Decisions of the United States Court of International Trade

Slip Op. 05–3

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

LUOYANG BEARING CORP. (GROUP), ZHEJIANG MACHINERY IMPORT & EXPORT CORP., and CHINA NATIONAL MACHINERY IMPORT & EXPORT CORPORATION, Plaintiffs, and WAFANGDIAN BEARING COMPANY, LTD., Plaintiff and Defendant-Intervenor, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor and Plaintiff.

Consol. Court No. 01–00036

Commerce's *Remand Results* are affirmed. Case dismissed.

Hume & Associates PC (*Robert T. Hume*) for Luoyang Bearing Corp. (Group) and Zhejiang Machinery Import & Export Corp., plaintiffs and Wafangdian Bearing Company, Ltd., plaintiff and defendant-intervenor.

Venable LLP (*Lindsay B. Meyer* and *Kristin K. Woody*) for China National Machinery Import & Export Corporation, plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*); of counsel: *Amanda L. Blaurock*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

Stewart and Stewart (*Terence P. Stewart* and *Wesley K. Caine*) for The Timken Company, defendant-intervenor and plaintiff.

OPINION

I. Standard of Review

The Court will uphold Commerce's redetermination pursuant to the Court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). 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." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

II. Background

In *Luoyang Bearing Corp. (Group) v. United States*, 2004 Ct. Intl. Trade LEXIS 51 (May 18, 2004) the Court remanded the case to the United States Department of Commerce, International Trade Administration ("Commerce") with instructions to: (1) explain why the surrogate values it chose for wooden cases used to ship tapered rollers bearings ("TRBs") to the United States and the steel used to produce rollers by Wafangdian Bearing Company, Ltd. ("Wafangdian") constitutes "the best available information;" (2) address the aberrational record data noted by Luoyang Bearing Corp. (Group) ("Luoyang"), Wafangdian, and Zhejiang Machinery Import & Export Corp. ("ZMC") (collectively, "Luoyang et al."); and (3) conduct a separate rates analysis for Premier Bearing & Equipment Ltd. ("Premier") and apply the People's Republic of China ("PRC") country-wide rate to all of Premier's United States sales unless Premier is found independent of government control. *See Luoyang*, 2004 Ct. Intl. Trade LEXIS 51.

Commerce filed its *Final Results of Redetermination Pursuant to Remand* ("*Remand Results*") on September 30, 2004. Luoyang et al. and The Timken Company ("Timken") filed their comments to Commerce's *Remand Results* on October 27, 2004, and October 20, 2004, respectively.[1] Commerce's response to these comments was filed with this Court on December 6, 2004. Timken filed rebuttal comments to Luoyang et al.'s comments on November 12, 2004.

III. Commerce Reasonably Explained its Choice of Surrogate Values

Commerce explains that when calculating surrogate values it generally relies on data from its primary surrogate country, which in the case at bar is India. *See Remand Results* at 7. In determining the value of steel used to produce TRBs, Commerce calculates a weighted average of the import prices into India from only market economy countries with imports more than seven metric tons. *See id.* at 7–8. Commerce excludes "imports from a country when the total amount imported from that country is small and the per-unit value of those imports is substantially different from the per-unit values of larger-quantity imports of that product from other countries. . . ." *Id.*

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[1] China National Machinery Import & Export Corporation did not submit comments to Commerce's *Remand Results*.

at 8. Commerce excluded from the Indian import data all imports from the PRC and Russia because each was a non-market economy country ("NME"). *See id.* at 10. Commerce also excluded imports from Australia, Sweden, and the United Kingdom because each country's total imports during the reporting period was less than seven metric tons, Commerce's benchmark for inclusion in the weighted average calculation. *See id.*

Upon reexamination, Commerce determined that "imports into India from Austria and Germany were made in small quantities and at per-unit values which differed substantially from the per-unit values of the larger-quantity imports. . . ." *Id.* at 11. Accordingly, Commerce excluded all imports into India from Austria and Germany. *See id.* Although Commerce found imports from France and Italy were also low (in comparison to imports from Brazil and Japan which accounted for the majority of the Indian imports), Commerce also found that the unit values from these countries were in line with the unit values of countries with larger quantities of exports to India. *See id.* Furthermore, Commerce included imports from France and Italy, even though some months evidenced extremely small quantities of imports, because overall imports from the two countries equaled 11 and 9 metric tons, respectively. *See id.* Commerce explains that its practice is not "to exclude certain months of a country's data from [its] surrogate value calculation based solely on the fact that the volume of imports from that country are small in a particular month." *Id.* at 9. Commerce used the Indian import data to calculate the surrogate value for the steel used to produce rollers "because this data was the most contemporaneous data on the record, yielded a value that was reliable when compared to the [United States] benchmark value, and was from [Commerce's] primary surrogate country, India. . . ." *Id.* at 10.

With respect to values for wooden cases, Commerce examined the Indian import data from a previous review, as requested by Wafangdian, but rejected the use of such data. *See Final Results* at 12. Commerce used Indian imports under the Harmonize Schedule category 4415.1000 (Cases Boxes Crates Drums and Similar Packing Cable-Drums of Wood) for the period April 1998 to August 1998, exclusive of imports from the PRC. *See id.* at 12–13. Commerce found that imports from the United Kingdom were small, only 1.17 percent of all imports, while imports from other countries each accounted for 7 percent or more of imports. *See id.* at 13. Accordingly, Commerce compared the unit value of United Kingdom imports with the other countries' larger-quantity import values. *See id.* Commerce found that the per-unit value of exports from the United Kingdom to India fell between the per-unit values of exports from Germany and the United States. *See id.* Commerce, therefore, determined that the per-unit value for exports from the United Kingdom are not aberrational but rather are comparable to the values of other countries that exported larger quantities to India. *See id.* at 14.

In its treatment of import data from Spain, Commerce explains that it only excludes "values when the total amount imported from that country is small and the per-unit value of those imports is substantially different from the per-unit values of larger-quantity imports of that product from other countries that exported to the surrogate country." *Id.* Here, Luoyang et al. did not argue, and Commerce did not find, that shipments from Spain to India were in small quantities. *See id.* Consequently, Commerce did not exclude imports from Spain in its calculation of surrogate values for wooden cases. *See id.*

Commerce reviewed the record and revised the surrogate value for roller steel to $772.25 per metric ton. *See Remand Results* at 14. Commerce, however, found that no changes were necessary for the surrogate value of wooden cases. The Court finds that Commerce complied with the Court's opinion and order in *Luoyang*, 2004 Ct. Intl. Trade LEXIS 51. Commerce reasonably explained why the Indian import values were the "best available information" to calculate the surrogate value for steel used to produce rollers. Commerce also reasonably included export values from the United Kingdom and Spain in its calculation of the surrogate value for wooden cases. Moreover, Commerce's determination is supported by substantial record evidence.

IV. Commerce Properly Did Not Revoke the Antidumping Order For ZMC

A. Background

In reviewing the record on remand, Commerce discovered a clerical error in calculating the antidumping margin for ZMC. *See Remand Results* at 23. Commerce had erroneously assigned the surrogate value calculated for steel used to manufacture cups and cone steel input to the roller and cage steel inputs. *See id.* Commerce, therefore, recalculated ZMC's antidumping margin, which had been calculated at 7.37 percent, and assigned a 0.00 percent margin to ZMC. *See id.* During the administrative review, ZMC requested Commerce to revoke the antidumping margin and Commerce had preliminarily found that ZMC qualified for revocation. *See id.* In its final results, however, Commerce did not revoke the order because ZMC had been assigned a 7.37 percent antidumping margin. *See id.* Upon correcting ZMC's antidumping margin, Commerce determined in the *Remand Results* that the antidumping order should not be revoked because there was evidence that ZMC had dumped during a subsequent period of review. *See id.*

B. Analysis

Commerce properly determined to reject ZMC's request to revoke the antidumping duty order against it. The pertinent regulations set out three criteria Commerce is to consider in determining whether to revoke in part an antidumping duty order.[2] *See* 19 C.F.R. § 351.222(B)(2)(i) (2004). ZMC argues that it has fulfilled all three of the regulatory criteria. *See* Comments of ZMC Commerce's Final Redetermination Results Pursuant Remand ("ZMC's Comments") at 4–9. ZMC asserts that the 0.00 percent antidumping margin is at least the third consecutive year that it has been found not to sell the subject merchandise for less than fair value. *See id.* at 5. Moreover, ZMC has agreed in writing to the immediate reinstatement of the antidumping duty order if Commerce finds that it has sold the subject merchandise at less than normal value. *See id.* ZMC argues that Commerce's reasons for deciding to not revoke the order is faulty; "[b]ut for the margin in [the subsequent review], Commerce would have revoked the order with respect to ZMC." *See id.* at 4.

While ZMC has fulfilled two of the three regulatory criteria set forth in 19 C.F.R. § 351.222(B)(2)(i)(A) & (B), the Court finds that ZMC's application for revocation of the antidumping duty order fails under the third criteria, 19 C.F.R. § 351.222(B)(2)(i)(C). Here, Commerce properly determined that "the discipline of the order continues to be necessary to offset dumping by ZMC." *Remand Results* at 31. Commerce based its decision on evidence that ZMC sold subject merchandise at less than normal value in a subsequent administrative review. *See id.* (citing *Final Results of 2000–2001 Administrative Review, Partial Rescission of Review, and Determination to Revoke Order, in Part for Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China* ("*2001 Final Results*"), 67 Fed. Reg. 68,990 (November 14, 2002). Based on this evidence, Commerce reasonably determined that it would not revoke ZMC's antidumping duty order because it remains necessary to offset dumping by ZMC.[3]

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[2] The regulations state that in making its determination to revoke an antidumping duty order in part, Commerce is to consider:

> (A) Whether one or more exporters or producers covered by the order have sold the merchandise at not less than normal value for a period of at least three consecutive years;
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> (B) Whether, for any exporter or producers that [Commerce] previously has determined to have sold the subject merchandise at less than normal value, the exporter or producer agrees in writing to its immediate reinstatement in the order . . . if [Commerce] concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value; and
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> (C) Whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.

19 C.F.R. § 351.222(B)(2)(i).

[3] ZMC argues that Commerce's determination in the *2001 Final Results* is erroneous because Commerce made a ministerial error in the calculation of ZMC's dumping margin. *See* ZMC's Comments at 6–9. Accordingly, ZMC requests the Court to direct Commerce to revisit and correct this alleged calculation error. *See id.* The Court's jurisdiction, however, is limited to Commerce's factual determination and remand determination in the case at bar.

