U.S. Customs and Border Protection

Slip Op.13–125

SKF USA INC., SKF FRANCE S.A., SKF AEROSPACE FRANCE S.A.S., SKF INDUSTRIE S.P.A., SOMECAT S.P.A., SKF (U.K.) LIMITED, AND SKF GMBH, Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 09–00392

[Denying relief on plaintiffs' remaining claim in action contesting, *inter alia*, final results of administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom]

Dated: September 27, 2013

Herbert C. Shelley, Steptoe & Johnson LLP, of Washington, DC, for plaintiffs. With him on the brief were *Alice A. Kipel* and *Laura R. Ardito*.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Shana Hofstetter*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Geert M. De Prest, Stewart and Stewart, of Washington, DC, for defendant-intervenor. With him on the brief were *Lane S. Hurewitz*, *Terence P. Stewart*, *William A. Fennell*, and *Noman A. Goheer*.

OPINION

Stanceu, Judge:

Plaintiffs SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF Industrie S.p.A., Somecat S.p.A., SKF GmbH, and SKF (U.K.) Limited (collectively, "SKF") brought this action to contest the final determination ("Final Results") issued by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), in the nineteenth administrative reviews of antidumping orders on imports of ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom for the period May 1, 2007 through April 30, 2008 ("period of review"). Compl. ¶¶ 19–35 (Sept. 15, 2009), ECF No.

2; *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Revocation of an Order in Part*, 74 Fed. Reg. 44,819 (Aug. 31, 2009) ("*Final Results*"). Plaintiffs also brought a claim challenging the Department's policy, rule, or practice of issuing liquidation instructions to U.S. Customs and Border Protection ("Customs") fifteen days after the date of publication of final results of a review (the "15-day rule"), a claim the court found meritorious in a previous opinion. Compl. ¶¶ 14–18. Before the court is a decision (the "Remand Redetermination") Commerce issued in response to the court's order in *SKF USA, Inc. v. United States*, 35 CIT __, __, 800 F. Supp. 2d 1316, 1319 (2011) ("*SKF*"). *Final Results of Redetermination Pursuant to Remand* (Dec. 5, 2011), ECF No.63 ("*Remand Redetermination*"). In this Opinion, the court determines that plaintiffs are not entitled to relief on the only claim that remains undecided in this action.

I. BACKGROUND

The background of this case is set forth in the court's previous Opinion and Order and is supplemented briefly herein. *SKF*, 35 CIT __, __, 800 F. Supp. 2d 1316, 1319 (2011). In that Opinion and Order, the court directed Commerce to reconsider its use of its "zeroing" methodology in the nineteenth reviews. *Id.*, 35 CIT at __, 800 F. Supp. 2d at 1328–29. As discussed later in this Opinion, the term "zeroing" refers to a methodology according to which Commerce calculates a weighted-average dumping margin. The court also held that plaintiffs were entitled to relief in the form of a declaratory judgment on their claim that the 15-day rule was contrary to law as applied to plaintiffs in the effectuation of the *Final Results*. *Id.*, 35 CIT at __, 800 F. Supp. 2d at 1328–29. The court denied relief on all other claims made by plaintiff in this litigation. *Id.*

Commerce filed its Remand Redetermination on December 5, 2011. *Remand Redetermination*. On July 31, 2012, the court ordered this action stayed until 30 days after the final resolution of all appellate proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248, which involved a claim challenging to the Department's use of zeroing in an administrative review that was similar to the zeroing claim in this action. Order, ECF No. 74.

On April 16, 2013, the Court of Appeals for the Federal Circuit ("Court of Appeals") issued its decision in *Union Steel*, affirming the Department's use of zeroing. *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013) ("*Union Steel*"). Pursuant to the court's order, the stay expired on July 10, 2013.

II. DISCUSSION

A. Jurisdiction and Standards of Review

Subject matter jurisdiction over this action is provided by section 201 of the Customs Courts Act of 1980. 28 U.S.C. § 1581(c) (for claims challenging the Final Results) & 1581(i) (for the claim challenging the 15-day rule).[1] For plaintiffs' claims contesting the Final Results, the court is directed to "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. *See* Tariff Act of 1930 ("Tariff Act"), § 516A, 19 U.S.C. § 1516a(b)(1)(B)(i). For plaintiffs' claim challenging the 15-day rule, the court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, § 706, 5 U.S.C. § 706; 28 U.S.C. § 2640(e).

