

UNITED STATES COURT OF INTERNATIONAL TRADE

CERAMARK TECHNOLOGY, INC.

Plaintiff,

v.

UNITED STATES,

Defendant,

and

SGL CARBON LLC and
SUPERIOR GRAPHITE CO.,

Defendant-Intervenors.

Before: Donald C. Pogue,
Senior Judge

Court No. 13-00357

OPINION

[Action dismissed for failure to exhaust administrative remedies.]

Dated: May 1, 2015

Brian W. Stolarz, LeClairRyan, of Alexandria, VA, and Katherine A. Calogero, Sheppard, Mullin, Richter & Hampton LLP, of Washington, DC, for the Plaintiff.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were Joyce R. Branda, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Claudia Burke, Assistant Director. Of counsel was Jessica M. Link, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

R. Alan Luberd and Katherine E. Wang, Kelley Drye & Warren LLP, of Washington, DC, for the Defendant-Intervenors.

Pogue, Senior Judge: This action returns to court following redetermination on remand. Prior to remand, in its initial decision, the U.S. Department of Commerce ("Commerce") determined that Plaintiff, Ceramark Technology, Inc. ("Ceramark"), had circumvented the antidumping duty order on small diameter graphite electrodes ("SDGE") from the People's Republic of China ("PRC").¹ Ceramark challenged this decision as not in accordance with law and unsupported by a reasonable reading of the record evidence.² The court agreed in part, and remanded, ordering Commerce to consider important aspects of the record that weighed against Commerce's determination. Ceramark, Tech., Inc. v. United States, __ CIT __, 11 F. Supp. 3d 1317, 1323-25 (2014). During the remand, however, Ceramark did not file comments on Commerce's draft redetermination. Final Results of Redetermination Pursuant to Ct. Remand, ECF Nos. 50-1 (conf. ver.) & 51-1 (pub. ver.) ("Final Redetermination"), at 5. In

¹ [SDGE] From the [PRC], 78 Fed. Reg. 56,864, 56,864-65 (Dep't Commerce Sept. 16, 2013) (affirmative final determination of circumvention of the antidumping duty order and rescission of later-developed merchandise anticircumvention inquiry) ("Final Redetermination"), and accompanying Issues & Decision Memorandum, A-570-929 (Sept. 10, 2013) ("I & D Mem."); see also [SDGE] from the [PRC], 74 Fed. Reg. 8775 (Dep't Commerce Feb. 26, 2009) (antidumping duty order) ("SDGE Order")

² Mem. of P. & A. in Supp. of Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 24-1 (conf. ver.) & 25-1 (pub. ver.) ("Rule 56.2 Mem.").

that redetermination, Commerce again concluded that Plaintiff had circumvented the SDGE Order. Id. at 1. Defendant and Defendant-Intervenors now seek dismissal for failure to exhaust administrative remedies.³ Plaintiff argues that exhaustion is not required here because further comment would have been futile.⁴

Contrary to Plaintiff's arguments, as explained below, exhaustion was appropriate, not futile, because Commerce's remand redetermination involved new factual findings and a reweighing of all the record evidence upon which the agency's decision was based. Therefore, this action is dismissed for failure to exhaust administrative remedies.

BACKGROUND

This controversy stems from an antidumping duty order on SDGE from the PRC. That order covers "all [SDGE] of any

³ See Def.'s Resp. to Pl.'s Comments on the Remand Redetermination, ECF No. 61, ("Def.'s Resp."), at 4-6; Def.'s Sur-reply to Pl.'s Remand Comments, ECF Nos. 70 (conf. ver.) & 71 (pub. ver) ("Def.'s Surreply"); Def.-Intervenors' Resp. to Pl.'s Comments on the Dep't of Commerce's Redetermination, ECF Nos. 60 (conf. ver.) & 62 (pub. ver.) ("Def.-Intervenors' Resp."), at 11-12; Surreply Br. of Def.-Intervenor SGL Carbon LLC & Superior Graphite Co., ECF No. 69 ("Def.-Intervenors' Surreply").