ZMC asserts that if Commerce had not miscalculated ZMC's dumping margin for the final results, then Commerce would have revoked the antidumping duty order against it. *See* ZMC's Comments at 4. Commerce's only basis to reject ZMC's application arose after the conclusion of the subsequent administrative review. ZMC argues that the Court should apply *nunc pro tunc* principles and order Commerce to revoke the antidumping duty order against it. *See id.* at 5–6. The Court finds ZMC's argument to be without merit. While ZMC should have qualified for revocation for the final results of this administrative review, Commerce may not ignore the evidence of continued dumping by ZMC, even if such evidence is uncovered in a subsequent administrative review. "[A]ntidumping laws are not punitive in nature, but are designed to remedy the inequities caused by unfair trade practices." *Allied Tube & Conduit Corp. v. United States*, 24 CIT 1357, 1370, 127 F. Supp. 2d 207, 218 (2000); *see NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (stating that "the antidumping laws are remedial not punitive" (citing *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–04 (Fed. Cir. 1990))). If Commerce does not consider the evidence that ZMC dumped during a subsequent period of review, then the remedial purpose of antidumping duty laws are undermined. Accordingly, the Court sustains Commerce's determination to maintain the antidumping duty order against ZMC.

V. Commerce Properly Applied the Separate Rates Test

A. Contentions of the Parties

1. Timken's Contentions

Timken contends that Commerce failed to comply with the Court's remand because Commerce's separate rates analysis failed to consider Premier in combination with its Chinese suppliers. *See* Comments Timken Commerce's Redetermination Pursuant Remand ("Timken's Comments") at 2–10. Timken argues that Commerce "avoided the Court's recognition that Premier needed to show independence *in conjunction - i.e., in combination* - with the company's various NME suppliers. . . ." *Id.* at 3 (emphasis in original). Timken maintains that Commerce's *Remand Results* are in error because they are "based on a narrow and incorrect reading of this Court's remand decision, and address[ ] an issue not in dispute, *viz.*, Premier's own technical independence when viewed in abstract isolation." *Id.* at 4.

Timken also argues that the *Remand Results* contradict other agency positions. Timken notes that Commerce's regulations regard-

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The Court lacks jurisdiction to consider the propriety of Commerce's determination in an administrative review subject of a separate civil action. The *2001 Final Results*, which ZMC calls into question, involve a record that is not before the Court in the context of this action.

ing the revocation of antidumping duty orders directs Commerce to focus "on *combinations* of particular exporters *and their producers* when trading companies (resellers) are involved." *Id.* at 5 (emphasis in original). The regulation, according to Timken, recognizes that data from the producer of the subject merchandise is important for determining whether a reseller or exporter qualifies for revocation. *See id.* Timken argues that Commerce's conflicting positions do not deserve deference from the Court. Timken also notes that Commerce has proposed a revision to its practice when NME producers sell subject merchandise through exporters located in a market economy. *See id.* at 7. Timken maintains that the proposed revision evidences agency inconsistencies toward the treatment of resellers. *See id.* at 9. Therefore, Timken asks the Court to direct Commerce to conduct a separate rates analysis for Premier in combination with each of its suppliers and apply the PRC rate to all United States sales of subject merchandise unless the Chinese supplier and Premier have established their independence from the state. *See id.*

2. Commerce's Contentions

Commerce responds that it properly implemented the Court's opinion and order and applied the separate rates test to Premier. *See* Def.'s Resp. Pl.'s Def.-Intervenor's Comments Upon Commerce's *Final Results* ("Commerce's Comments") 9–12. Commerce analyzed whether Premier had established the absence of government control in law and in fact. *See id.* at 10. Commerce argues that "the Court in no way suggested or implied that the analysis should be applied to any other entity." *Id.* at 11.

Based on Premier's questionnaire responses, Commerce found that Premier successfully demonstrated a lack of *de jure* government control. *See id.* at 10. Although Premier could not provide legislation or other governmental measures demonstrating decentralized control of Premier's export activities, Premier provided a copy of its business registration certificate, which certified that Premier was operating legally in Hong Kong. *See Final Results* at 20. In addition, Premier's responses indicated that the subject merchandise was not on any government list of export provisions or export licensing and that there were no export quotas. *See id.* at 20–21. Moreover, Commerce found that "the PRC exercised no *de facto* government control over Premier." Commerce's Comments at 10. Premier demonstrated that: (1) it established its own export prices through direct negotiations with its customers; (2) its pricing was not coordinated with other exporters or the Hong Kong Chamber of Commerce; (3) the selection process for its directors was not controlled by the government; (4) it had sole control over its bank accounts; and (5) the activities of its general manager were not subject to any level of government approval. *See id.* at 10–11. Accordingly, Commerce found that Premier was not subject to government control and therefore should be assessed a separate rate from the PRC rate.[4]

B. Analysis

The Court instructed Commerce to conduct the separate rates analysis for Premier and apply the PRC rate to all of Premier's United States sales unless Commerce found Premier to be free of state control. *See Luoyang*, 2004 Ct. Intl. Trade LEXIS at *84–85. On remand, Commerce found that Premier has established that it is autonomous from government control. *See Final Results* at 20–23. Commerce determined that Premier is the company that set the price at which the subject merchandise was sold in the United States. *See id.* at 24. Accordingly, Commerce found that Premier warranted a company-specific dumping margin and not the PRC rate to all of Premier's sales to the United States. The Court finds that Commerce fully complied with its instruction to conduct a separate rates analysis and that Commerce's determination is supported by substantial evidence.

As the Court has stated before, "the essence of a separate rates analysis is to determine whether *the exporter* is an autonomous market participant, or whether instead it is so closely tied to the communist government as to be shielded from the vagaries of the free market." *See Fujian Mach. & Equip. Imp. & Export Corp. v. United States*, 25 CIT 1150, 1174, 178 F. Supp. 2d 1305, 1331 (2001) (emphasis added). Contrary to Timken's argument that Commerce's separate rates analysis must also consider Premier's NME suppliers, a separate rate analysis is used to determine whether the exporter, not the producer of the subject merchandise, is an autonomous market participant. *See id.*; *see also Final Determination of Sales at Less Than Fair Value for Sparklers From the People's Republic of China*, 56 Fed. Reg. 20,588 (May 6, 1991). The separate rates analysis focuses on the exporter's activities and the exporter's ability to set the United States price for its sales of the subject merchandise. Accordingly, an exporter may qualify for a separate antidumping duty rate by demonstrating both *de jure* and *de facto* independence from the central government. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). To show a lack of *de jure* control, an exporter may point to legislation or other governmental measures that demonstrate a lack of centralized control. *See id.* The absence of *de facto* control may be established with evidence that the exporter: (1) sets its prices and negotiates its contracts independently of the government and other exporters; (2) controls the proceeds of its sales;

[4] Commerce issued a notice inviting comments upon a possible change to its NME separate rates analysis. *See* Commerce's Comments at 10. Commerce maintains that such notice does not constitute a change in its policy. *See id.* at 12.

and (3) makes its own personnel decision, such as the selection of management. *See id.*

Here, Commerce properly found that Premier established that there was an absence of both *de jure* and *de facto* government control. Premier's business registration certificate shows that it was operating legally in Hong Kong. *See Remand Results* at 20–21. In addition, the subject merchandise was not on any government list of export provisions or export licensing and there was no indication of export quotas. *See id.* Premier also successfully demonstrated that: (1) it negotiated directly with its customers to establish its export prices; (2) its pricing was not coordinated with either other exporters or the Hong Kong Chamber of Commerce; (3) the government did not control the selection process for its directors; (4) it solely controlled its accounts; and (5) its general manager's activities were not subject to any level of government approval. *See id.* at 21–22. The Court finds that Commerce's determination to apply a separate antidumping duty rate to Premier is supported by substantial evidence.

VI. Commerce's Use of Other Producers' Factors Data to Calculate Premier's Normal Value

In *Luoyang*, 2004 Ct. Intl. Trade LEXIS 51, the Court stated that it would "not address the issue of whether Commerce should have applied the Premier 'facts available' rate of 25.56 percent to all reported Premier sales until it receives the remand results." *Id.* at *89. The Court finds that Commerce's determination to apply partial facts available is supported by substantial evidence and in accordance with law.[5] Timken argues that Commerce improperly determined that Premier acted to the best of its ability to obtain factors of production ("FOP") information and that Commerce should have applied adverse facts available to all of Premier's sales. *See id.* at *85. Premier provided Commerce with FOP information for some of its suppliers. *See Issues and Decision Mem.*[6] at 34–36. In the instances in which it was unable to obtain such information, Premier provided Commerce with documentation of its efforts to obtain the information from its suppliers. *See id.* Commerce found that this documentation demonstrated Premier's good faith efforts to supply Commerce with the requested information. The Court agrees with Commerce

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[5] The Court set forth a detailed account of the arguments of Timken and Commerce in *Luoyang*, 2004 Ct. Intl. Trade LEXIS 51, at *85–88.

[6] The full title of this document is *Issues and Decision Memo for the 1998–99 Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results*, compiled as an appendix to the *Amended Final Results of 1998–1999 Administrative Review and Determination To Revoke Order in Part on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China* ("*Amended Final Results*"), 66 Fed. Reg. 11,562 (Feb. 26, 2001). The Court will refer to this document as *Issues & Decision Mem.* and match pagination to the printed documents from www.ia.ita.doc.gov/frn/summary/prc/01–777–1.txt.

and finds Commerce's refusal to apply adverse facts available to all of Premier's sales reasonable and in accordance with law.

Commerce took into consideration "the fact that Premier's suppliers may be direct competitors of Premier and, therefore, may be understandably reluctant to provide proprietary information to Premier." *Id.* at 34. Timken points out that different conclusions may be drawn as to why Premier failed to provide FOP information. Inconsistent conclusions drawn from record evidence, however, does not render Commerce's conclusions unsupported by substantial evidence. *See Consolo*, 383 U.S. at 620. Here, Commerce properly inferred from record evidence that Premier acted to the best of its ability to supply Commerce with FOP information.[7] The Court finds that Commerce properly applied adverse facts available only to those sales of models with no corresponding FOP data.[8] Commerce's use of model-specific FOP data on the record of corresponding models was reasonable and in accordance with law.

Therefore, upon review of the record, and the arguments presented by the parties on remand, the Court finds that the *Remand Results* are supported by substantial evidence on the record and in accordance with law. Accordingly, it is hereby

ORDERED that the *Remand Results* are affirmed in all respects; and it is further

ORDERED that Commerce's determination to apply adverse facts available to only some of Premier's United States sales is reasonable and supported by substantial evidence; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

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[7] Commerce inferred that: (1) Premier would not benefit from submitting incomplete FOP data; (2) Premier's competitors would be reluctant to provide proprietary information; and (3) Premier's high antidumping duty margins in previous reviews provided an incentive for Premier to cooperate during this review. *See Issues and Decision Mem.* at 34–35.

[8] Timken argues that Commerce erred by using other producers' data in the record to calculate Premier's normal value. *See* Timken's Comments at 4. Timken argues that Commerce has violated the statute, 19 U.S.C. § 1677b(c)(1) (1994), which "directs Commerce to determine the 'normal value' of particular goods by reference to the producer's FOPs, not those of other producers." Timken's Comments at 4. Timken takes issue with the method used by Commerce to calculate a factor utilization rate for Premier in the instances in which no actual FOP data existed. As long as Commerce's choice of methodology is reasonable and supported by substantial evidence, "courts are even less in the position to question an agency action. . . ." *Maier, P.E. v. United States Envtl. Prot. Agency*, 114 F.3d 1032, 1043 (10th Cir. 1997) (citing *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983)); *See also Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 840, 159 F. Supp. 2d 714, 721 (2001) (stating that Commerce's methodology does not have to be "the only way or even the best way to calculate surrogate values for factors of production as long as it was reasonable"). Here, Commerce's method of averaging the actual constructed value data by model for Premier's actual suppliers to the same models of producers that do not supply Premier is reasonable and supported by substantial evidence.