B. Plaintiffs Are Not Entitled to Relief on their Claim Challenging the Use of Zeroing

In calculating a weighted-average dumping margin in an administrative review, Commerce first determines two values for each entry of subject merchandise falling within the period of review: the normal value and the export price ("EP") (or the constructed export price ("CEP") if the EP cannot be determined). Tariff Act, § 751, 19 U.S.C. § 1675(a)(2)(A)(i). Commerce then determines a margin for each entry by taking the amount by which the normal value exceeds the EP or CEP. *Id.* §§ 1675(a)(2)(A)(ii), 1677(35)(A). In determining a dumping margin according to the zeroing methodology, which it applied in the nineteenth administrative reviews, Commerce assigns a value of zero, not a negative value, to the entry if normal value is less than EP or CEP. Finally, Commerce aggregates these values to calculate a weighted-average dumping margin. *Id.* § 1677(35)(B).

As directed by the court's remand order, Commerce reconsidered its use of zeroing in the nineteenth reviews and included in the Remand Redetermination an explanation of why it considered the use of that methodology to be in compliance with the Tariff Act despite the Department's discontinuation of zeroing in antidumping duty investigations. *Remand Redetermination* 7–15.

In *Union Steel*, the Court of Appeals affirmed the Department's use of zeroing in circumstances analogous to those presented by this case.

[1] All statutory citations herein are to the 2006 edition of the U.S. Code.

Union Steel, 713 F.3d at 1103. The court considers *Union Steel* dispositive of the zeroing issue presented by this action and sustains the Department's use of zeroing in the *Final Results.*

C. The Court Previously Adjudicated Plaintiffs' Claim Challenging the 15-Day Rule

In *SKF*, the court concluded that Commerce failed to support with adequate reasoning its application of the 15-day rule to implement the *Final Results*. The court stated that "[a]s relief on the 15-day-rule claim, the court will award plaintiffs a declaratory judgment that the Department's use of the 15-day rule in these reviews was unlawful." *SKF*, 35 CIT at __, 800 F. Supp. 2d at 1328. Regarding the form of relief, the court noted that "[n]o other relief is requested on this claim." *Id.* Accordingly, the court will award to plaintiffs a judgment declaring the Department's policy, rule, or practice of issuing liquidation instructions to Customs fifteen days after the date of publication of the final results of an administrative review to have been unlawful as applied to plaintiffs in the implementation of the *Final Results*.

III. CONCLUSION

For the reason discussed above, the court denies plaintiffs relief on the claim challenging the use of zeroing in the *Final Results.* Judgment will be entered in favor of defendant on those of plaintiffs' claims that challenged aspects of the *Final Results* and in favor of plaintiffs on the claim challenging the Department's application to plaintiffs of the 15-day rule to implement the *Final Results*.

Dated: September 27, 2013
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 13–128

ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 12–00374

[Commerce's final scope ruling is sustained]

Dated: October 9, 2013

Alan H. Price, *Derick G. Holt*, *Laura El-Sabaawi*, *Lori E. Scheetz*, *Robert E. DeFrancesco, III*,and *Tessa V. Capeloto*, Wiley Rein, LLP, of Washington DC, for Plaintiff.

Tara K. Hogan, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Joanna V. Theiss*, Office of Import Administration, U.S. Department of Commerce, of Washington, DC.

OPINION & ORDER

Carman, Judge:

This matter comes before the Court following the U.S. Department of Commerce's ("Commerce" or "Defendant") determination in *Antidumping (AD) and Countervailing Duty (CVD) Orders: Aluminum Extrusions from the People's Republic of China (PRC): Final Scope Ruling on Side Mount Valve Controls* (Oct. 26, 2012) ("*Final Scope Ruling*"), A.R. 8.[1] Plaintiff Aluminum Extrusions Fair Trade Committee ("AEFTC" or "Plaintiff") challenges Commerce's determination that importer Innovative Controls, Inc.'s ("Innovative") merchandise "side mount valve controls" ("SMVC") meets the exclusion for "finished goods kits" and accordingly is not subject to the antidumping and countervailing duty orders covering *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (May 26, 2011) and *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,652 (May 26, 2011) (collectively, "*Orders*"). Without reaching the merits of Commerce's scope determination, the Court denies Plaintiff's motion on the agency record because the doctrine of exhaustion of administrative remedies applies in this case.

BACKGROUND

The *Orders* at issue cover aluminum extrusions from China. *See supra Orders*.On May 11, 2012, Innovative submitted a scope ruling request advocating that its product SMVC kits fell under a scope exclusion for "finished goods kits" in the *Orders*. *See Letter from Innovative Controls Inc. to Sec'y of Commerce, Re: Scope Ruling Request, Aluminum Extrusions from People's Republic of China (A-570–967, C-570–968)* (May 11, 2012) ("*Ruling Request*"), A.R. 1.

Plaintiff asserts that Innovative's SMVC do not fall under the exclusion of "finished goods kits" because they are subassemblies "that will be incorporated into a larger, finished downstream product." Pl.'s Mem. in Supp. of Pl.'s R. 56.2 Mot. for J. on the Agency

[1] A.R. is the Administrative Record, which is comprised of both the antidumping duty ("AD") case number (A-570–967) and countervailing duty ("CVD") case number (C-570–968). The AD and CVD cases contain identical documents. *See* Def.'s Opp'n at 2 n.1. For ease of reference, the Court will refer to the documents filed under the CVD case number.