⁴ Pl.'s Reply to Def. & Def.-Intervenors' Resps. to Pl.'s Comments on the Dep't of Commerce's Remand Redetermination, ECF Nos. 67 (conf. ver.) & 68 (pub. ver.) ("Pl.'s Reply").

length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less” SDGE Order, 74 Fed. Reg. at 8775.⁵

Subsequently, Commerce determined, pursuant to § 781(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677j(c) (2012),⁶ that 17-inch graphite electrodes constituted a circumventing minor alteration of the order. Final Determination, 78 Fed. Reg. at 56,864-65.

Plaintiff, an importer of 17-inch graphite electrodes, challenged Commerce’s minor alteration determination, Compl., ECF No. 9 at ¶2, as not in accordance with law and unsupported by substantial evidence on the record. Rule 56.2 Mem., ECF Nos. 24-1 (conf. ver.) & 25-1 (pub. ver.). The court agreed in part and remanded because the agency had not reasonably considered: (1) the prior commercial availability of 17-inch graphite electrodes; (2) the importance of diameter as a

⁵ This scope definition was derived from the petition and is coextensive with that used by the International Trade Commission (“ITC”). See Ceramark, ___ CIT at ___, 11 F. Supp. at 1319-20 (citing [SDGE] from the [PRC], 73 Fed. Reg. 8287, 8287 (Dep’t Commerce Feb. 13, 2008) (initiation of antidumping duty investigation); [SDGE] from the [PRC], 74 Fed. Reg. 2049, 2050 (Dep’t Commerce Jan. 14, 2009) (final determination of sales at less than fair value and affirmative determination of critical circumstances); [SDGE] from China, USITC Pub. 4062, Inv. No. 731-TA-1143 (Feb. 2009) at 6, 9-10).

⁶ All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition.

defining characteristic of graphite electrodes; and (3) the decision made by petitioners, Commerce, and the ITC to exclude 17-inch graphite electrodes from the original antidumping duty order. Ceramark, ___ CIT at ___, 11 F. Supp. 3d at 1323-25.

On remand, Commerce re-weighed all the record evidence, including the previously unconsidered facts, and found that the evidence emphasized by the court did not so detract from the substantiality of the evidence as to dictate a different outcome. The agency again found that 17-inch graphite electrodes constituted a circumventing minor alteration. Draft Remand Redetermination, ECF No. 72-1 ("Draft Redetermination"), at 4-9. Commerce circulated its draft redetermination, requesting comments. See Remand Admin. Rec. Index, ECF No. 52, at 1 (Public Document 2 (letter from Commerce to interested parties setting deadline for comments)). Plaintiff, despite participating fully in prior administrative and judicial proceedings, did not respond. Final Redetermination, ECF No. 51-1, at 5.⁷ Commerce then filed its final redetermination, substantially the same as the draft, finding "no reason to

⁷ Defendant (citing to the administrative record), suggests that the Plaintiff's sudden silence may have been the result of some sort of error (on Plaintiff's part) attendant to a change in law firm. See Def.'s Resp., ECF No. 61, at 3-4. However Plaintiff at no point makes this argument (instead relying solely on the futility exception to the exhaustion doctrine).

alter" its prior circumvention determination. Final Redetermination, ECF No. 51-1, at 1.

Defendant and Defendant-Intervenors now seek dismissal for failure to exhaust administrative remedies. Def.'s Resp., ECF No. 61, at 4-6; Def.'s Surreply, ECF No. 71; Def.-Intervenors' Resp., ECF No. 62, at 11-12; Def.-Intervenors' Surreply, ECF No. 69. In response, Plaintiff argues that exhaustion of administrative remedies is not required because the futility exception applies. Pl.'s Reply, ECF No. 68.

DISCUSSION

I. Exhaustion of Administrative Remedies

Plaintiffs, "where appropriate," are required to exhaust administrative remedies before seeking judicial relief. 28 U.S.C. § 2637(d). This means that, with limited exception, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Sandvik Steel Co. v. United States, 164 F.3d 596, 599 (Fed. Cir. 1998) (quoting McKart v. United States, 395 U.S. 185, 193 (1969)).

Here, Ceramark has not exhausted its administrative remedies because it did not comment on Commerce's draft during the remand proceeding. Final Redetermination, ECF No. 51-1,

at 5; see also Pl.'s Reply, ECF No. 68, at 1 (arguing that exhaustion of remedies not appropriate here).