Slip Op. 05–4

UNITED STATES STEEL CORPORATION and ISPAT INLAND INC., *Plaintiffs*, v. UNITED STATES, *Defendant*, and USINAS SIDERURGICAS DE MINAS GERAIS S/A, COMPANHIA SIDERURGICA PAULISTA and COMPANHIA SIDERURGICA NACIONAL, *Defendant-Intervenors.*

Court No. 99–08–00525

[Action challenging countervailing duty suspension agreement is dismissed, pursuant to Stipulation of Dismissal submitted by Plaintiffs and signed by all parties, following termination of suspension agreement and issuance of countervailing duty order.]

Decided: January 21, 2005

Skadden, Arps, Slate, Meagher & Flom LLP (*Robert E. Lighthizer*, *John J. Mangan*, and *Jeffrey D. Gerrish*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini* and *Ada E. Bosque*); *Christine J. Sohar* and *Peter J.S. Kaldes*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

Willkie Farr & Gallagher (*William H. Barringer* and *Christopher A. Dunn*), for Defendant-Intervenors.

OPINION

RIDGWAY, Judge:

More than six years ago, the plaintiff domestic steel producers ("Domestic Producers"),[1] among others, petitioned for the initiation of parallel antidumping and countervailing duty proceedings, alleging that various Brazilian producers ("Brazilian Exporters")[2] were both selling steel in this country at less than fair value, and receiv-

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[1] Together, the plaintiff Domestic Producers constitute roughly half of the industry overall, and well over half of the industry that participated in the underlying investigation. *See Bethlehem Steel Corp. v. United States*, 25 CIT 895, 896 n.3, 159 F. Supp. 2d 730, 731 n.3 (2001) ("*Bethlehem II*"); *Bethlehem Steel Corp. v. United States,* 28 CIT ____ , ____ n.5, 316 F. Supp. 2d 1309, 1311 n.5 (2004) ("Bethlehem III").

When this action was filed, the plaintiffs included – in addition to U.S. Steel Group, a unit of USX Corporation, and Ispat Inland Inc. – Bethlehem Steel Corporation, LTV Steel Company, Inc., and National Steel Corporation. *See Bethlehem II*, 25 CIT at 896 n.3, 159 F. Supp. 2d at 731 n.3; *Bethlehem III*, 28 CIT at ____ n.5, 316 F. Supp. 2d at 1311 n.5. However, Bethlehem Steel has since declared bankruptcy, and has been dissolved; and LTV Steel and National Steel were determined to no longer have an interest in this litigation. Those three companies were therefore dismissed from the action, and the caption of the case was modified accordingly. *See* Consent Motion to Dismiss Certain Plaintiffs (June 1, 2004); Order (June 3, 2004).

[2] The three Brazilian Exporters that are Defendant-Intervenors in this action – Usinas Siderúrgicas de Minas Gerais, Companhia Siderúrgica Paulista, and Companhia Siderúrgica Nacional – were the respondents in the underlying countervailing duty investigation, and were respondents in the parallel antidumping investigation as well.

ing countervailable subsidies from the Government of Brazil. In July 1999, following intense investigations spanning more than eight months (and on the "drop dead" due date for the U.S. Department of Commerce's issuance of its Final Determinations in the two cases),[3] the agency suspended both proceedings pursuant to agreements which it entered into – at the eleventh hour – with the Brazilian producers (in the antidumping case) and the Government of Brazil (in the countervailing duty case). The Domestic Producers brought actions challenging both suspension agreements.[4]

This case has already spawned two opinions – *Bethlehem II* and *Bethlehem III*, both of which remanded to the Commerce Department that agency's determination to suspend its investigation into alleged countervailable subsidies received from the Brazilian Government by the three Brazilian steel exporters.[5] *See Bethlehem II*, 25 CIT at 896, 927, 159 F. Supp. 2d at 732, 762; *Bethlehem III*, 28 CIT at ____ , 316 F. Supp. 2d at 1311–12, 1322. Familiarity with those opinions is presumed.

In response to *Bethlehem III*, Commerce filed its Final Redetermination Pursuant to Court Remand ("Redetermination on Remand"). The Government continued to staunchly defend the Suspension Agreement, asserting, *inter alia*, that "Commerce did everything possible to comply fully with the notice, comment, and consultation requirement[s] of the suspension agreement statute," but concluded that "it was not appropriate to terminate the agreement . . . because the agreement provides concrete benefits and those benefits outweigh the benefits available under a CVD order." The Government therefore urged that the Court "sustain Commerce's Final Redetermination and dismiss this action." *See* Defendant's Response to Plaintiffs' Comments on the Final Redetermination Pursuant to Court Remand ("Defendant's Brief") at 5, 13, 30.[6]

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[3] *See* footnote 8, *infra*.

[4] *Bethlehem I* issued in the companion case, which challenged the suspension agreement in the parallel antidumping duty proceeding. *Bethlehem Steel Corp. v. United States*, 25 CIT 519, 146 F. Supp. 2d 927 (2001) ("*Bethlehem I*"). After *Bethlehem I* remanded to Commerce the suspension agreement in that proceeding, the Brazilian steel exporters were found to be in violation of the agreement. Commerce therefore terminated the agreement, and the action was dismissed. *See* Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil: Final Results of Antidumping Duty Administrative Review and Termination of the Suspension Agreement, 67 Fed. Reg. 6,226 (Dep't Commerce Feb. 11, 2002).

Read together, *Bethlehem I, Bethlehem II*, and *Bethlehem III* provide the backdrop for this opinion.

[5] *See* Suspension of Countervailing Duty Investigation: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, 64 Fed. Reg. 38,797 (Dep't Commerce July 19, 1999) (suspension of countervailing duty investigation and entry of suspension agreement) (the "Suspension Agreement" or the "Agreement").

[6] The Brazilian Exporters elected not to participate in the briefing on Commerce's Redetermination on Remand.

In contrast, the Domestic Producers maintain that the Suspension Agreement fails to meet any of the "stringent and extensive requirements in the statute that must be satisfied before the Department of Commerce . . . may enter into a suspension agreement." Plaintiffs' Comments on the Final Redetermination Pursuant to Court Remand Issued By the Department of Commerce ("Plaintiffs' Brief") at 1. According to the Domestic Producers, Commerce's Redetermination on Remand evinces "a complete and brazen disregard for the Court's rulings," and "is an affront not only to Plaintiffs, but to the Court as well." *Id.* at 2. The Domestic Producers' comments therefore urged that "the Court . . . determine, once and for all" that "Commerce's determination to enter into and maintain the Suspension Agreement is not supported by substantial evidence on the record and is otherwise not in accordance with law," and that "[t]he Court . . . direct Commerce to terminate the Agreement and issue a countervailing duty order forthwith." *Id.* at 2–3, 55. *See also* Plaintiffs' Reply Brief on the Final Redetermination Pursuant to Court Remand ("Plaintiffs' Reply Brief") at 1 (reiterating that Commerce should be directed to terminate the Suspension Agreement and issue a countervailing duty order, in light of the agency's "repeated intransigence").

Recent developments, however, have now obviated the need for a final ruling on the lawfulness of the Suspension Agreement. The Government of Brazil has terminated the Agreement, and a countervailing duty order has been issued by Commerce.[7] In light of

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[7] *See* Agreement Suspending the Countervailing Duty Investigation on Hot-Rolled Flat-Rolled Carbon-Quality Steel From Brazil; Termination of Suspension Agreement and Notice of Countervailing Duty Order, 69 Fed. Reg. 56,040 (Dep't of Commerce Sept. 17, 2004).

Reports in the trade press indicate that "Brazil first notified the U.S. of its intention to pull out of the [Suspension Agreement] *during a June 24–25 meeting* with Deputy Assistant Secretary for Policy and Negotiations Joe Spetrini," and that Brazil formally gave notice in a July 28 letter to Commerce. *See* "Brazil Pulls Out of Hot-Rolled Steel CVD Suspension Agreement," *Inside U.S. Trade*, Aug. 6, 2004, at 10 (emphasis added). However, the Government failed to advise the Court of the Brazil's intentions until August 16, 2004 – *seven weeks* after Brazil's first notice to Commerce, and even *two weeks* after Brazil's formal notice. *See* [Defendant's] Consent Motion for Leave to File a Status Report and Status Report (dated August 12, 2004 and filed August 16, 2004). In the meantime, the Court had independently learned of Brazil's action through accounts in the news media. *See* Letter from Court to Counsel (Aug. 13, 2004) (enclosing copy of news article).

Moreover, although Commerce submitted an "updated administrative record" to the Court on August 6 (more than a week before the Government's Status Report was filed), Commerce's cover letter gave no indication as to the contents of that updated record (which, the Court later discovered, included at page 351 a copy of Brazil's July 28 letter). *See* Letter from U.S. Dep't of Commerce to Clerk of Court (Aug. 6, 2004) (transmitting "updated administrative record").

Counsel are obligated to ensure that the court is promptly apprised of relevant developments in any case. The precise definition of "promptness" in a particular situation depends on (a) the significance of the development, and (b) the procedural status of the case at the time.

Here, it is beyond cavil that the development in question had great significance; indeed, Brazil's action arguably mooted the case. Moreover, the case was fully submitted to the Court – Commerce had filed its Redetermination on Remand, and all briefing had been those events, the plaintiff Domestic Producers have filed with the Court a Stipulation of Dismissal, signed by all parties.

Accordingly, pursuant to that Stipulation, and with the observations that follow, this action is dismissed.

I. *Background*

In late September 1998, the Domestic Producers, among others, petitioned Commerce and the International Trade Commission ("ITC"), seeking the imposition of countervailing duties on certain steel products from Brazil. The ITC issued an affirmative preliminary material injury determination one month later. Commerce's preliminary determination followed, in mid-February 1999, finding that countervailable subsidies were indeed being provided to the Brazilian Exporters.

On June 6, 1999, barely one month prior to the deadline for its final determination, Commerce and the Brazilian Government initialed a proposed agreement to suspend the countervailing duty investigation. Because the relevant statute requires that a suspension agreement be completed no later than the date of Commerce's final determination, and because the statute requires that the agency notify and consult with petitioners at least 30 days in advance, June 6 was *the last possible day* on which Commerce could announce its intention to suspend the investigation.[8] Commerce provided a copy of the proposed agreement to the Domestic Producers, and required that any comments be submitted by June 28, 1999.

The Domestic Producers filed a timely and lengthy submission, detailing numerous substantive objections to the proposed suspension agreement (and identifying a number of typographical errors and erroneous cross-references). Nevertheless, a few days later, on July 6, 1999 – the deadline for issuance of Commerce's final determination in the countervailing duty investigation – the agency and the Brazilian Government executed the Suspension Agreement. No changes were made in response to the Domestic Producers' comments. Even

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completed. Given that procedural status, Brazil's action – arguably mooting the case – took on even greater significance. Not only their obligations to the court, but also mere common courtesy required that counsel immediately notify the Court of Brazil's intentions, so that the Court could confer with the parties (if appropriate) and decide whether to continue to devote judicial resources to analysis of the remand results and the comments thereon.

