

Corus Staal BV v. United States
Court No. 02-00003, Slip Op. 03-25 (March 7, 2003)

Final Results of Redetermination Pursuant to Court Remand
Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands

SUMMARY

The Department of Commerce (the Department) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (the Court) in *Corus Staal BV v. United States*, Consol. Ct. No. 02-00003, Slip Op. 03-25 (March 7, 2003) (*Corus Staal*). This case involves the *Notice of Final Determination of Sales at Less than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products*, 66 Fed. Reg. 50,408 (October 3, 2001) and accompanying Issues and Decision Memorandum, *amended by* 66 Fed. Reg. 55,637 (November 2, 2001) (*Final Determination*). This remand pertains to lifting the suspension of liquidation six months after the preliminary determination in this case pursuant to 19 U.S.C. § 1673b(d). In the order on hot-rolled carbon steel products from the Netherlands the Department inadvertently omitted the proper language stating that it would instruct the United States Customs Service (Customs) to cease collection of provisional measures after six months.

As requested by the Court, the Department has explained its interpretation of what constitutes “six months” in 19 U.S.C. § 1673b(d) in the context of collection of provisional measures in antidumping cases and, in accordance with the Department’s voluntary request for remand, will revise the order consistent with this interpretation.

If the Court approves these results of redetermination on remand, the Department will include language lifting the suspension of liquidation six months after the date of publication of the preliminary determination in an amended antidumping duty order on certain hot-rolled carbon steel flat products from the Netherlands, and in instructions to Customs.

BACKGROUND

In the underlying investigation the Department issued the preliminary determination on May 3, 2001. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 22,146 (May 3, 2001). Corus requested an extension of the final determination pursuant to section 351.210(b) of the Department’s regulations. Corus agreed in its request to an extension of provisional measures from a four-month period to not more than six months. *See Corus’s May 22, 2001 Letter to Commerce*

(cited in *Corus Staal*, Court No. 02-00003, Slip op. 03-25 at 4). The Department granted the postponement and stated it would issue its final determination by September 15, 2001. See *Postponement of Final Determination for Antidumping Duty Investigation: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 32,600 (June 15, 2001). As a result of the events of September 11, 2001, the time frame for issuing this determination was extended by four days, and the Department published the final determination on October 3, 2001, and an amended final on November 2, 2001. See *Final Determination*, 66 Fed. Reg. 50,408 (October 3, 2001) and accompanying Issues and Decision Memorandum, *amended by* 66 Fed. Reg. 55,637 (November 2, 2001). Subsequently, the International Trade Commission (the Commission) notified the Department of its determination of material injury in this case. See *Hot Rolled Steel Products From China, India, Indonesia, Kazakhstan, The Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 66 Fed. Reg. 57,482 (November 15, 2001). The Department published the order on November 29, 2001. See *Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59,565 (November 29, 2001).

In its brief to the Court Corus argued that provisional measures should not have been collected more than six months after the preliminary determination was issued on May 3, 2001. The Department agreed and admitted that it inadvertently excluded the appropriate language from the antidumping order that would lift the suspension of liquidation six months after the preliminary determination. The Department voluntarily requested remand on this issue in order to include the appropriate language in the order and, in turn, inform Customs to lift suspension.

Although the Department and Corus agreed that provisional measures should not have been collected more than six months after the preliminary determination was published, in the briefs to the Court, the Department and Corus disagreed upon the final date of collection of the provisional measures. Corus argued that because the Department has previously interpreted six months to consist of 180 days, provisional measures should not have been collected after October 30, 2001, *i.e.*, 180 days after the publication date of the preliminary determination. *Corus Staal*, Court No. 02-00003, Slip op. 03-25 at 34. The Department argued that six months is equal to six calendar months, and therefore, the provisional measures were properly collected through November 3, 2001. *Id.*

The Court remanded this issue to the Department for the sole purpose of revising its antidumping duty order to preclude collection of provisional measures beyond the six month period and to explain its practice concerning the interpretation of the term “six months.” *Id.* at 35.

The *Draft Redetermination Pursuant to Court Remand (Draft Results)* was released to the parties on March 20, 2003. Respondent Corus submitted comments on the *Draft Results* on March 31, 2003. The Department has addressed those comments below.