II. The Futility Exception

Failure to exhaust is not *per se* fatal to Ceramark's challenge - exhaustion is a practical, not absolutist, doctrine. It accommodates exceptions. Exhaustion is meant to "protect[] administrative agency authority," McCarthy v. Madigan, 503 U.S. 140, 145 (1992), by "ensur[ing] Commerce has the opportunity to consider arguments during agency proceedings, and before a judge intervenes on appeal." Blue Field (Sichuan) Food Indus. Co. v. United States, __ CIT __, 949 F. Supp. 2d 1311, 1322 (2013).⁸ Further, exhaustion "promot[es] judicial efficiency," McCarthy, 503 U.S. at 145, by "promoting development of an agency record that is adequate for later court review and by giving an agency a full opportunity to correct errors and thereby narrow or even eliminate disputes needing judicial resolution," Itochu Bldg. Products v. United States, 733 F.3d 1140, 1145 (Fed. Cir. 2013) (citing McCarthy, 503 U.S. at 145-46). However, "where the obvious result would be a plain miscarriage of justice,"

⁸ See United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952) ("Simple fairness" to the agency and interested parties "requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.")

exhaustion is not required. Hormel v. Helvering, 312 U.S. 552, 558 (1941). Where exhaustion serves no purpose, when further comment would be futile – that is, “a useless formality,” Yangzhou Bestpak Gifts & Crafts Co. v. United States, 716 F.3d 1370, 1381 (Fed. Cir. 2013) (citation omitted), or involving “obviously useless motions in order to preserve [parties’] rights,” Corus Staal BV v. United States, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (quotation marks and citations omitted) – exhaustion is not required.

Ceremark argues that there is “no practical reason to apply the exhaustion doctrine” here, because further comment on its part during the remand proceedings would have been futile. Pl.’s Reply, ECF No. 68, at 10. Ceremark claims that it had already repeatedly presented all its arguments to Commerce, Commerce had repeatedly rejected those arguments, and “there is nothing in the record or in Commerce’s Redetermination to suggest that Ceremark’s arguments would have been considered any differently had Ceremark presented them again.” Id., at 6. Ceremark considers it “disingenuous for Commerce to urge this Court to apply the exhaustion doctrine, since Commerce itself stated that Ceremark’s arguments were before the agency on remand and were, in fact considered and, as usual, rejected.” Id. at 5-6.

It is possible, indeed likely, that if Ceramark had simply re-submitted its previous comments, Commerce would not have changed its position. This is because Commerce was already considering these same comments on remand, in accordance with Ceramark, __ CIT at __, 11 F. Supp. 3d at 1323-25. See Draft Redetermination, ECF No. 72-1, at 5-6, 8-9. But repetition is not what the Plaintiff was required to do here. Rather, Plaintiff was required to comment on new factual findings, and the resultant new balance of evidence, that Commerce undertook specifically for this redetermination.⁹ The best indication of this is Plaintiff's own comments on the redetermination filed with this Court, which offered additional, fact-based arguments

⁹ Compare I & D Mem. cmt. 1 at 11 (reasoning that the prior existence of a product "does not preclude the Department from conducting a minor alterations anticircumvention analysis," and therefore has "no relevance" to the minor alteration inquiry) (citation omitted) with Final Redetermination, ECF No. 51-1, at 6-8 (finding that, given "the record evidence as a whole," 17 inch graphite electrodes were a circumventing, not alternate, product, because, while 17 inch graphite electrodes existed prior to the order, they were not a standard, common product). Compare I & D Mem. cmt. 1 at 10 (finding that a minor alteration need not be "insignificant" as long as it meets the requirements of Commerce's five factor minor alteration test) with Final Redetermination, ECF No. 51-1, at 9 (finding that neither a one nor two inch difference in diameter would "represent a significant difference without more information with regard to how the electrode is used in comparison to in-scope merchandise"). As Defendant argues, "Commerce had not made any of these findings before its draft remand results. Ceramark did not - and *could not* - have presented any arguments challenging these findings before those results were released." Def.'s Surreply, ECF No. 71, at 3 (emphasis original).

tailored to the remand.¹⁰ While Commerce still might not have agreed with Ceramark's arguments on remand, the "mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies." Corus Staal, 502 F.3d at 1379.¹¹