Here, there is a very strong argument that the Government (and perhaps the Brazilian Exporters as well) should have given appropriate notice to the Court immediately following Commerce's June 24–25 meeting with the Government of Brazil. Certainly there can be no excuse for delaying even a day after the July 28 letter.

[8] The deadline for Commerce's Final Determination had already been extended several times, and could not be extended past July 6, 1999 – the agency's "drop-dead" due date. *See generally Bethlehem II*, 25 CIT at 900 n.17, 159 F. Supp. 2d at 736 n.17 (citing the relevant provisions of the statute, and detailing their application to the facts of this case).

the typographical errors and erroneous cross-references went uncorrected.[9]

Commerce's final affirmative determination in the underlying investigation – issued that same day – found net subsidy rates for the Brazilian Exporters ranging between 6.35% and 9.67%.[10] However, as a result of the Suspension Agreement, no countervailing duty order was issued.

II. *The Suspension Agreement Statute*

As discussed in *Bethlehem II*, there are essentially two distinct types of suspension agreements in countervailing duty cases – so-called "subsection (b) agreements" and "subsection (c) agreements." *See generally Bethlehem II*, 25 CIT at 898–99, 159 F. Supp. 2d at 734–35. Subsection (b) agreements eliminate or offset completely a countervailable subsidy, or cease exports of the subject merchandise. 19 U.S.C. § 1671c(b) (1994).[11] In contrast, subsection (c) agreements – like the Suspension Agreement at issue here – do not cease exports; nor do they completely eliminate or offset countervailable subsidies. Rather, they eliminate only the exports' injurious effect. 19 U.S.C. § 1671c(c).

Prior to accepting either a subsection (b) or (c) agreement, Commerce must find both that "suspension of the investigation is in the public interest," and that "effective monitoring of the agreement by the United States is practicable." 19 U.S.C. § 1671c(d)(1). Commerce also is required to notify petitioners of, and consult with them concerning, its intention to suspend the investigation. Further, Commerce must provide petitioners with a copy of the proposed agreement, and accord them an opportunity to comment. 19 U.S.C. § 1671c(e).

But there are additional requirements for subsection (c) agreements. Because such agreements, by definition, allow some subsidy practices to continue, Congress imposed further restrictions on subsection (c) agreements, limiting their use to cases involving "extraordinary circumstances" – cases where the suspension of the investigation is more beneficial to the domestic industry than its continuation, and where the investigation is "complex." *See* S. Rep. No. 96–249, at 51 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 437

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[9] There was only one difference between the draft suspension agreement that was initialed by Commerce and the Government of Brazil, and the Suspension Agreement that they actually executed by the two parties – and that change was not made to reflect the comments of the petitioning Domestic Producers. *See Bethlehem II*, 25 CIT at 907, 159 F. Supp. 2d at 742–43.

[10] The following month, the ITC issued its final determination on material injury, confirming its affirmative preliminary finding.

[11] All statutory citations are to the 1994 edition of the U.S. Code.

(discussing the extraordinary circumstances requirement set out in 19 U.S.C. § 1671c(c)(4)).

Moreover, while all subsection (c) agreements require findings of "extraordinary circumstances" and "complexity" (as discussed above), there are even more, unique requirements for those subsection (c) agreements which are – like the Agreement here at issue – quantitative restriction agreements.[12] Specifically, the statute mandates that, in evaluating the public interest vis-à-vis such an agreement, Commerce must both (i) consult with potentially affected consuming industries, as well as potentially affected producers and workers in the domestic industry, and (ii) take into account the impact of such an agreement on U.S. consumers, the international economic interests of the United States, and the competitiveness of the domestic industry (in addition to any other necessary or appropriate factors). 19 U.S.C. § 1671c(d)(1).

As Congress intended, Commerce has invoked the suspension provisions of the trade laws only infrequently in both countervailing duty and antidumping investigations. Notably, prior to the suspensions of both the countervailing duty investigation at issue and the parallel antidumping investigation, Commerce had accepted only four other subsection (c) agreements, including both antidumping and countervailing duty cases. (Significantly, in each of those four prior cases, Commerce sought – and obtained – the consent of the petitioners.) *See Bethlehem II*, 25 CIT at 899, 159 F. Supp. 2d at 735.

Moreover, not only were suspension agreements expected to be relatively unusual but, in addition, Congress also intended that – in those rare cases where they were appropriate – suspension agreements generally would be entered into very early in the investigative process. *See generally Bethlehem I*, 25 CIT at 522, 146 F. Supp. 2d at 930–31; *Bethlehem II*, 25 CIT at 898, 159 F. Supp. 2d at 733; *Bethlehem III*, 28 CIT at ___ , 316 F. Supp. 2d at1313.[13] Consistent with that intent, the Commerce Department's regulations require, in a nutshell, that a copy of any proposed countervailing duty suspension agreement be forwarded to petitioners no later than 15 days after Commerce's preliminary determination, and Commerce must accept or reject a final agreement no later than 45 to 60 days after the preliminary determination (depending on the circumstances). See 19 C.F.R. §§ 351.208(f)(1)(ii), 351.208(f)(2)(i)(B), 351.208(g)(1).

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[12] A quantitative restriction agreement is an agreement by a foreign government to limit the volume of imports of the merchandise at issue into the United States – that is, an agreement establishing a quota. *See* 19 U.S.C. § 1671c(c)(3).

[13] *But see* S. Rep. No. 96–249, at 15, *reprinted in* 1979 U.S.C.C.A.N. at 401 (contemplating that, in certain cases, Commerce could accept a suspension agreement as late as its final determination).

III. *Analysis*

In patent contravention of Congressional intent and Commerce's own regulations, the timing of the Suspension Agreement in this action gave new meaning to the phrase "down to the wire." As discussed in greater detail below, the timing issue has cast a long shadow over the Agreement. Indeed, it has significant, and arguably fatal, implications for the Agreement, in light of several provisions of the applicable statute – particularly the notice-and-comment requirements and the consultation requirements, as well as the "more beneficial" requirement.

A. *Notice, Comment and Consultation*

The notice, comment and consultation requirements of the suspension agreement statute mandate that, before entering into such an agreement, the Commerce Department must:

> (1) notify the petitioner of, and consult with the petitioner concerning, its intention to suspend the investigation . . . not less than 30 days before the date on which it suspends the investigation,
>
> (2) provide a copy of the proposed agreement to the petitioner . . . together with an explanation of how the agreement will be carried out and enforced (including any action required of foreign governments), and of how the agreement will meet the requirements of subsections (b) and (d) or (c) and (d) of [the statute], and
>
> (3) permit all interested parties . . . to submit comments and information for the record before the date on which notice of suspension of the investigation is published. . . .

19 U.S.C. § 1671c(e). The legislative history of the statute highlights the importance of those provisions, emphasizing that "the requirement that the petitioner be consulted will not be met by pro forma communications. Complete disclosure and discussion is required." S. Rep. No. 96–249, at 54, *reprinted in* 1979 U.S.C.C.A.N. at 437.

The Domestic Producers argue that "while Commerce has refused to make any effort to engage in meaningful consultations with Plaintiffs, it has continued to engage in discussions with the Brazilians." Indeed, the Domestic Producers emphasize that "Commerce has had almost five years and numerous opportunities to consult with Plaintiffs and to comply with the requirements of the suspension agreement statute, . . . [but] has shown time and time again that it is unwilling to do so." The Domestic Producers therefore urged, in their comments on the Redetermination on Remand, that "[t]he time for consultations and for Commerce to act should . . . be declared over." Plaintiffs' Brief at 12.

In contrast, as it has from the start, the Government maintains that the Commerce Department complied fully with all applicable notice, comment and consultation requirements. *See, e.g.*, *Bethlehem II*, 25 CIT at 904–05, 159 F. Supp. 2d at 739–40 (and authorities cited there); *Bethlehem III*, 28 CIT at ____ , 316 F. Supp. 2d at 1315; Redetermination on Remand at 5, 7–11, 28, 31 ("Commerce has given petitioners a full opportunity to express their views and to make known their objections to the Agreement"). However, it is not enough to prove that the agency solicited and received comments from the Domestic Producers before executing the Suspension Agreement. As the Government has previously conceded, the agency must also give those comments meaningful consideration. *See Bethlehem II*, 25 CIT at 907, 159 F. Supp. 2d at 743 (*citing* Oral Argument Tr. at 44–46). In addition, the agency must engage the Domestic Producers in good faith consultations, in a timely fashion.[14] Given the timeline on which the agency was operating, that was virtually impossible here.

Though it has no one but itself to blame, the Commerce Department found itself engaged in a headlong race against time – rushing to complete both the Suspension Agreement and the agency's Final Determination.[15] As a purely practical matter, the clock effectively refutes any suggestion that the agency gave the Domestic Producers' comments the meaningful consideration required by the statute – a point reinforced by the administrative record, which initially was essentially devoid of affirmative evidence "to indicate that Commerce even reviewed – much less considered or responded to – the petition-

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[14] In addition to the consultation requirements of 19 U.S.C. § 1671c(e) (quoted above), which govern all suspension agreements under both subsections (b) and (c), there are additional consultation requirements which apply to quantitative restriction agreements such as the Suspension Agreement at issue here. *See* 19 U.S.C. § 1671c(d)(1).

Throughout this action, the Government has persisted in conflating Commerce's notice-and-comment obligations with its consultation obligations. And, to some extent, the Government has also conflated its consultation obligations under one part of the statute with its consultation obligations under another part. However, the statute is clear: Commerce's consultation obligations are separate and distinct from (albeit related to) its notice-and-comment obligations. *See generally Bethlehem II*, 25 CIT at 908 n.26, 159 F. Supp. 2d at 743 n.26; *Bethlehem III*, 28 CIT at ____ , 316 F. Supp. 2d at 1317. And, as discussed immediately above, the statute imposes several separate and distinct consultation obligations as well.

[15] As *Bethlehem II* noted, there can be no doubt that "the tandem tasks of both finalizing the [agency's] Final Determination and determining whether to suspend the investigation in fact did tax Commerce personnel to the limit." *Bethlehem II*, 25 CIT at 906 n.24, 159 F. Supp. 2d at 742 n.24.

Indeed, Commerce promulgated the agency regulations here at issue to significantly advance the deadlines for initialing and signing suspension agreements to avoid precisely the dilemma presented here – the "enormous burden on the parties and on the Department" inherent in the simultaneous consideration of a suspension agreement and preparation of a final determination. *Id. (quoting* Antidumping Duties; Countervailing Duties, 61 Fed. Reg. 7,308, 7,316 (Dep't Commerce Feb. 27, 1996)).

ers' written comments" before concluding the suspension agreement. *See Bethlehem II*, 25 CIT at 905, 159 F. Supp. 2d at 740.

