

and

HILLTOP INTERNATIONAL and OCEAN
DUKE CORP.,

Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge

Court No. 11-00335

OPINION AND ORDER

[Defendant's motion to expand scope of remand granted]

Dated: January 9, 2013

Andrew W. Kentz, David A. Yocis, Jordan C. Kahn, and Nathaniel Maandig Rickard, Picard Kentz & Rowe LLP, of Washington, DC, for Plaintiff Ad Hoc Shrimp Trade Action Committee.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were Stuart F. Delery, Principal Deputy Assistant Attorney General, Jeanne E. Davidson, Director, and Patricia M. McCarthy, Assistant Director. Of counsel on the brief was Melissa M. Brewer, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Mark E. Pardo and Andrew T. Schutz, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for Defendant-Intervenors Hilltop International and Ocean Duke Corporation.

Pogue, Chief Judge: Before the court is Defendant's motion to expand the scope of previously ordered remand proceedings. Def.'s Partial Consent Mot. to Expand the Scope of the Court's Nov. 30, 2012 Remand Order, ECF No. 68 ("Def.'s Mot.");¹ see Order, Nov. 30, 2012, ECF No. 67 (remanding certain matters to the United States Department of Commerce ("Commerce") for additional proceedings). Commerce moves for a court order to permit the agency to reopen the administrative record to address new allegations, which were submitted in connection with a request for a changed circumstances review. Def.'s Mot. at 1-2. Specifically, Commerce requests permission to consider newly presented information that the agency believes could show that the mandatory respondent in the administrative review at issue provided false and incomplete information regarding its affiliates. Id. Although Commerce decided not to initiate the requested changed circumstances review, the agency requests that the court permit it to consider these allegations in the course of the court-ordered remand that is currently under way. Id. at 2.² For the reasons below, Defendant's motion will be granted.

¹ Plaintiff Ad Hoc Shrimp Trade Action Committee consents to Defendant's motion, while Defendant-Intervenors Hilltop International and Ocean Duke Corporation oppose it. Def.'s Mot. at 1.

² Cf. Home Prods. Int'l, Inc. v. United States, 633 F.3d 1369, 1377 (Fed. Cir. 2011) ("Commerce may not reopen a case while it is on appeal until the case has been remanded by the [court]."); Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United
(footnote continued . . .)

Commerce relies on Tokyo Kikai Seisakusho, Ltd. v. United States, 529 F.3d 1352 (Fed. Cir. 2008) and Home Prods. Int'l, Inc. v. United States, 633 F.3d 1369 (Fed. Cir. 2011) to support the agency's claim that "Commerce has inherent authority to cleanse its proceedings where they are tainted by fraud and may reconsider a previous determination where evidence of fraud has come to light." Def.'s Mot. at 2. Commerce argues that, "[h]ere, new evidence has been brought to light that 'calls into question the integrity of the agency's proceeding.'" Id. (quoting Home Prods., 633 F.3d at 1380).

Defendant-Intervenors Hilltop International and Ocean Duke Corporation ("Defendant-Intervenors") oppose Defendant's motion to expand the scope of the remand. Def.-Ints.' Opp'n to Def.'s Partial Consent Mot. to Expand the Scope of the Court's Nov. 30, 2012 Remand Order, ECF No. 69 ("Def.-Ints.' Opp'n"). Defendant-Intervenors argue that Tokyo Kikai and Home Products - the two decisions cited in Defendant's motion - "plainly establish that there must be a prima facie showing that the proceeding was tainted by fraud and that this alleged fraud had a material impact upon Commerce's initial dumping determination," id. at 5 (emphasis omitted), whereas Defendant "has failed to provide even the most cursory details concerning these allegations, nor has Defendant

States, 68 F.3d 487 (Fed. Cir. 1995) (per curiam) ("We do not approve of Commerce's excursion beyond the mandate of [the remand order]").

attempted to explain how these allegations by Ad Hoc (even if assumed to be true) would have a material impact on Commerce's margin calculation for Hilltop in the fifth administrative review." Id. at 2-3.

But neither the Tokyo Kikai nor the Home Products decision squarely governs the issue presented here. Tokyo Kikai dealt with a challenge to Commerce's own decision to reopen an administrative review proceeding before commencement of any litigation to challenge the final results of that proceeding, whereas Home Products addressed the question of when a court must remand to reopen an administrative proceeding over the agency's own opposition to doing so. Tokyo Kikai, 529 F.3d at 1357-58; Home Prods., 633 F.3d at 1377-78. In Tokyo Kikai, the Court of Appeals held that "Commerce possesses inherent authority to protect the integrity of its yearly administrative review decisions, and to reconsider such decisions on proper notice and within a reasonable time after learning of information indicating that the decision may have been tainted by fraud." Tokyo Kikai, 529 F.3d at 1361-62 (footnote omitted). In Home Products, where Commerce opposed another party's request to reopen an administrative proceeding, the Court of Appeals held that this Court abuses its discretion by refusing to order a remand to reopen proceedings "where a party brings to light clear and convincing new evidence sufficient to make a prima facie case that the agency proceedings under review were tainted by material fraud." Home Prods., 633 F.3d at 1378.

Thus Tokyo Kikai discussed the extent of Commerce's authority to reconsider a decision that had not yet been appealed to the courts, whereas Home Products addressed the limitations upon the court's discretion to remand to reopen administrative proceedings when the agency opposes the remand request. Neither decision squarely addresses whether the court must grant or deny the Government's request for a voluntary remand to reopen the record of an administrative decision that is already on appeal before the court, which is the issue presented here.