Record ("Pl.'s Mot.") at 10. Plaintiff urges that SMVC are "merely parts for final finished products that are assembled after importation—firetrucks." *Id*. at 11 (internal quotations omitted). Citing to the *Ruling Request* as support, Plaintiff points out Innovative imports its SMVC under Harmonized Tariff System of the United States ("HTSUS") subheading 8708.29 for "other *parts and accessories* (of the bodies) of the motor vehicles of heading 8701 to 8705." *Id*. (internal quotations and citations omitted) (emphasis in original). Plaintiff argues "Commerce unlawfully broadened the definition of the exclusion, improperly excluding" SMVC. *Id.* at 9.

Commerce issued an initiation of scope inquiry and a preliminary scope ruling pursuant to 19 C.F.R. §351.225(f). *See Mem. to Christian Marsh, Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations, Re: Initiation and Preliminary Scope Ruling on Side Mount Valve Controls* (Sept. 24, 2012) ("*Preliminary Scope Ruling*"), A.R. 7. Commerce preliminarily determined that SMVC kits were excluded from the scope of the *Orders* as finished goods kits, "revising the manner in which it determines whether a given product is a 'finished goods' or 'finished goods kit.'" *Preliminary Scope Ruling* at 6–7. In prior scope rulings, Commerce concluded that "merchandise could not be considered a 'finished goods' or 'finished goods kit' if it was designed to work with other parts to form a larger structure or system." *Id.* at 6. However, in the instant case, Commerce "identified a concern with this analysis, namely that it may lead to unreasonable results. An interpretation of 'finished goods kit' which requires all parts to assemble the ultimate downstream product may lead to absurd results, particularly where the ultimate downstream product is, for example, a fire truck." *Id*. at 7. Given the change in its "finished goods" and "finished goods kit" analysis in the *Preliminary Scope Ruling*, Commerce "invite[d] interested parties to submit comments." *Id*. at 8. Neither Innovative nor Plaintiff submitted any comments. *See Final Scope Ruling* at 2. Accordingly, Commerce issued its *Final Scope Ruling* without any change from the *Preliminary Scope Ruling*. *Id*.

As an affirmative defense, Commerce raises the doctrine of exhaustion of administrative remedies as a bar to Plaintiff's claim. Def.'s Opp'n to Pl.'s Mot. for J. upon the Agency Record ("Def.'s Opp'n") at 5–10. Commerce alleges that Plaintiff "failed to present any arguments to Commerce concerning its new subassemblies analysis" announced in the *Preliminary Scope Ruling* and that Plaintiff's failure "deprived Commerce of the opportunity to address [Plaintiff's] arguments" in the *Final Scope Ruling*. *Id*. at 5. Plaintiff responds that "invoking the exhaustion requirement in this case would be inappro-

priate." Pl.'s Reply to Def.'s Opp'n to Pl.'s Mot. for J. upon the Agency Record ("Pl.'s Reply") at 1. In support of its position, Plaintiff cited to the Court of the Appeals for the Federal Circuit's ("CAFC") recently issued decision in *Itochu Building Products v. United States*, __ F.3d __, 2013 WL 4405863 (Fed. Cir. 2013) ("*Itochu*"). In *Itochu*, where plaintiff similarly did not file comments after the preliminary determination and defendant raised the exhaustion doctrine as an affirmative defense, the CAFC reversed the lower court's decision that the exhaustion doctrine applied by invoking the futility exception. 2013 WL 4405863. The CAFC issued *Itochu* on August 19, 2013, after Defendant's opposition brief was filed but before Plaintiff's reply brief was filed.

To give all parties the opportunity to be heard on the impact of the *Itochu* decision, the Court invited parties to provide supplemental briefing on whether that decision applies to the instant case. *See Letter from the Court to Counsel, Re: Application of Itochu* (Sept. 9, 2013), ECF No. 32. Plaintiff argues that *Itochu* "is directly applicable here." Pl.'s Resp. to the Ct.'s Sept. 9, 2013 Letter to the Parties ("Pl.'s Suppl. Br.") at 1. Plaintiff urges that "invoking the exhaustion requirement in this case would be inappropriate" because "the facts of the instant case are analogous to those of *Itochu*." *Id.* at 1–2. Plaintiff claims that it "put its full argument on the record" prior to the issuance of the preliminary results so "any additional material or argument" would not "have been significant to Commerce's consideration of the issue in the final results." *Id*. at 2–3. Plaintiff avers that in the *Preliminary Scope Ruling* "Commerce acknowledged and definitively rejected Plaintiff's argument," *id*. at 3, and argues that "no purpose would be served by requiring Plaintiff to have resubmitted its comments in the scope inquiry after Commerce announced its preliminary results," *id*. at 2.