Nor does the Commerce Department claim that it made one single change to the proposed agreement to reflect the concerns expressed in the Domestic Producers' comments. Indeed, it is undisputed that the agency failed even to correct any of the numerous typographical errors and erroneous cross-references in the proposed agreement, which the Domestic Producers pointed out in their comments. *See Bethlehem II*, 25 CIT at 907 n.25, 159 F. Supp. 2d at 743 n.25; *Bethlehem III*, 28 CIT at ___ , 316 F. Supp. 2d at 1311. That fact is silent (and damning) testimony to the press of time under which the agency was operating, and – particularly in the totality of the circumstances – calls into question how carefully and by whom (perhaps even whether) the Domestic Producers' comments were read before the Suspension Agreement was executed. At a bare minimum, the agency's skin-of-its teeth timing belies any argument that the Domestic Producers' comments were carefully analyzed or given serious consideration – much less that the Agreement was the subject of meaningful, good faith consultations – before the Commerce Department executed the Agreement.[16]

Bethlehem III accorded the Commerce Department "one final opportunity to engage in further consultations with the Domestic Producers," and emphasized that – if it were, in fact, even possible for the agency to remedy *post hoc* its violation of the Domestic Producers' right to *pre-agreement* consultations (a question on which judgment was reserved) – Commerce would be required to "give meaningful consideration to *terminating, abandoning or revising* the Agreement, in light of the Domestic Producers' comments and the agency's consultations; and that consideration must be sufficiently documented in the administrative record to enable a court to review the agency's action and satisfy itself that the agency's consideration of options was, indeed, meaningful." *Bethlehem III*, 28 CIT at ___ , 316 F. Supp. 2d at 1319 (emphasis added).

Instead, the agency's Redetermination on Remand includes little more than a chronology of contacts with the Domestic Producers. *See* Redetermination on Remand at 6–11, 31–33. The record on remand

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[16] *Bethlehem III* disposed of the Domestic Producers' more technical challenges to the Commerce Department's analysis of their comments on remand. *See Bethlehem III*, 28 CIT at ____ , 316 F. Supp. 2d at 1316–17 (addressing, *inter alia*, Domestic Producers' arguments that Commerce failed to respond to a number of their comments, and "flatly rejected every single one").

However, *Bethlehem III* did not reach the fundamental question whether a *post hoc* analysis of a petitioner's comments effectively remedies the agency's violation of the statute's procedural requirement that comments be considered *before* an agreement is executed. *See generally Bethlehem III*, 28 CIT at ____ , 316 F. Supp. 2d at 1319 (observing that, while "it is clear that the Domestic Producers have been deprived of certain procedural rights accorded them by the statute," it is "entirely unclear . . . whether those deprivations can be effectively remedied").

is barren of evidence that the agency complied with the court's instructions to "give meaningful consideration to terminating, abandoning or revising the Agreement" – with the exception of Commerce's bald assertions that it "has meaningfully consulted with petitioners and considered the possibility of termination," but "has concluded not to terminate the Agreement" since the Agreement "[has] not been violated and meets the requirements" of the statute. *See* Redetermination on Remand at 31, 33. As a procedural matter, self-serving, conclusory statements such as those cannot constitute a record sufficient to enable a court to "satisfy itself that the agency exercised a reasoned discretion" in reaching its determination. *See Greater Boston Television Corp. v. Federal Communications Comm.*, 444 F.2d 841, 850 (D.C. Cir. 1971).

Moreover, as *Bethlehem III* suggested, Commerce's approach to notice-and-comment and consultation is not only procedurally defective; it is substantively flawed as well. *See Bethlehem III*, 28 CIT at ___ , 316 F. Supp. 2d at 1318–19. Ordered to consider whether the Agreement should be modified or rescinded in an effort to cure (if possible) the agency's failure to comply with the procedural requirements of the statute before the Agreement was executed, Commerce responded that it "has concluded not to terminate the Agreement" because it "[has] not been violated and meets the requirements" of the statute. See Redetermination on Remand at 31, 33. That is not the proper standard.

In short, Commerce has continued to view the Agreement through the rear-view mirror – treating it as a "done deal." Commerce's perspective may be understandable, under the circumstances. But, as *Bethlehem III* observed, any dilemma that the agency has confronted is one of its own making:

> Due to its own failure to allow itself sufficient time to consult meaningfully with the Domestic Producers before entering into the Suspension Agreement, Commerce may well now feel trapped between a rock and a hard place. Although it has sought (however belatedly) to consult with the Domestic Producers, it (at least arguably) cannot repudiate the Agreement, or even revise it without the consent of the Brazilian Government. Under these circumstances, it is perhaps not surprising that Commerce's general tenor throughout these proceedings has been to minimize or dismiss the Domestic Producers' comments and concerns.

Bethlehem III, 28 CIT at ___ , 316 F. Supp. 2d at 1318.

Given the procedural posture of this case, it is now (mercifully) unnecessary to decide whether there is any action that the agency could take at this time that would effectively remedy *post hoc* its violation of the Domestic Producers' statutory right to *pre-agreement* consultations. But, clearly, that violation could not be cured by applying the standard that Commerce articulated here. As *Bethlehem III* observed:

> [D]ue to the unique posture of this case, Commerce now necessarily views the Domestic Producers' comments through the prism of an *executed* Agreement by which it is bound, and rejects their concerns because (according to Commerce) they do not reflect either a violation of the statute, or a violation of the Agreement (which would justify its termination). . . . There can be little doubt that this is a very different – and much more rigorous – standard for comments than that which Commerce has applied in other cases, where it has consulted petitioners in advance.

Bethlehem III, 28 CIT at ___ , 316 F. Supp. 2d at 1319.

The two-part standard that Commerce applied in this case – *i.e.*, that the terms of the suspension agreement (a) meet the requirements of the statute, and (b) have not been violated – may be a standard that properly could be applied to justify an agency decision not to terminate an agreement that was entered into in full compliance with the procedural requirements of the statute. But the Agreement in this case is not such an agreement.

The standard articulated by Commerce is far too lenient where, as here, the agency failed to accord the Domestic Producers their procedural rights *before* signing the agreement. In such a case, Commerce can cure its error – if at all – only by seeking to "turn back the clock" and to now consider how it would have modified the draft Agreement (and, indeed, whether it would have entered into the Agreement at all) if – in the fullness of time, *before* signing the Agreement – it had engaged in meaningful, good faith consultations with the Domestic Producers and had given careful consideration to their comments, as the statute requires.

As *Bethlehem III* noted:

> One can only speculate what the Suspension Agreement would have looked like had Commerce allowed itself sufficient time to confer in advance with the Domestic Producers in order to ascertain their concerns, and then to negotiate with the Brazilian Government in an effort to resolve them. Maybe timely consultations and negotiations would have yielded a suspension agreement acceptable to the Domestic Producers (as such consultations and negotiations have in all other cases); maybe there would have been no agreement at all. In any event, it is highly unlikely that – had Commerce consulted with the Domestic Producers in a timely fashion (as the statute requires) – any resulting agreement would have been identical in every respect to the Agreement now in place.

Bethlehem III, 28 CIT at ___ , 316 F. Supp. 2d at 1318–19 (footnote omitted).

B. *Extraordinary Circumstances/"Beneficiality"*

Just as the timing of the Agreement here prejudiced Commerce's ability to comply with the *procedural* requirements of the suspension agreement statute, it had equally grave implications for certain of the statute's *substantive* requirements. The so-called "beneficiality" requirement is a case in point.

As summarized in section II above, subsection (c) agreements (like the Suspension Agreement here) are limited to cases involving "extraordinary circumstances" – that is, circumstances in which, *inter alia*, "suspension of an investigation will be *more beneficial to the domestic industry* than continuation of the investigation." 19 U.S.C. §§ 1671c(c)(1), 1671c(c)(4)(A) (emphasis added).

As section II explains, Congress intended suspension agreements would be used only rarely and, in any event, *early in an investigation* – when the intrinsic benefits inherent in an agreement would include the avoidance of substantial costs at the administrative and appellate levels by all parties, as well as the availability of early and certain (even if different, or arguably less complete) relief for the domestic industry.[17] Commerce's own regulations are to the same effect.

In this respect, suspension agreements have been aptly analogized to settlement agreements used in general civil litigation. *See, e.g.*, *Bethlehem II*, 25 CIT at 896, 159 F. Supp. 2d at 731–32 (*citing*, *inter alia*, 125 Cong. Rec. 20,168 (1979), noting that members of Congress analogized suspension agreements to settlement agreements in general civil litigation). Early in a civil case, both parties have incentives to settle, and both parties face uncertainty. As a general matter, as litigation progresses, the parties' "sunk costs" mount (and thus the price tag on settlement increases), and the parties' uncer-

[17] "In authorizing the use of suspension agreements in appropriate countervailing duty cases, Congress recognized their 'importance . . . to both importers and domestic industry as *a means of achieving the remedial purposes of the law in as short a time as possible and with a minimum expenditure of resources by all parties involved*.' " *Bethlehem II*, 25 CIT at 898, 159 F. Supp. 2d at 733 (*quoting* H. Rep. No. 96–317, at 53 (1979)) (emphasis supplied).

See S. Rep. No. 96–249, at 54, 1979 U.S.C.C.A.N. at 440 (touting suspension agreements as a means of "permit[ting] *rapid* and pragmatic resolutions of countervailing duty cases") (*quoted in Bethlehem II*, 25 CIT at 898, 159 F. Supp. 2d at 733) (emphasis added). *See also* H. Rep. No. 96–317, at 55, 65 (including, among the advantages of subsection (c) suspension agreements, "the *expenses saved* because of *prompt settlement* of a case" and "the *certainty of prompt relief*") (*quoted in Bethlehem II*, 25 CIT at 898 n.10, 159 F. Supp. 2d at 733 n.10) (emphasis added); Statements of Administrative Action for Trade Agreements Act of 1979, H.R. Doc. No. 96–153, Part II at 402, *reprinted in* 1979 U.S.C.C.A.N. 665, 675 (emphasizing that the advantages of subsection (c) agreements include "the value of *settling the case quickly*" and "the *certainty* of *prompt relief*") (*quoted in Bethlehem II*, 25 CIT at 898 n.10, 159 F. Supp. 2d at 733 n.10) (emphasis added).

tainty as to the outcome of the case diminishes (as they get a better "feel" both for the probability that they will prevail at trial, and for the range of money damages that could be awarded).

Thus, early in a case, an injured party has an incentive to settle because, *inter alia*, (a) it has relatively little "feel" for how much it may be awarded at trial (and, indeed, there is at least a possibility that it will be awarded nothing at all); and (b) it can avoid most, if not all, of the costs of litigation. An early settlement – ensuring an injured party at least some measure of relief – may thus be attractive (even though the relief is less than the party might have received at trial), because (a) the relief is immediate; (b) the relief is certain (*i.e.*, the injured party avoids the risk that it will be found entitled to no relief at all, or to less relief than that for which it settled); and (c) the relief is not diminished by the expense of litigation. Civil litigants – by definition – "settle" their cases (if at all) *before* the jury returns its verdict (and, often, well before the case even goes to trial). But that is not what happened here.