¹⁰ Compare Pl.'s Comments on the Dep't of Commerce's Redetermination, ECF Nos. 54 (conf. ver.) & 55 (pub. ver.) ("Pl.'s Comments"), at 2-5 (arguing that, in the redetermination, Commerce's commercial availability analysis was flawed because it "erroneously conflated ['standard product' and 'commercial availability']," focusing too much on "standard product" (production volume) rather than "commercial availability" (presence, as an alternative product, on the market)), with Rule 56.2 Mem., ECF No. 25-1, at 14 (arguing that Commerce's complete "disregard of the commercial availability of the 17-inch diameter [graphite electrodes] prior to the investigation was erroneous"); Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 45, at 6-7 (same), and Ceramark Initial Questionnaire Resp., A-570-929 Anticircumvention Inquiry (Aug. 3 2012), reproduced in Pub. App. to Mem. of P. & A. in Supp. of Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("Pub. App. to Rule 56.2 Mem."), ECF Nos. 28-2 (pub. ver.) & 29-2 (conf. ver.) at Tab 2, at 1-3, 12-13 (arguing that 17 inches graphite electrodes are a standard product), Ceramark's 1st Supp. Questionnaire Resp., A-570-929 Anticircumvention Inquiry (Oct. 17, 2012), reproduced in Pub. App. to Rule 56.2 Mem., ECF Nos. 28-7 (pub. ver.) & 29-7 (conf. ver.) at Tab 7, at 1-2, 6-7 (same); Ceramark's 2d Supp. Questionnaire Resp., A-570-929 Anticircumvention Inquiry (Nov. 30, 2012), reproduced in Pub. App. to Rule 56.2 Mem., ECF Nos. 28-8 (pub. ver.) & 29-8 (conf. ver.) at Tab 8, 1, 5-6, 8-9 (same).

¹¹ See, e.g., Xinjiamei Furniture (Zhangzhou) Co. v. United States, ___ CIT ___, 968 F. Supp. 2d 1255, 1266 (2014) (Exhaustion is futile when a party "has already fully presented its arguments to [Commerce] in some form and had those arguments rejected, but not where it declines to present the arguments at all because it believes the agency will be unlikely to accept them."); Pakfood Pub. Co. v. United States, ___ CIT ___, 724 F. (footnote continued)

Providing comments on remand would have, at the very least, provided "the agency an opportunity to set forth its position in a manner that would facilitate judicial review." Id. at 1380.¹² Certainly the court's review would have benefited had Commerce had the opportunity to consider whether its new factual findings, reconsideration, and resultant redetermination were based on a reasonable reading of the entire record.

Supp. 2d 1327, 1351 (2010) (Exhaustion may be futile when "an agency has articulated a very clear position on the issue which it has demonstrated it would be unwilling to reconsider," but only if "the agency's commitment to its position [is] so strong as to render requiring a party to raise the issue with the agency inequitable and an insistence of a useless formality.") (internal quotation marks and citations omitted).

¹² Ceramark argues that any comment at all would have been futile because the agency exhibited an "unwillingness to change its position," Pl.'s Reply, ECF No. 68, at 9, akin to that seen in Itochu, where "there was no reasonable prospect that Commerce would have changed its position . . . [because] Commerce's apparent position," as defended in a concurrent case, "made such comments legally immaterial." 733 F.3d at 1147; see Pl.'s Reply, ECF No. 68, at 6-7. But that is not the case here, where Commerce was presented with a factual question - an issue of substantial evidence. While, as in Itochu, Commerce was defending a similar position in a concurrent case, Deacero S.A.P.I. de C.V. v. United States, CIT Ct. No. 12-00345, because both Ceramark and Deacero presented unique questions of fact, any decision or disposition in one did not make comments immaterial in the other. Rather, that Commerce had been instructed to consider Ceramark's prior arguments on remand suggests that Commerce "might have been receptive to [further] counter-arguments" on fact-specific questions related to those arguments. See Mittal Steel Point Lisas Ltd. v. United States, 548 F.3d 1375, 1384 (Fed. Cir. 2008).

CONCLUSION

Because Ceramark did not provide comments to Commerce during remand proceedings, Ceramark did not exhaust its administrative remedies. Because filing comments would not have been a useless formality, the futility exception does not apply. Accordingly, this action is dismissed for failure to exhaust administrative remedies.

IT IS SO ORDERED.

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

Dated: May 1, 2015
New York, NY