ANALYSIS

Provisional Measures

As stated above, the Department maintained in its brief to the Court that like the concurrent hot-rolled case of *Certain Hot-Rolled Carbon Steel Flat Products From Argentina and the Republic of South Africa*, 66 Fed. Reg. 48,242, 48,243 (September 19, 2001), the final date for collection of provisional measures is six months after the preliminary determination, and not 180 days. However, after review of our practice with respect to our interpretation of “six months” in the context of provisional measures, we agree with Corus that the practice has not been consistent. In its brief to the Court Corus cited the *Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Antidumping Investigation of Low Enriched Uranium from France*, 67 Fed. Reg. 6,680 (February 13, 2002) (*Uranium from France*), where the Department stated it interpreted six months to consist of 180 days. In recent cases since the final determination in the underlying investigation, the Department has followed the practice of interpreting six months as 180 days consistent with *Uranium from France*. See, e.g., *Notice of Antidumping Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945, 65,947 (October 29, 2002) (*Wire Rod*). The Department, therefore, agrees with Corus in this redetermination that the Department’s current practice is to interpret “six months” as 180 days.

The Department considers the interpretation of six months equaling 180 days as appropriate for two reasons. First, it is consistent with the Department’s regulation for countervailing duty investigations wherein the limit on the provisional measure time period is set forth in days, *i.e.*, 120 days. Specifically, 19 C.F.R. 351.210(h) provides:

Termination of suspension of liquidation in a countervailing duty investigation. If the Secretary postpones a final countervailing duty determination, the Secretary will end any suspension of liquidation ordered in the preliminary determination not later than *120 days after the date of publication of the preliminary determination*, and will not resume it unless and until the Secretary publishes a countervailing duty order.

19 C.F.R. 351.210(h) (emphasis added).

There appears to be no reason to distinguish between antidumping cases and countervailing duty cases concerning this issue. Second, utilizing a set day-based time limit, *i.e.*, 180 days, provides consistency across all cases whereas the period covered within a six month time frame can vary for each case depending upon how many months within the six month period consist of 28, 30, or 31 days.

Therefore, if the Court affirms the Department's redetermination pursuant to the Court's remand, the Department will revise the antidumping duty order to include the appropriate language lifting suspension of liquidation 180 days from the date of publication of the preliminary determination in the *Federal Register*. In this case, 180 days from the publication of the preliminary determination, which was May 3, 2001, is October 30, 2001. The Department also will amend its instructions to Customs to lift suspension from and including October 30, 2001. Although Corus argued in its brief to the Court that provisional measures should not have been collected after October 30, 2001 (Corus Br. at 39), the correct instruction is for provisional measures not be collected after October 29, 2001 because the collection of the provisional measures starts on the date of publication of the preliminary determination. *See, e.g., Wire Rod*, 67 Fed. Reg. at 65,947 (October 29, 2002).

Additionally, Corus stated in its brief to the Court that the appropriate date to resume collection of cash deposits is November 29, 2001, the date of publication of the order. We disagree; the appropriate date to resume collection of duties is the date the Commission publishes its final affirmative injury determination. *See, e.g., "Antidumping Duty Order in the Investigation of Bulk Aspirin From the People's Republic of China,"* Customs instructions, paras. 3 and 4, included as Attachment 1 to this Redetermination; *Antidumping Duty Orders: Steel Concrete Reinforcing Bars From Belarus, Indonesia, Latvia, Moldova, People's Republic of China, Poland, Republic of Korea and Ukraine*, 66 Fed. Reg. 46,777, 46,778 (September 7, 2001); "Antidumping Duty Order in the Investigation of Steel Concrete Reinforcing Bars from the PRC," Customs instructions, para. 5, at Attachment 2; and "Antidumping Duty Order in the Investigation of Certain Softwood Lumber Products from Canada," Customs instructions, para. 4; Attachment 3. Although the latter two cases involve Commission final affirmative determinations that the domestic industry would be threatened by material injury, as opposed to a finding of material injury, they are nevertheless instructive because they set forth when the provisional measures time period ends, and in turn, when definitive duties begin.

The parameters in which the Department is to resume collection of duties, *i.e.*, what constitutes the provisional measures period, is set out in section 737 of the Tariff Act. Section 737 establishes a cap period for the assessment rate on entries made between the Department's preliminary less than fair value determination and the Commission's final affirmative injury determination. Specifically, section 737 sets forth what to do with provisional duty deposits that differ from the rate established in the order. Section 737(a) and (b) both use as the salient date the publication of the notice of the Commission's affirmative final injury determination. This establishes that the collection of duty deposits resumes at the publication of the Commission's final affirmative injury determination.