Here, it is as though the jury returned its verdict (*i.e.*, the Commerce Department completed its investigation and rendered its Final Determination), but the plaintiffs inexplicably then decided to settle for *less* than the amount of the jury's verdict – except that, of course, here the "plaintiffs" (*i.e.*, the Domestic Producers) were not even a party to the "settlement."[18]

Given the timing in this case, the Domestic Producers – as a practical matter – had little or nothing to gain by the Suspension Agreement. Because the Suspension Agreement was executed on the deadline for the issuance of Commerce's Final Determination, there was no "uncertainty of relief." As a practical matter, the Domestic Producers knew *precisely* what relief they would have received under a countervailing duty order, and the "benefits" accorded to them under the Suspension Agreement paled by comparison. Moreover, because the Suspension Agreement was executed on the deadline for the issuance of Commerce's Final Determination, the "benefits" accorded the Domestic Producer under the Suspension Agreement were not – in any real sense – more immediate than the relief that they would have received under an order. Further, because the Commerce Department entered into the Suspension Agreement at the very end of the investigation, the Domestic Producers were not spared the costs

[18] *See* 125 Cong. Rec. 20,168 (1979) (in a colloquy immediately preceding vote on proposed suspension agreement statute, Senator Heinz distinguished suspension agreements from the settlement agreements used in general civil litigation, emphasizing that the domestic industry is not a party to a suspension agreement: "In fact there is a major difference [between suspension agreements and settlement agreements in general civil suits]. In a suit any settlement is between plaintiff and defendant. In this bill any settlement is between defendant and judge, a very different relationship, especially when the judge is not always neutral.").

of investigation and litigation. (Indeed, *over and above* the full costs of completing the countervailing duty investigation, they were also forced to incur the costs of analyzing and commenting on the draft Suspension Agreement – on an exigent basis, no less.) *See generally Bethlehem II*, 25 CIT at 916 n.42, 159 F. Supp. 2d at 751 n.42 (addressing parties' respective arguments on lack of benefits of "early settlement" in this case).

In short, by choosing to enter into the Suspension Agreement here *at the last possible moment* permitted by the statute, the Commerce Department not only flouted its own regulations governing the timing of such agreements (and violated the procedural requirements of the statute), it also deprived itself of the ability to point to the availability of early relief and savings to all parties as benefits of the Agreement.[19] *See generally* Plaintiffs' Brief at 33–34.

In an attempt to build a case that the Agreement is "more beneficial" to the Domestic Producers than would be a countervailing duty order, but unable to rely on any of the benefits inherent in a suspension agreement reached early in an investigation, Commerce has been reduced to pointing to a laundry list of asserted "benefits," which the Domestic Producers emphatically reject. Compare Redetermination on Remand at 13–16, 34–43 *with* Plaintiffs' Brief at 23–34 *and* Plaintiffs' Reply Brief at 9–14.

In light of the procedural posture of the case, there is no need to here analyze separately each of the asserted "benefits" that Commerce has identified. Suffice it to say that at least some of the agency's claims of "benefit" are strained. For example, in its Redetermination on Remand, Commerce continues to tout the Agreement's three-month "moratorium" on imports,[20] emphasizing that such relief would be beyond the scope of a countervailing duty order, and arguing that the Agreement is thus "more beneficial" than an order. *See, e.g.*, Redetermination on Remand at 13–14, 21–24, 40–41. But the mere fact that a suspension agreement affords an industry some particular form of relief that would not be available under an order

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[19] It also seems likely that – if Commerce had engaged in the meaningful, good faith consultations with the Domestic Producers required by the statute *before* concluding the Agreement – the Agreement (if there was one) would have looked at least somewhat different, and might have incorporated other, additional "benefits" to the Domestic Producers to which Commerce could now point. *See generally* 25 CIT at 906 n.24, 159 F. Supp. 2d at 742 n.24 (noting that, in the course of oral argument, counsel for the Government conceded that the press of time constrained Commerce's ability to consult with the petitioning Domestic Producers before executing the Agreement).

As *Bethlehem II* noted, nothing in the parties' submissions discloses why Commerce failed in this case to adhere to the timeline established in its own regulations. *Bethlehem II*, 25 CIT at 906 n.24, 159 F. Supp. 2d at 742 n.24.

[20] Specifically, under the Agreement, imports of Brazilian steel were excluded from the United States from July 19, 1999 through September 30, 1999. *See* Suspension Agreement, 64 Fed. Reg. at 38,798.

cannot, as a matter of logic, mean that the agreement is necessarily "more beneficial" to the domestic industry. That particular form of "relief" may be of little interest or benefit to the industry at issue, particularly compared to the relief available under a countervailing duty order. Apples-to-oranges comparisons are dangerous. When you're making orange juice, apples hold little appeal.

Moreover, the extent of any purported alternative "relief" must be considered as well. Commerce here relies on a three-month moratorium. But there is no apparent magic to three months (as opposed to a shorter, or longer, period). What about one day? A one-day moratorium is "relief" that is not available under a countervailing duty order. Would Commerce try to argue with a straight face that a *one-day* moratorium would suffice to make a suspension agreement "more beneficial" than an order?

Commerce's inability to point here to benefits of "early settlement" – early and certain relief for the domestic industry, and cost savings for all parties – as "benefits" to the Domestic Producers seriously undermines the agency's ability to establish the "extraordinary circumstances" required under the statute, and has left the agency grasping at straws. The infirmities in its case on "beneficiality" are both illustrated and exacerbated by the Domestic Producers' opposition to (and the wholesale absence of any affirmative support for) the Suspension Agreement.

Emphasizing that they speak for a majority of the domestic industry,[21] the Domestic Producers have argued in this action that Commerce cannot find the Agreement to be "more beneficial" to the domestic industry if the Domestic Producers themselves oppose it. *See Bethlehem II*, 25 CIT at 912–13, 159 F. Supp. 2d at 747–48 (and authorities cited there); *Bethlehem III*, 28 CIT at ____ , 316 F. Supp. 2d at 1320 (and authorities cited there). Although *Bethlehem III* rejected the suggestion that – as a matter of law – the statute's

[21] In its Redetermination on Remand, Commerce repeatedly seeks to minimize the significance of the Domestic Producers' opposition, asserting that "[t]he stated opinions of the petitioners, however, cannot be considered representative of the opinions of all petitioners, let alone of the domestic industry as a whole." Redetermination on Remand at 40. *See also id.* at 13 ("These stated opinions of the five petitioners, however, cannot be considered representative of all the parties to this proceeding, nor reflective of the entire hot-rolled flat-rolled carbon-quality steel industry.").

Contrary to Commerce's implication, the uncontroverted evidence of record establishes that the plaintiff Domestic Producers constitute roughly half of the industry overall, and well over half of the industry that participated in the underlying investigation. *See* footnote 1, *supra*.

Moreover, it is noteworthy that, "[i]n the companion case challenging the suspension agreement in the related antidumping proceeding, the Government and the Brazilian Exporters made much of the fact that seven of the petitioning U.S. steel producers wrote a letter supporting certain aspects of that agreement. *In contrast, none of the petitioners here broke ranks.*" *Bethlehem II*, 25 CIT at 913 n.33, 159 F. Supp. 2d at 748 n.33 (citation omitted) (emphasis added).

"beneficiality" requirement requires the petitioning industry's consent for a subsection (c) agreement, it sounded a note of caution:

> To say that the statute does not require petitioners' consent to a subsection (c) agreement, however, is not to say that their opposition is irrelevant. Even if petitioners' consent is not *per se* required, the extent of the domestic industry's consent – or opposition – logically must bear on (and, arguably, itself constitutes evidence as to) whether or not a suspension agreement is, in the words of the statute, "more beneficial to the domestic industry." *When Commerce elects to enter into a subsection (c) agreement over the objections of a majority of the industry, it does so at its peril – particularly where, as here, it cannot point to "early settlement" as a benefit.*

Bethlehem III, 28 CIT at ____ , 316 F. Supp. 2d at 1321–22 (emphasis added). As *Bethlehem III* concluded, "Commerce is being far too cavalier here. It cannot dismiss the fact that a majority of the industry affirmatively and vehemently opposes the Suspension Agreement, and no one – not a single domestic producer . . . – affirmatively supports it."[22] 28 CIT at ____ , 316 F. Supp. 2d at 1322.

It is indeed telling that – as section II above notes – Commerce had obtained the domestic industry's consent to all subsection (c) suspension agreements, prior to this one.[23] In the final analysis, although the suspension agreement statute grants Commerce the authority to make the "more beneficial" determination, any such determination must be supported by substantial evidence on the record and otherwise in accordance with law. It is not at all clear that Commerce could ever justify making a "more beneficial" finding in the face of so much industry opposition – particularly where, as here, there is no affirmative industry support, and there are no "benefits" associated with the timing of the agreement.

IV. *Conclusion*

This case tests the absolute outer limits of Commerce's authority to enter into suspension agreements. If Commerce can enter into a subsection (c) suspension agreement under circumstances such as

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[22] Commerce's inability to establish, and document for the record, at least *some* affirmative support from domestic producers may be simply yet another symptom of the extreme time pressure under which the agency was operating.

[23] Of course, as *Bethlehem III* pointed out, none of Commerce's prior subsection (c) agreements involved the exigencies present in this case (and in the companion antidumping case). "[T]hus, [in those other cases], there was presumably the opportunity for greater consultation and negotiation between Commerce and the domestic interests on the one hand, and between Commerce and the foreign interests on the other hand." *Bethlehem III*, 28 CIT at _____ n.13, 316 F. Supp. 2d at 1318 n.13. Obviously, adequate time for meaningful, good faith consultation enhances the likelihood of negotiating an agreement that both enjoys the support of the domestic industry and is acceptable to the foreign interests at issue.

those presented here – at the eleventh hour, where there are no benefits of "early settlement," and over the vehement objections of the majority of the domestic industry, with no affirmative domestic industry support whatsoever – the agency's authority may be, as a practical matter, virtually unconstrained.

Here, more than five years after the commencement of this action, Commerce still had yet to "directly address the extent of the opposition of the domestic industry" to this Agreement. Nor did the agency ever "articulate precisely why its judgment as to the best interests of the industry should be credited over that of [the majority of those in the industry]" – that is, the judgment of the men and women in the trade "who live and breathe the industry every day, and whose futures and fortunes are inextricably tied to it." *Bethlehem III*, 28 CIT ____ , 316 F. Supp. 2d at 1322.