Commerce generally has inherent authority to reopen and reconsider its previously-conducted yearly administrative reviews of antidumping duty orders because "[t]he power to reconsider is inherent in the power to decide." Tokyo Kikai, 529 F.3d at 1360 (citation omitted).³ Far from requiring the sort of showing that Defendant-Intervenors suggest is necessary for Commerce to exercise its inherent authority to reconsider, the Court of Appeals suggested that the exercise of this authority is appropriate where 1) newly revealed information "raised questions" about the original

³ Note that, contrary to Defendant-Intervenors' contentions, the Court of Appeals did not subject this power to reconsider, inherent in the power to decide, to "a prima facie showing that the proceeding was tainted by fraud and that this alleged fraud had a material impact upon Commerce's initial dumping determination." See Def.-Ints.' Opp'n at 5 (emphasis omitted). The court merely stated that "[a]n agency's power to reconsider is *even more fundamental* when, as here, it is exercised to protect the integrity of its own proceedings from fraud." Tokyo Kikai, 529 F.3d at 1361 (emphasis added, citation omitted).

proceedings,⁴ 2) after-discovered fraud "is alleged,"⁵ 3) Commerce wishes "to consider" new allegations,⁶ or 4) Commerce "believes" that its decision was incorrect and "wishes" to alter it.⁷ But here, unlike in Tokyo Kikai, Commerce cannot simply exercise its inherent authority to reconsider because the agency's final determination is already on appeal before this Court. See Home Prods., 633 F.3d at 1377 ("Commerce may not reopen a case while it is on appeal until the case has been remanded by the [court].").

Commerce argues that expanding the scope of remand is necessary because newly discovered information has the potential to undermine the accuracy of Commerce's calculations in the administrative review at issue. Def.'s Mot. at 1-2. Because the stated basis for Commerce's remand request is concern for the potential effect of new information, this request for remand may appropriately be characterized as based on intervening events.⁸

⁴ Tokyo Kikai, 529 F.3d at 1360.

⁵ Id. at 1361 (quoting Elkem Metals, Co. v. United States, 26 CIT 234, 240, 193 F. Supp. 2d 1314, 1321 (CIT 2002)).

⁶ Home Prods., 633 F.3d at 1377 ("Tokyo Kikai established that Commerce has inherent authority to reopen a case to *consider* new evidence that its proceedings were tainted by fraud.") (emphasis added).

⁷ Id. at 1378 n.10 (quoting SKF USA Inc. v. United States, 254 F.3d 1022, 1028 (Fed. Cir. 2001)).

⁸ Although the usual examples of "intervening events" in this context are "a new legal decision or the passage of new legislation," SKF, 254 F.3d at 1028, allegations of fraud also fit comfortably into this category.

Where an agency seeks remand "because of intervening events outside of the agency's control, . . . [a] remand is generally required if the intervening event may affect the validity of the agency action." SKF, 254 F.3d at 1028 (citing Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993) (noting "the tradition of allowing agencies to reconsider their actions where events pending appeal draw their decision in question"))).

"[E]ven if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position." SKF, 254 F.3d at 1029. In such situations, remand is "usually appropriate" if "the agency's concern is substantial and legitimate," although "remand may be refused if the agency's request is frivolous or in bad faith." Id.; see also Nucor Corp. v. United States, __ CIT __, 612 F. Supp. 2d 1264, 1336 (2009) ("Under SKF, an agency is generally entitled to a voluntary remand to reconsider its position, 'if the agency's concern is substantial and legitimate.'") (quoting SKF, 254 F.3d at 1028-29). This Court has found that Commerce's concerns are substantial and legitimate where 1) "Commerce provided a compelling justification for its remand request," 2) "the need for finality - although an important consideration - does not outweigh the justification for voluntary remand presented by Commerce," and 3) the "scope of Commerce's remand request is appropriate." Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v.

United States, 29 CIT 1516, 1522-26, 412 F. Supp. 2d 1330, 1336-39 (2005).

Here, Commerce has provided a compelling justification - it has been presented with information sufficient to persuade the agency that its determinations in the administrative review at issue may have been based on information that was false or incomplete and that further inquiry and reconsideration is therefore warranted. Def.'s Mot. at 1-2. While Commerce does not disclose the specific information it asks the court to permit it to consider on remand, there is no indication of bad faith or frivolousness. Cf. Nucor Corp., __ CIT at __, 612 F. Supp. 2d at 1336 (granting request for voluntary remand because "the Government must be presumed to have acted in good faith," there was "no evidence to substantiate any suggestion of prejudgment on the part of Commerce," and this was "not a case in which it can be said that a remand to the agency would be futile"). In addition, the need for finality does not outweigh Commerce's justification for seeking to consider this additional information on remand because protecting the integrity of administrative proceedings from fraud or material inaccuracy is among the most fundamental justifications for disturbing the finality of agency decisions. See Tokyo Kikai, 529 F.3d at 1361. Finally, the scope of Commerce's remand request - to expand the scope of remand to allow Commerce to consider certain information addressed to a discrete material issue - is reasonable and appropriate. Accordingly, the Government's request

for an expansion of the scope of remand is based on a substantial and legitimate concern, and should therefore be granted. See SKF, 254 F.3d at 1029; Shakeproof, 29 CIT at 1522-26, 412 F. Supp. 2d at 1336-39.

For the reasons presented, Commerce's request to expand the scope of remand to permit the agency to consider new evidence concerning the question of whether Hilltop International provided false or incomplete information regarding its affiliates in the course of the fifth administrative review of this antidumping duty order is GRANTED.

It is SO ORDERED.

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

Dated: January 9, 2013
New York, NY