Also, section 351.212(d) of the Department's regulations provides a description of what constitutes the provisional measures deposit cap, and in turn, sets out the provisional measures time frame. Section 351.212(d) provides:

Provisional measures deposit cap. This paragraph applies to subject merchandise entered, or withdrawn from warehouse, for consumption

before the date of publication of the Commission's notice of an affirmative final injury determination or in a countervailing duty proceeding that involves merchandise from a country that is not entitled to an injury test the date of the Secretary's notice on an affirmative final countervailing duty determination. If the amount of duties that would be assessed by applying the rates included in the Secretary's affirmative preliminary or affirmative final antidumping or countervailing duty determination ("provisional duties") is different from the amount of duties that would be assessed by applying the assessment rate under paragraphs (b)(1) and (b)(2) of this section [automatic assessment] ("final duties"), the Secretary will instruct the Customs Service to disregard the difference to the extent that the provisional duties are less than the final duties, and to assess antidumping duties or countervailing duties at the assessment rate if the provisional duties exceed the final duties.

Accordingly, the provisional measures time period ends when the Commission publishes an affirmative final injury determination. In this case, the Commission published its notice in the *Federal Register* on November 15, 2001. See *Hot Rolled Steel Products From China, India, Indonesia, Kazakhstan, The Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 66 Fed. Reg. 57,482 (November 15, 2001). Therefore, the Department will instruct Customs to resume collection of duty deposits effective November 15, 2001.

COMMENTS

Provisional Measures

Corus agrees with the Department's interpretation of "six months" as 180 days, rather than six calendar months. Corus, however, argues the Department erred in its redetermination on remand that the date to resume collection of duties is the publication date of the Commission's final affirmative injury determination. Corus argues that the appropriate time is instead, the date of publication of the Department's antidumping duty order.

First, Corus argues the Department stated in its brief to the Court that the "gap period" runs until the date of the order. Corus maintains the Court only remanded this case to the Department to resolve the issue of the final date for collection of provisional measures. Accordingly, Corus argues, the issue of the end of the "gap period" was not addressed before the Court. Corus claims that because the Court never addressed the issue of when the duties resume, doing so for the first time in the redetermination on remand is unfair to Corus and inconsistent with established judicial procedures.

Second, Corus notes that the cases cited by the Department in the redetermination, including *Low Enriched Uranium from France*, *Carbon and Certain Alloy Steel Wire Rod from Brazil*, *Indonesia*, *Mexico*, *Moldova*, *Trinidad and Tobago*, and *Ukraine*, and *Certain Hot-Rolled Carbon Steel Flat Products from Argentina and South Africa*, contain language stating that the “gap period” runs until the day preceding publication of the order. Corus insists the Department must follow its previous practice and use the date of the publication of the order as the first date on which the collection of duties should resume.

Third, Corus argues the cases cited to support the Department’s position that the date to resume duties is the date of the Commission’s final affirmative determination, *i.e.*, *Steel Concrete Reinforcing Bar from the PRC* and *Certain Softwood Lumber Products from Canada*, involve a different statutory provision or “special rule”, *i.e.*, section 736(b)(2) of the Tariff Act, and the cases are inapposite to the present case. Corus notes that both cases cited by the Department in its redetermination are affirmative injury determinations based on a finding of *threat* of material injury as opposed to present material injury. Corus explains where injury is based on threat, the injury is deemed to be prospective only, and bonds and duties deposited based on provisional measures prior to the Commission’s final affirmative threat determination are released and refunded. This case was based on present material injury and, therefore, Corus argues the “special rule” found at section 736(b)(2) of the Tariff Act, which allows final measures to go into place as soon as the Commission reaches its final determination, does not apply to determinations of present material injury.

Corus further argues the Department incorrectly cited the statutory and regulatory provisions for the provisional measures cap on estimated duties to define the time period during which provisional measures are in place. Corus argues that the section cited, 737(a) and (b) of the Tariff Act, cannot define the period for provisional measures because it addresses both preliminary estimated duties and final estimated duties. Likewise, Corus contends the Department’s provisional measures cap regulation, section 351.212(d), is not applicable because it cannot be interpreted beyond the scope of the statutory provision.

Finally, Corus claims that sections 351.205(a) and 351.211 when read together indicate the Department considers the period for provisional measures to run until the date of the order. Specifically, section 351.205(a) indicates the preliminary determination is the first point at which a remedy is available, and section 351.211, in turn, states “the issuance of an order ends the investigative phase of a proceeding, and generally, upon the issuance of an order, importers no longer may post bonds as security for antidumping or countervailing duties, but instead must make a cash deposit of estimated duties.”