The administrative record is also conspicuously silent on the reason behind the extraordinary, last-minute timing of the Agreement – the need for exigency. However, as supplemented on remand, the record does offer some insight into the Agreement's *raison d'etre:*

> In mid-1997, a severe financial crisis spread through many economies in Asia and led to the region's worst economic downturn in thirty years. Within a year, the financial contagion had also spread to Russia and Brazil. In 1998, the Brazilian currency began to depreciate sharply. The value of the *real* with respect to the U.S. dollar fell 8 percent during that year, then plunged another 30 percent in the one-half year before the signing of the Agreement. The country's financial crisis threatened to spill over to other economies in the region. The financial crisis that began in Asia and spread to Brazil was an unprecedented event that took place just prior to the time during which the Agreement was being considered. *In part as a result of the worsening economic circumstances in Brazil, and the concern that the country's financial crisis could spread to other economies, Commerce sought to foster and support economic stability in Brazil.*
>
> Brazil has a significant steelmaking capacity that is an important sector of the Brazilian economy. By permitting Brazilian hot-rolled steel manufacturers to continue to sell hot-rolled steel in the United States, albeit within the significant disciplines of a suspension agreement, *the Agreement fosters economic stability in an important sector of the overall Brazilian economy.*

Redetermination on Remand at 26 (emphasis added). *See also id.* at 29 (emphasizing that "Brazil is a major U.S. trading partner, the largest Latin American economy, and an economy that is facing economic instability").[24]

The suspension agreement statute provides that, in evaluating a proposed subsection (c) agreement involving quantitative restrictions, the Commerce Department must consider whether the proposed agreement is in the public interest. The three factors to be weighed in determining the public interest include – in addition to, *inter alia*, "the relative impact on the competitiveness of the domestic industry . . . , including any such impact on employment and investment in that industry" – "the relative impact on the international economic interests of the United States." 19 U.S.C. § 1671c(a)(2)(B).

Commerce was thus required by statute to consider the "international economic interests" of this country in evaluating the proposed agreement at issue here. But nothing in the statute suggests that Congress intended "international economic interests" to trump other statutory criteria. Nothing in the statute suggests that Congress intended to permit "beneficiality" to the domestic industry to be sacrificed on the altar of foreign policy or politics. Indeed, to the contrary, as section II above explains, Congress enacted the suspension agreement statute for the express purpose of imposing on the Executive Branch "strict limits on discontinuing or suspending investigations pursuant to deals with foreign governments." *See generally Bethlehem II*, 25 CIT at 896–98, 159 F. Supp. 2d at 733–34 (*quoting* 125 Cong. Rec. 20,163 (1979)).

As *Bethlehem III* observed, this case ultimately leaves one "with a distinctly uneasy sense that there is more here than meets the eye – that not all the cards are on the table." *Bethlehem III*, 28 CIT ___ , 316 F. Supp. 2d at 1322. Fortunately for Commerce, the procedural posture of the case spares it from any deeper probing of the bases for its actions in this case. Perhaps time will prove this case to be anomalous, an aberration of agency practice.[25]

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[24] That language is taken verbatim from Commerce's prior remand results. *See* Amended Final Redetermination Pursuant to Court Remand (March 7, 2002) at 14–15, 36.

Significantly, the Public Interest Memorandum that Commerce prepared in July 1999 to support its initial suspension determination alluded only vaguely to the benefits that the Brazilian Exporters were expected to reap from the Agreement. *See* Memorandum from ITA Office of Policy to Ass't Sec. For Import Administration (July 6, 1999) (Supp. P.R. Doc. No. 2) ("Public Interest Memorandum"). Only more recently has Commerce expressly acknowledged those benefits, albeit casting them as integrally tied to "the international economic interests of the United States."

[25] There is, however, at least one case pending before the court in which the plaintiffs allege that Commerce's failure to comply with the deadlines set in its own regulations governing suspension agreements constitutes reversible error. *See* Complaint at ¶¶ 16–23 *and* Memorandum of Points and Authorities in Support of San Vicente Camalu's Motion for Judgment on the Agency Record at 11–20, *San Vicente Camalu SPR de RI v. United States*, No. 02–00811 (CIT filed Dec. 17, 2002).

It is worth noting that, in the future, the Commerce Department would be well advised to honor the letter and the spirit of both the suspension agreement statute and its own regulations, including those provisions governing the timing of such agreements. Any failure to do so may cast grave doubt on the legitimacy of the agency's exercise of its authority, and raise the spectre of its abuse for improper purposes, risking not only judicial review but Congressional scrutiny as well.

An Order of Dismissal will enter accordingly.

Slip Op. 05–5

Before: Judge Judith M. Barzilay

WESLO, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 95–01332

[Plaintiff's Motion for Summary Judgment denied; Defendant's Cross-Motion for Summary Judgment granted.]

Decided: January 24, 2005

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Steven P. Florsheim*), (*Robert F. Seely*), for Plaintiff.

Peter D. Keisler, Assistant Attorney General; (*Barbara S. Williams*), Attorney in charge, International Trade Field Office, Civil Division, Department of Justice, Civil Litigation Branch; *Beth C. Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for Defendant.

OPINION

BARZILAY, JUDGE:

Before the court are Cross-Motions for Summary Judgment from Plaintiff Weslo Inc. ("Weslo") and the United States Department of Customs and Border Protection ("Customs" or "Defendant" or "the government"). This opinion addresses the remaining three of the original four claims asserted by Plaintiff.[1] Weslo requests that the court order Customs to reliquidate the subject entries at a duty-free rate. Plaintiff bases this request on what it argues was Customs' arbitrary, capricious and illegal refusal to either liquidate the entries as entered (duty-free) or to delay the effective date of ruling letter

[1] This Court addressed Plaintiff's 19 U.S.C. § 1625(c) claim and severed and dismissed seven entries covered by the original action in *Weslo Inc. v. United States*, 25 CIT 561, 167 F. Supp. 2d 1348 (2001).

HQ 089891 that applied a 4.6% *ad valorem* duty rate to the subject merchandise. Defendant argues it was not required to apply the duty-free rate because no established and uniform practice ("EUP") of liquidating the subject merchandise at the duty-free rate existed, or alternatively, if an EUP did exist, it was terminated prior to the entry of Weslo's merchandise. Defendant also argues that it did not abuse its discretion when denying Plaintiff's request to delay the effective date of ruling letter HQ 089891 because Plaintiff failed to meet the requirements of the applicable regulation, 19 C.F.R. § 177.9(e).

This court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1996) as Plaintiff's valid protests were denied by Customs. Summary judgment is appropriate because no genuine issues of material fact exist. USCIT R. 56(d). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505; 91 L. Ed. 2d 202 (1986). Because the court finds that any established and uniform practice of liquidating the subject merchandise at a duty-free rate was terminated by the HTSUS, and that Customs did not abuse its discretion in deciding not to delay the effective date of its ruling letter, as explained below, Plaintiff's Motion for Summary Judgment is denied and Defendant's Motion is granted.

I. Background

Plaintiff imported merchandise consisting of electronic speedometer/tachometers (other than bicycle speedometers), which were then incorporated into stationary exercise equipment such as treadmills. Plaintiff cites to a long history of having its own or similar merchandise liquidated by Customs at a duty-free rate, as far back as June 1980. Prior to the adoption of the HTSUS a number of Plaintiff's entries were imported and classified under TSUS 711.98 ("other speedometers and tachometers"), a duty-free provision.[2] Plaintiff also misclassified a number of other entries, was charged a duty, protested, and was able to reclassify those entries under the duty-free classification. *Pl.'s Ex.* 2. After the adoption of the HTSUS, Plaintiff was advised by its Customs broker that its imported parts would be classifiable under a dutiable provision of the HTSUS. Plaintiff then filed 27 entries of the subject merchandise under HTSUS subheading 9017.80.00 ("other measuring instruments"), a dutiable provision, and Customs liquidated these entries as entered. Plaintiff also claims that it was contacted by the Customs Import Specialist at the port of Los Angeles and instructed that the electronic speedometers/tachometers for exercise equipment should be

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[2] Both the harmonized tariff schedules of the United States (HTSUS) and the tariff schedules of the United States (TSUS) are classification schemes for identifying merchandise by its characteristics so that the proper duty rate can be assessed. The HTSUS replaced the TSUS effective January 1, 1989.

entered under HTSUS subheading 9029.20.40, a duty free provision. *Pl.'s Ex.* 4. Plaintiff thereafter protested the classification of its 27 entries, claiming that correct classification was 9029.20.40 HTSUS, a duty-free provision covering "other speedometers and tachometers," which Customs then approved. *Pl.'s Ex.* 3. Plaintiff states that it then, between January 1989 and December 1990, filed 181 entries that were classified under HTSUS subheading 9029.20.40, all of which were liquidated by Customs. *Pl.'s Ex.* 5.

In October 1990, however, Plaintiff received Notices of Action from Customs indicating that in the absence of further information, certain models including those at issue here would be liquidated under a dutiable subheading. *Pl.'s Ex.* 5. Also, on January 7, 1991, Customs issued Notices of Proposed Action to Plaintiff stating that merchandise similar to that at issue in this case was misclassified under 9029.20.40. Soon thereafter, Plaintiff began to import the specific merchandise at issue in this action. Between January 1991 and September 1993, Plaintiff made 234 entries.[3] Plaintiff made 10 additional entries between December 9 and 15, 1993. In June 1991, Plaintiff requested a binding ruling that its imported electronic monitoring equipment for exerciser equipment other than bicycles (model numbers ECT-61, ECT-50, ECT-12) was classifiable under HTSUS subheading 9029.20.40. Pending this ruling request, Customs suspended liquidations of Plaintiff's entries of the subject merchandise. On September 15, 1993 Customs issued HQ 089891 in response to Plaintiff's request, ruling that the subject merchandise was classifiable under HTSUS subheading 9506.91.00 ("Articles and equipment for general physical exercise, gymnastics or athletics; parts and accessories thereof "), dutiable at a rate of 4.64% *ad valorem*. On April 1, 1994, Customs liquidated the suspended entries, assessing the 4.64% *ad valorem* duty rate. Weslo protested this action and Customs denied its protests.

II. Discussion

Plaintiff argues that when it entered the subject merchandise, Customs had an established and uniform practice of classifying the imported speedometers and tachometers for exercise equipment under a duty-free provision of the TSUS and the corresponding provision of the HTSUS. Plaintiff further argues that Customs' issuance of HQ 089891 terminated the EUP, subjecting this reclassification ruling to the notice requirements of 19 U.S.C. 1315(d) and 19 C.F.R. 177.10(c)(1). Thus, Plaintiff argues that the higher duty rates established by HQ 089891 should not have been applied to its suspended entries. This court reviews Customs' decision to apply the higher duty rates according to a clearly erroneous standard. *Hasbro Indus-*

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[3] Seven entries were subsequently dismissed in *Weslo*, 167 F. Supp. 2d at 1353.

tries v. United States, 879 F.2d 838 (Fed. Cir. 1989). Alternatively, Plaintiff argues that Customs abused its discretion under 19 C.F.R. 177.9(e) by not delaying the effective date of HQ 089891 long enough to liquidate Plaintiff's merchandise duty-free as entered. Where an agency interprets its own regulations, the APA provides that agency determinations shall be held invalid where they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. Under this standard, it is clear that the agency's determination cannot be upheld where it fails to acknowledge applicable law or to demonstrate how it reaches its conclusions of law. *See Burlington Truck Lines Co. v. United States*, 371 U.S. 156, 168, 9 L. Ed. 2d 207, 83 S. Ct. 239 (1962) (holding that an agency determination must show a "rational connection between the facts found and the choice made").

