

Commerce Chided For Not Explaining Itself In Catfish Cases

By Jennifer Doherty

Law360 (April 18, 2024, 6:47 PM EDT) -- The U.S. Court of International Trade has kicked the final decision in a 2019 review of catfish duties back to the U.S. Department of Commerce, saying the agency flubbed basic administrative law by failing to "show its work" amid crisscrossing claims.

In one suit, Green Farms Seafood JSC, a Vietnamese catfish producer and exporter, challenged its rate following Commerce's 17th review of the decades-old duties on Vietnamese catfish as too high. Meanwhile, domestic industry group Catfish Farmers of America and some of its members filed a separate complaint alleging that the duties in the same review were unacceptably low.

"The government, caught in a crossfire in this latest skirmish in the enduring Twenty Years' Catfish War, asserts the department reached the Goldilocks solution — just right," wrote Judge M. Miller Baker in his opinion Wednesday. "For the reasons explained below, the court sends both cases back to the agency's drawing board."

The judge's reasons include Commerce's decision to list the factors it considers in determining whether a producer in a nonmarket economy operates independently, rather than explain how one of the mandatory respondents in its review, East Sea Seafoods JSC, measured up.

Commerce's assessment of East Sea matters to Green Farms because Green Farms did not undergo an individual examination in the administrative review. Instead, Commerce calculated its duty rate by averaging East Sea's with the other mandatory respondent's.

The problem, from Green Farms' perspective, was that East Sea received a penalty rate after it stopped cooperating with Commerce's investigation, which trickled down to Green Farms through Commerce's averaging calculation.

While Judge Baker expressed reservations about Green Farms contention that awarding East Sea an individual duty rate separate from the one set for state-controlled catfish producers is contrary to law, he agreed that Commerce failed to back up its decision with substantial evidence.

"In layman's terms, the department didn't show its work," he said, quoting precedent dating back to a 2014 D.C. Circuit decision in *Amerijet Int'l, Inc. v. Pistole* that highlights such explanations as a "basic principle" of administrative law, "indispensable to sound judicial review."

Further, Judge Baker accepted Green Farms' argument comparing itself to Yangzhou Bestpak Gifts &

Crafts Co., which won a remand from the Federal Circuit in 2013 when the appeals court held that the rate Commerce set for Bestpak — similarly based on an average that included a penalty rate — unfairly punished the company and was unrelated to its commercial activity.

"As in Bestpak, 'a review of the administrative record reveals a lack of substantial evidence showing that Green Farms's tariff 'reflects economic reality,'" wrote Judge Baker, quoting Bestpak.

Catfish Farmers of America, conversely, challenged Green Farms' rate because Commerce's calculations included the other mandatory respondent in the administrative review, NTSF Seafoods JSC, which came away from the review with a 0% duty rate.

In evaluating NTSF, Commerce applied data from India's catfish industry. Commerce routinely uses surrogate data from a market economy at a similar level of economic development as the nonmarket economy under scrutiny in duty probes.

The U.S. petitioners urged Commerce to use Indonesian, not Indian data, as the benchmark in the 17th review, as they have in years past — arguments Commerce appeared to dismiss out of hand as it did previously, by stating that Indonesia was not at the same level of development as Vietnam.

"But the department never considered whether Indonesia is at a comparable level, as Catfish Farmers contend," wrote the judge. "That omission invalidates the analysis because, as the court has explained, Commerce may not ignore Catfish Farmers' evidence and argument."

On remand, Judge Baker directed Commerce to justify or change its treatment of East Sea, as well as its reliance on Indian over Indonesian data, directives that could change either East Sea or NTSF's rate and, by extension, Green Farms'.

Green Farms' counsel, Crowell & Moring LLP partner Robert LaFrankie welcomed the remand in a statement to Law360.

"We remain hopeful that Commerce will do the right thing in the remand and lower our client's rate so that it reflects economic reality, as the judge instructed," he said.

Counsel for NTSF declined to comment on the opinion. Counsel for the other parties did not immediately respond to press inquiries Thursday.

Green Farms is represented by Robert L. LaFrankie of Crowell & Moring LLP.

Catfish Farmers of America is represented by Nazak Nikakhtar, Maureen E. Thorson, and Stephanie M. Bell, Wiley Rein LLP.

The government is represented by Kara M. Westercamp of the U.S. Department of Justice's Commercial Litigation Branch and by Hendricks Valenzuela of the U.S. Department of Commerce's Office of the Chief Counsel for Trade Enforcement & Compliance

NTSF is represented by Robert G. Gosselink and Jonathan M. Freed of Trade Pacific PLLC.

The cases are Green Farms Seafood Joint Stock Co. v. United States, case number 1:22-cv-00092, and

Catfish Farmers of America et al. v. United States, case number 1:22-cv-00125, in the U.S. Court of International Trade.

--Editing by Amy French.

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