THE DEPARTMENT’S POSITION

Although the issue of when to resume collection of duties was not directly addressed in the briefs to the Court, Corus did include in its brief the specific dates which it defined as the “gap period” *i.e.*, 180 days from the preliminary determination to, as it argues, the issuance of the order. *See* Corus Br. at 38. Specifically, Corus argued that the Department failed to recognize there was a period during which provisional measures were incorrectly imposed against Corus’s subject imports. The Department recognized this, and is addressing Corus’s characterization of the time between lifting the suspension of liquidation and the resumption of duty collection. This includes defining the end of the “gap period.”

Also, as a practical matter, to comply with the Court’s order to lift suspension of provisional measures beyond the six month period, the Department must also include the date to resume collection of duties in its instructions to Customs. Therefore, the question of when to resume collection of duties is appropriately addressed in the Department’s redetermination on remand.

As explained in the redetermination, we disagree with Corus’s interpretation of the date the provisional measures time period ends in an antidumping duty investigation. The appropriate date is not the date of the publication of the Department’s order, but the publication of the Commission’s final affirmative determination.

We acknowledge that in the brief to the Court, where we explained that we inadvertently excluded the appropriate language from the order lifting suspension of liquidation six months after the date of publication of our preliminary determination, we included language which indicated the provisional measures time period extended to the date of the publication of the order. This statement, however, is incorrect as it is not precise. Additionally, we also acknowledge that in the cases Corus cited in its comments on the draft redetermination the Department indicated it would resume collection of duties on the date of publication of the order. The Department’s statements in those cases, however, are also not accurate. It is appropriate, therefore, in the context of the instant redetermination on remand to include the correct date.

Additionally, we disagree with Corus’s comments concerning the distinction between a threat and an injury determination and the provisional measures time period. The Department merely cited the Customs instructions for *Steel Concrete Reinforcing Bar from the PRC* and *Certain Softwood Lumber Products from Canada* to define when the provisional measures time period ends and, in turn, when definitive duties begin. The fact that in a threat case the provisional duties collected are released because the Commission did not find present material injury, does not mean that the provisional measures time period is different. The date the Commission publishes its affirmative determination is the date provisional measures end, and definitive duties are collected. *See, e.g.*, “Antidumping Duty Order in the Investigation of Bulk Aspirin From the People’s Republic of China,” Customs instructions, para. 3 and 4, at Attachment 1. We have clarified this point in the final redetermination on remand.

Contrary to Corus’s argument, the determination that definitive duties begin on the date the Commission publishes its affirmative determination is in accordance with the statute and the

Department's regulations. As explained in the redetermination, section 737 of the Tariff Act sets forth that the date the provisional measures time period ends is the date of publication of the Commission's final affirmative determination. Merely because this provision establishes both preliminary and final estimated duties does not detract from this conclusion. Also, Commerce's regulation, section 351.212(d), sets forth the period of time provisional measures are in place, and is applicable.

Also, Corus's reliance on sections 351.205 and 351.211 to establish the requisite date collection of duties resumes is unconvincing. Section 351.205 merely sets forth that provisional measures begin when the Department makes a preliminary determination. Section 351.211(b)(3), in fact, provides that the Department will publish an antidumping order that "[o]rders the suspension of liquidation ended for all entries of the subject merchandise entered, or withdrawn from warehouse, for consumption before the date of publication of the Commission's final determination" Section 351.211(a) is not a regulation, but an introductory paragraph for the regulation. The introductory paragraphs contained in the subsections "(a)" are general statements which reflect the content of the regulation itself. They do not instruct particular action. *See* the preamble to the Department's final rule noting the purpose of the general introductory sections. *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27,296, 27,297 (May 19, 1997).

We note that nothing in this interpretation of the correct date upon which to re-impose suspension of liquidation and collection of cash deposits affects the definition of the "anniversary month" of antidumping and countervailing duty orders in accordance with section 351.213(b) of the Department's regulations.

RESULTS OF REDETERMINATION

For the reasons discussed above, the Department determines, on remand, that consistent with its current practice, six months constitutes 180 days. Accordingly, if the Court approves these results of redetermination on remand, the Department will issue an amended order and instructions to Customs including language lifting suspension 180 days from the publication of the preliminary determination until publication of the Commission's final affirmative determination.

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

Date