Defendant asserts that the CAFC's "decision in *Itochu* does not affect this case because the 'futility' exception does not apply, and there was no potential for the plaintiff to suffer harm by submitting comments." Def.'s Resp. to the Ct.'s Order ("Def.'s Suppl. Br.") at 3. Defendant points out three key differences between *Itochu* and the instant case: (1) this case involves a new interpretation of scope language while *Itochu* involved a past practice that Commerce was defending in litigation; (2) this case involves a policy decision while *Itochu* involved a perceived statutory mandate; and (3) this case does not involve any potential prejudice by submitting comments while *Itochu* had the threatened delay of 225 days, during which time *Itochu* would have had to continue depositing duties on the merchandise, if comments were submitted. *Id*.at 4–5.

STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006).[2] For scope determinations, the Court sustains determinations, findings or conclusions of Commerce unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

DISCUSSION

Defendant raises the affirmative defense that Plaintiff's claim is barred by the doctrine of exhaustion of administrative remedies. The doctrine of exhaustion is not only mandated by statute but also well-settled law. "[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred *against objection made at the time appropriate under its practice." Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed. Cir. 2008) (emphasis in original) (*quoting United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 37 (1952)). The statutory exhaustion requirement "indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). Under the doctrine of exhaustion, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (internal quotations and citations omitted). The purpose of this doctrine is to permit the agency to consider an issue prior to judicial review, as the CAFC has explained:

> Requiring exhaustion can protect administrative agency authority and. . . serve judicial efficiency by promoting development of an agency record that is adequate for later court review and by giving an agency a full opportunity to correct errors and thereby narrow or even eliminate disputes needing judicial resolution.

Itochu, 2013 WL 4405863 at *4 (internal citations omitted).

[2] All references to the United States Code refer to the 2006 edition hereinafter, unless otherwise stated.

As with every general rule, there are exceptions. At issue in this case is an exception for futility, where a party must demonstrate that exhaustion would require it "to go through obviously useless motions in order to preserve [its] rights." *Corus Staal*, 502 F.3d at 1379 (internal quotation omitted). The futility exception, however, "is a narrow one." *Id*. Faced with rare circumstances, the CAFC invoked the futility exception in the *Itochu* case because "Commerce's position, which Commerce was defending in court at the time, was that it had no discretion in the matter because it was constrained by statute to reject Itochu's position." *Itochu*, 2013 WL 4405863 at *7. The *Itochu* court recognized, however, that these were "likely rare" circumstances in which "the demanding abuse-of-discretion standard for reversal of an exhaustion ruling under section 2637(d)" was satisfied. *Id*.

Under this purview, the Court reviews the circumstances of the instant case. First, this case involves a scope ruling challenge while *Itochu* involved a changed circumstance challenge. Distinguishable from *Itochu*, where Commerce had no power of discretion over the effect of a statutory mandate, here, Commerce was clearly exercising its power of discretion on a policy question. Commerce explains that "[i]ndeed, because this was the first time Commerce announced its preliminary revision to its subassembly test, there can be no allegation that Commerce would have been unreceptive to comments or arguments submitted by" Plaintiff. Def.'s Opp'n at 10. The Court agrees. In a scope proceeding, when Commerce announces a new interpretation or policy in its preliminary determination and invites interested parties to comment, the appropriate time for parties to object to Commerce's new analysis is after publication of the preliminary determination and before issuance of the final determination. Further, the possibility of prejudice and risk of harm—the potential to pay 225 more days of duty deposit if Commerce decided to delay the issuance of its final determination to review parties' comments—cited in *Itochu* is not present here.

Therefore, the instant case does not present the same rare circumstances found in *Itochu*. Given that a new discretionary policy regarding an interpretation of a scope exclusion was announced in the preliminary determination, that Commerce requested comments from all interested parties regarding its new interpretation, that the parties chose not to file comments, and that there was no possibility of prejudice caused by filing comments, the Court holds that the futility exception of the exhaustion doctrine does not apply under

these circumstances. Plaintiff is therefore barred from raising issues before the Court that it neglected to raise appropriately during the administrative proceeding.

CONCLUSION

As a result of the considerations detailed above, the Court holds that the doctrine of exhaustion of administrative applies to this case, barring Plaintiff's claims. Consequently, it is hereby

ORDERED that Defendant's *Final Scope Ruling* is sustained; and it is further

ORDERED that Plaintiff's motion for judgment on the agency record is denied; and it is further ORDERED that Plaintiff's motion for oral argument (ECF No. 33) is denied.

Judgment to enter accordingly.

Dated: October 9, 2013
New York, New York

/s/ Gregory W. Carman
GREGORY W. CARMAN, JUDGE