A. Liquidation Pursuant to an Established and Uniform Practice

Plaintiff's first claim turns on whether an established and uniform practice of classifying Plaintiff's merchandise under a duty-free provision existed at the time Plaintiff entered the subject merchandise. Plaintiff argues that if an EUP did exist, pursuant to 19 U.S.C. 1315(d), Customs would have been required to liquidate the subject entries as entered. Section 1315(d) sets out the effective date of administrative rulings that result in higher duty rates. It states that

> No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling. . . . This subsection shall not apply with respect to increases in rates of duty resulting from the enactment of the Harmonized Tariff Schedule of the United States to replace the Tariff Schedules of the United States.

19 U.S.C. § 1315(d). The statute on its face bars the imposition and collection of increases in duties when an EUP exists taxing the particular imported goods at a lower rate, unless the higher rate has been fixed by an administrative ruling, notice of which has been given as provided in the statute. Such notice, however, is not required when the increased rate results from the enactment of the HTSUS. The corresponding regulatory provision provides

> (c) Changes of practice. Before the publication of a ruling which has the effect of changing an established and uniform practice and which results in the assessment of a higher rate of duty within the meaning of 19 U.S.C. 1315(d), notice that the prac-

> tice (or prior ruling on which that practice was based) is under review will be published in the Federal Register and interested parties will be given an opportunity to make written submissions with respect to the correctness of the contemplated change. . . .
>
> (e) Effective dates. Except as otherwise provided in § 177.12(e) or in the ruling itself, all rulings published under the provisions of this part will be applied immediately. If the ruling involves merchandise, it will be applicable to all unliquidated entries, except that a change of practice resulting in the assessment of a higher rate of duty or increased duties shall be effective only as to merchandise entered for consumption or withdrawn from warehouse for consumption on or after the 90th day after publication of the change in the Federal Register.

19 C.F.R. 177.10. Thus, where an established and uniform practice exists, Customs must publish Federal Register notice before the EUP is altered to effect a higher rate of duty than was levied under the EUP. Furthermore, where an EUP is altered to effect a higher rate of duty, Customs' ruling shall not apply to merchandise entered for consumption before the 90th day after Federal Register publication. Plaintiff argues that an EUP of applying a duty-free rate to the subject merchandise existed until this practice was altered by HQ 089891, which applied a higher rate of duty. Thus, Plaintiff argues that HQ 089891 cannot apply to the entries at issue in this action because they were entered for consumption before the 90th day after Federal Register publication.

Traditionally, an EUP is established by a finding of the Secretary of the Treasury that such a practice exists. In *Heraeus-Amersil, Inc. v. United States*, this Court held that the plaintiff could show an established and uniform practice by actual uniform liquidations, even though the Secretary of the Treasury had made no "finding" that such a practice existed. 8 CIT 329, 335, 600 F. Supp. 221, 226 (1984). The essence of such a *de facto* EUP is a determination by the court that Customs consistently classified a specific type of merchandise under a particular category of the tariff schedules prior to some distinct point in time. *See Atari Caribe, Inc. v. United States*, 16 CIT 588, 595, 799 F. Supp. 99, 106–07 (1992).

However, unlike in situations where the Secretary of the Treasury has made a finding that an established and uniform practice existed, an importer's claim based on an actual uniform practice may be extinguished by actual notice of the discontinuance of such practice instead of publication in the Federal Register. *See Heraeus-Amersil v. United States*, 9 CIT 412; 617 F. Supp. 89, 95 (1985) *aff'd* 795 F.2d 1575 (Fed. Cir. 1986) ("Adoption of plaintiff's position [that Customs was bound *ad infinitum* by a then-discontinued EUP unless Customs published notice of the change in classification practice] could lead to the absurd result of allowing importers to go back through the records, find long-discontinued EUPs and protest classifications accordingly. . . .''). Moreover, as the statute itself indicates, ''[section 1315(d)] will not apply with respect to increases in rate of duty *resulting from* the enactment of the HTSUS to replace the TSUS.'' 19 U.S.C. § 1315(d) (emphasis added). As interpreted in *Hemscheidt Corp. v. United States*, the words ''resulting from'' require a causal link between the enactment of the HTSUS and the new classification. 72 F.3d 868, 871–72 (Fed. Cir. 1995). Thus, where the enactment of the HTSUS requires an increase in the duty rate, the timing and notice requirements of section 1315(d) do not apply.

In the case at hand, Weslo points to Customs' history of liquidating or reliquidating the merchandise at issue or similar merchandise at the duty-free rate in support of its claim that an EUP existed until HQ 089891 was issued. Customs argues that no such uniform practice existed, that Weslo had notice that its merchandise was not classifiable under a duty-free provision before the merchandise at issue was imported, and finally that the enactment of the HTSUS mandated a new, dutiable classification.

The court notes from the outset that if, as Weslo argues, a *de facto* EUP existed during the 1980s, it must have survived the enactment of the HTSUS in order to be applicable to the entries at issue in this case. Assuming, *arguendo*, that Customs did have an established and uniform practice of liquidating Weslo's subject merchandise at a duty free rate, the court finds that this EUP was terminated well before Plaintiff imported the merchandise at issue in this action. Specifically, as Defendant points out, Legal Note 3 to Chapter 95 of the HTSUS states that

> . . . parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles.

HTSUS Ch. 95 Notes, N.3. The merchandise at issue in this action includes speedometers and tachometers for use in exercise equipment other than bicycles, and is therefore described by subheading 9506.91.00 (''Articles and equipment for general physical exercise, gymnastics or athletics; parts and accessories thereof'') as parts of sports equipment. Thus, according to Note 3, the subject merchandise cannot be classified under subheading 9029.20.40 (''Other speedometers and tachometers''), which is the successor tariff provision for TSUS item 711.98.20. *See* Continuity of Import And Export Trade Statistics After Implementation of the Harmonized Commodity Description and Coding System, Report to the President on Investigation No. 332–250 Under Section 332 of the Tariff Act of 1930, USITC Pub. 2051, p. 297. By contrast, the TSUS did not contain a comparable note. Therefore, while the subject merchandise was correctly classified under the TSUS subheading 711.98 ("Other speedometers and tachometers"), a duty-free provision, the enactment of the HTSUS required that the subject merchandise be classified under subheading 9506.91.00 by virtue of Legal Note 3 to Chapter 95 of the HTSUS, as Weslo's entries are comprised of speedometers and tachometers that are suitable for use solely or principally with exercise equipment. Because the increase in rate of duty applicable to Weslo's merchandise was a direct result of the enactment of the HTSUS to replace the TSUS, section 1315(d) and the corresponding regulations are inapplicable.

B. Customs' Discretion to Delay the Effective Date of HQ 089891

Weslo also claims that Customs abused its discretion in not delaying the effective date of HQ 089891 pursuant to 19 C.F.R. § 177.9(e). This regulation provides for a party affected by a Customs ruling letter to request that Customs delay the effect of that ruling letter for a period of up to 90 days. Specifically, it states

> Effect of ruling letters.
>
> (e) Ruling letters modifying past Customs treatment of transactions not covered by ruling letters – (1) General. The Customs Service will from time to time issue a ruling letter covering a transaction or issue not previously the subject of a ruling letter and which has the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions of either the recipient of the ruling letter or other parties. Although such a ruling letter will generally be effective on the date it is issued, the Customs Service may, upon application by an affected party, delay the effective date of the ruling letter, and continue the treatment previously accorded the substantially identical transaction, for a period of up to 90 days from the date the ruling letter is issued.
>
> (2) Applications by affected parties. In applying to the Customs Service for a delay in the effective date of a ruling letter described in paragraph (e)(1) of this section, an affected party must demonstrate to the satisfaction of the Customs Service that the treatment previously accorded by Customs to the substantially identical transactions was sufficiently consistent and continuous that such party reasonablely relied thereon in arranging future transactions. The evidence of past treatment by the Customs Service shall cover the 2-year period immediately prior to the date of the ruling letter, listing all substantially identical transactions by entry number . . . the quantity and value of merchandise covered by each such transaction . . . and the dates of final action by the Customs Service. The evidence of reliance shall include contracts, purchase orders, or other

> materials tending to establish that the future transactions were arranged based on the treatment previously accorded by the Customs Service.

19 C.F.R. § 177.9(e) (1993). The court notes that on its face, the regulation provides a wide degree of discretion to Customs, stating that it "may" delay the effective date of the ruling letter, and that an affected party must demonstrate "to the satisfaction of the Customs Service" that the treatment previously afforded was sufficiently consistent and continuous. *Id.* Customs, however, must be able to show a rational connection between the facts found and its ultimate decision. *See Burlington Truck Lines Co.*, 371 U.S. at 168.

Weslo argues that it relied on what it claims was Customs consistent liquidation or reliquidation of the subject merchandise or substantially similar merchandise during the years leading up to the issuance of HQ 089891. Weslo also cites to Customs' treatment of similar products produced by Weslo's competitors and to the advice offered by Customs import specialists as evidence that it relied on the expectation of duty-free treatment for its parts until HQ 089891 was issued. Additionally, Weslo argues that by denying its request for a delay, Customs effectively singled out its subject entries for "retroactive application" of the new ruling.

Customs responds by arguing that HQ 089891 cannot be considered a ruling letter as described by 12 C.F.R. § 177.9(e) because both HQ 087550 (February 28, 1991) and NY 836900 (March 13, 1989) had already addressed the issue covered by HQ 089891, and because HQ089891 did not modify the treatment previously accorded by Customs to substantially identical transactions. Customs also argues that in early 1989, there was no clear practice of classification of the subject merchandise; that in early 1991 Weslo was issued a Notice of Action indicating that classification under the duty-free provision was incorrect; and that Weslo failed to provide any contracts, purchase orders, or other evidence establishing that it had entered into unalterable contracts based on its reliance of duty-free treatment of its goods.

The court concludes that in the two-year period immediately preceding HQ 089891, the proper classification of Weslo's products was, at best, unclear. While Customs had liquidated or reliquidated Weslo's merchandise a number of times prior to HQ089891, 19 C.F.R. § 177.9(e) directs Customs to focus exclusively on the two-year period preceding the ruling letter. By this time, Weslo had numerous indications that its goods were not properly classified as duty-free, including the proposed Notice of Action issued in January 1991 and the enactment of the HTSUS, as discussed above. Furthermore, although Weslo provided the sworn deposition testimony of its Import Manager, Jeffrey Carmignani, it failed to provide specific documentary evidence of reliance in the form of contracts and purchase orders. Although this court may be sympathetic to Weslo's claim of reliance, the regulation clearly gives Customs' discretion to determine, to its own satisfaction, whether Weslo reasonably relied on the past treatment in "arranging future transactions." 19 C.F.R. § 177.9(e). Furthermore, where, as Customs has done here, the agency can show even a rational connection between the facts found and its decision, the court must defer to the agency's decision.

C. Conclusion

Because the increase in duty rates, from duty-free to 4.64% *ad valorem*, directly resulted from the enactment of the HTSUS to replace the TSUS, Plaintiff is unable to rely on the notice, timing and publication provisions of 19 U.S.C. § 1315(d) or the corresponding regulation, 19 C.F.R. 177.10. Furthermore, because the court finds that Customs' decision not to delay the effect of HQ 089891 pursuant to 19 C.F.R. § 177.9(e) was not arbitrary, capricious or an abuse of discretion, Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted.