U.S. Court of International Trade

Slip Op. 20–101

PERRY CHEMICAL CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 15–00168
PUBLIC VERSION

[Granting in part and denying in part plaintiff's motion for judgment on the agency record.]

Dated: July 22, 2020

Kelly A. Slater, *Edmund W. Sim*, and *Jay Y. Nee*, of Appleton Luff PTE LTD, of Washington, DC, for plaintiff Perry Chemical Corporation.

Joseph H. Hunt, Assistant Attorney General, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Meen Geu Oh*, Trial Attorney. Of counsel was *Jessica M. Link*, Assistant Chief Counsel, Office of the Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Kelly, Judge:

Perry Chemical Corporation ("Perry") brings this action for judgment on the agency record pursuant to U.S. Court of International Trade Rule 56.1 as well as seeks a writ of mandamus compelling the U.S. Department of Commerce ("Commerce" or "Department") to issue corrected liquidation instructions to the U.S. Customs and Border Protection ("CBP"), directing reliquidation of certain entries of polyvinyl alcohol ("PVA") from Taiwan produced and exported by Chang Chun Petrochemical Co. Ltd. ("Chang Chun"), and to refund all cash deposits, with interest, made by Perry. *See* Compl. at ¶ 1, June 19, 2015, ECF No. 4; R. 56.1 Mot. J. Agency R. on Behalf of Pl. [Perry], Feb. 7, 2020, ECF No. 85 ("Pl.'s R.56.1 Mot."); Pet. Writ Mandamus, June 19, 2015, ECF No. 5. Specifically, Perry requests reliquidation without regard for antidumping duties ("ADD"), in accordance with Commerce's final determination and revocation of the ADD order covering PVA from Taiwan, for entries liquidated on or after publication of a Timken notice (i.e., January 28, 2014), as well as for entries made during the time periods (1) March 1, 2012 through February 28, 2013 ("AR2 Period") and (2) March 1, 2013 through December 29,

2013 ("Open Period").[1] *See* Pl.'s R. 56.1 Mot. at 1–2; Memo. Supp. Pl. [Perry's] R. 56.1 Mot. J. Agency R. at 1–2, Feb. 7, 2020, ECF No. 86 ("Pl.'s Br."); *see also [PVA] from Taiwan*, 79 Fed. Reg. 4,442 (Dep't Commerce Jan. 28, 2014) (notice of ct. decision not in harmony with final determination of sales at less than fair value and revocation of [ADD] order) ("*Timken Notice*"). Defendant opposes Plaintiff's request for a writ of mandamus. *See* Def.'s Resp. Opp'n [Pl.'s Br.] at 1, 4 n.3, 6–12, Mar. 4, 2020, ECF No. 88 ("Def.'s Br.").[2] For the reasons that follow, Commerce's Post-Timken Instructions and liquidation of Open Period entries are contrary to law. However, Commerce's liquidation of Perry's AR2 entries is in accordance with law.

BACKGROUND

In April 2011, Chang Chun initiated an action challenging certain aspects of the final determination in the original investigation of PVA from Taiwan. *See [PVA] from Taiwan*, 76 Fed. Reg. 5,562 (Dep't Commerce Feb. 1, 2011) (final determination of sales at less than fair value) ("*Final Results*"); *[ADD] Order: [PVA] From Taiwan*, 76 Fed. Reg. 13,982 (Dep't Commerce Mar. 15, 2011) ("*ADD Order*"); *see also* Summons, Apr. 14, 2011, ECF No. 1 (from Dkt. Consol. Ct. No. 11–00095); Compl., May 16, 2011, ECF No. 8 (from Dkt. Consol. Ct. No. 11–00095). While the lawsuit progressed, Commerce, on April 30, 2012, initiated the first administrative review ("AR1") of the *ADD Order*, covering the period of review, September 13, 2010 through February 29, 2012. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 25,401, 25,402 (Dep't Commerce Apr. 30, 2012); *see also [PVA] From Taiwan*, 78 Fed. Reg. 20,890, 20,890 (Dep't Commerce Apr. 8, 2013) (preliminary results of [ADD] admin. review;

[1] Perry was not required to pay cash deposits for part of the Open Period, from June 24, 2013 to December 29, 2013, because the deposit rate was set to 0.00%. *See* Compl. at 9 n.3; *see also* CBP Message No. 3177303 at 2; *AR1 Final Results*. However, Perry's request for relief encompasses all Open Period entries because, even though no deposits were collected, "Commerce still failed to order proper liquidation at the zero rate on the basis of the revocation of the [*ADD Order*]." Compl. at 10 n.4.

[2] Defendant argues that Plaintiff's petition for a writ of mandamus is procedurally improper. *See* Def.'s Br. at 4 n.3. Defendant aptly notes that the existence of an alternate APA remedy would preclude issuance of a writ of mandamus and acknowledges that it is within the Court's authority to issue a mandatory injunction, *id.* (citing *Erwin Hymer Grp. N. Am., Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1336, 1345 (2017), *rev'd* on other grounds, 930 F.3d 1370 (Fed. Cir. 2019)), which has been construed to be "essentially in the nature of mandamus relief[.]" *See Mt. Emmons Min. Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997). However Perry fashions its request for relief—under 5 U.S.C. § 706(1) or as mandamus—it seeks a mandatory injunction directing CBP to perform an action unlawfully withheld. *Cf. Tobacos de Wilson, Inc. v. United States*, 42 CIT __, 324 F. Supp. 3d 1304, 1316 n.11 (2018). It is within the Court's authority to grant such relief, and, given that Perry has stated a claim for relief under 19 U.S.C. § 1581(i), the court will construe Perry's claim for relief under the APA.

2010–2012) ("*Prelim. Results*"). Chang Chun participated as the sole respondent. *Prelim. Results*, 78 Fed. Reg. at 20,890.

On April 10, 2013, the court issued its decision, remanding certain aspects of Commerce's final determination. *See Chang Chun Petrochemical Co. v. United States*, 37 CIT 514, 530, 906 F. Supp. 2d 1369, 1382 (2013) ("*Chang Chun I*"). Soon after, and before the conclusion of AR1, Commerce announced the initiation of the second administrative review ("AR2") of the *ADD Order* for the period of review, March 1, 2012 through February 28, 2013, where Chang Chun again was the only respondent. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 Fed. Reg. 25,418, 25,420 (Dep't Commerce May 1, 2013). On June 24, 2013, Commerce concluded AR1 and calculated a 0.00% dumping margin for Chang Chun. *[PVA] from Taiwan*, 78 Fed. Reg. 37,794, 37,795 (Dep't Commerce June 24, 2013) (final results of [ADD] admin. review; 2010–2012) ("*AR1 Final Results*"). Commerce instructed CBP to revise the cash deposit rate for Chang Chun's entries of subject PVA to 0.00%, effective June 24, 2013.[3] *See* Cash Deposit Instructions for [PVA] from Taiwan (A-583–841), Message No. 3177303, PD 45, (June 26, 2013) ("CBP Message No. 3177303").[4] Prior to that date, Perry had paid cash deposits equivalent to the margin calculated in the *Final Results*, i.e., 3.08%, on entries made from February 1, 2011. On July 1, 2013, following Chang Chun's withdrawal of its request for administrative review, Commerce rescinded AR2.[5] *See [PVA] From Taiwan*, 78 Fed. Reg. 39,256 (Dep't Commerce July 1, 2013) (rescission of [ADD] administrative review; 2012–2013). Commerce instructed CPB to liquidate all entries of Chang Chun's subject PVA made during the AR2 period at the cash deposit rate at the time of entry, i.e., 3.08%. *See* Notification of Rescission of Admin. Review (A-583–841), Message No. 3199303 at ¶ 1, PD 7, (July 18, 2013) ("July Notice").

On July 12, 2013, Commerce issued its remand redetermination pursuant to *Chang Chun I* and calculated a weighted average dumping margin of 0.00% for Chang Chun. Results of Redetermination Pursuant to Court Remand, July 12, 2013, ECF No. 47–1 (from Dkt. Consol. Ct. No. 11–00095) ("*Remand Results*"). Following the court's

[3] CBP liquidated a small number of Perry's AR1 entries at rates other than zero, which Perry protested before CBP. Compl. at 7 n.1.

[4] On January 1, 2020, Defendant filed indices to the public and confidential administrative records underlying CBP's liquidation of Perry's entries, on the docket, at ECF Nos. 83 and 84, respectively. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices.

[5] Pursuant to 19 C.F.R. § 351.213(d)(1), Commerce will rescind an administrative review "in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review."

decision sustaining the *Remand Results*, *see Chang Chun Petrochemical Co. v. United States*, 37 CIT 1716, 1724, 953 F. Supp. 2d 1300, 1307 (2013) ("*Chang Chun II*"), Commerce published a Timken notice[6] on January 28, 2014, amending its *Final Results* and revoking the *ADD Order* in full. *See Timken Notice*, 79 Fed. Reg. at 4,442. On March 14, 2014, Commerce issued additional instructions directing CBP to liquidate Chang Chun's PVA entries made during the Open Period at the cash deposit rate in place at the time of entry ("Post-Timken Instructions").[7] Liquidation Instructions for [PVA] from Taiwan Produced and/or Exported by [Chang Chun] and Revocation of [ADD] Order (A-570–583–841), Message No. 4073303, PD 1, (Mar. 14, 2014) ("Post-Timken Instructions"); *see also Timken Notice*, 79 Fed. Reg. at 4,442 n.2 (explaining the effective date of *Chang Chun II*). Commerce's instructions specified that only the entries made on or after December 30, 2013 would be liquidated at 0.00%. *See* Post-Timken Instructions at ¶ 3. However, the instructions did not address AR2 entries that had not yet liquidated as of January 28, 2014. *See id.*

Subsequently, Perry initiated the present action. *See* Summons; Compl. On September 16, 2015, Defendant moved to partially dismiss Perry's complaint. *See* Def.'s Partial Mot. Dismiss Pl.'s Compl. With Respect to Previously Liquidated Entries and Entries for Which Pl. Had No Injury, Sept. 16, 2015, ECF No. 14. The court granted the motion in part, holding that Perry lacked standing with respect to entries for which it was not the importer and, further, that Perry had failed to state a claim for which relief could be granted for AR2 entries that had liquidated prior to the revocation of the *ADD Order* on January 28, 2014, because Perry failed to protect its interests by forestalling liquidation. *See Perry Chemical Corporation v. United States*, 43 CIT __, __, 375 F. Supp. 3d 1324, 1333–39 (2019) ("*Perry I*"). However, the court declined to dismiss Perry's claim with respect to AR2 entries "that were not liquidated on or before January 28, 2014, the date on which Commerce issued the Timken/Revocation Notice[.]" *Id.*, 43 CIT at __, 375 F. Supp. 3d at 1339; *see also Perry Chemical Corporation v. United States*, 43 CIT __, 415 F. Supp. 3d 1260 (2019) (denying Defendant's motion for reconsideration of *Perry I* and reject-

[6] The Timken notice stems from *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990), as clarified by *Diamond Sawblades Mfrs. Coalition v. United States*, 626 F.3d 1374 (Fed. Cir. 2010), where the Court of Appeals for the Federal Circuit interpreted the requirements of 19 U.S.C. § 1516a(c)(1). Commerce must notify the public when a court's final judgment in a case is "not in harmony" with an original agency determination, and Commerce will suspend liquidation to ensure that post-notice entries are liquidated at a rate consistent with a conclusive court decision. *Timken Co.*, 893 F.2d at 341.

[7] Liquidation for these entries was suspended pending a request for an administrative review. *See* 19 C.F.R. § 351.213.

ing its notice of errata) ("*Perry II*"). The government conceded that, with respect to entries Perry imported from Chang Chun during the Open Period, those entries were liquidated unlawfully. *See* Def.'s Supp. Br. Resp. Ct.'s July 19, 2016 Order at 15 n.3, Sept. 6, 2016, ECF No. 34.

On April 29, 2020, the court issued a letter to the parties, requesting further information as to the manufacturer of Perry's AR2 entries. *See* Letter, Apr. 29, 2020, ECF No. 91.[8] Although Defendant initially contended that another entity[9] was the producer and exporter of the AR2 entries, *see* Def.'s Br. at 9–12, in response to the court's letter, Defendant concedes, and agrees with Perry, that the AR2 entries are manufactured by Chang Chun. *See* Def.'s Resp. Ct. Letter at 8–9, June 12, 2020, ECF No. 102 ("Def.'s Letter"); *see also* Pl.'s Resp. Ct. Letter at 2–3, June 12, 2020, ECF No. 100; [Pl.'s] Cmts. Resp. [Def.'s Letter] at 1–2, June 19, 2020, ECF No. 104 ("Pl.'s Resp. Def.'s Letter"). However, Defendant now contends that the subject entries were deemed liquidated prior to the issuance of the *Timken Notice*. *See* Def.'s Letter at 8.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(i)(4) (2012), which authorizes the court to review the administration and enforcement of, *inter alia*, ADD determinations under section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a.[10] Commerce's liquidation instructions are reviewable under the Administrative Procedures Act ("APA"). *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004); *see also* 5 U.S.C. § 702 (2000). Under the APA, the court "shall compel [an] agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis omitted).

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[8] The court requested clarification in light of the parties' apparent disagreement as to the identity of the producer and exporter of Perry's AR2 entries. *See generally* Letter. Specifically, Defendant contended that there were no post-Timken AR2 entries for which Chang Chun was the producer and exporter, because of inconsistencies between the name of the manufacturer listed in CBP's database records and that on the supporting customs documentation. *See* Def's Br. at 9–12. Defendant explained that Perry cannot recover for entries based on the AD case number, which is assigned to both Chang Chun and another entity, when its complaint only seeks reliquidation of entries produced and exported by Chang Chun. *Id*. at 9–12.

[9] The other entity is [[ ]]. *See* All POR2 Entries Imported by Perry Chemical Corporation, CD 1; *see also* POR2 Entries Imported By Perry Chemical Corporation with Liquidation Dates on or after January 29, 2014, CD 22.

[10] Further citations to the Tariff Act of 1930, as amended, are to relevant provisions of Title 19 of the U.S. Code, 2012 edition.

The court's scope of review of actions commenced pursuant to this provision is limited, and may not be wielded to prescribe the manner in which an agency is to carry out the compelled act, or "to specify what the action must be." *Id.* at 65. The court "shall hold unlawful and set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A).

DISCUSSION

Perry contends that Commerce's Post-Timken Instructions and the post-Timken notice liquidations of AR2 and Open Period entries are unlawful, because they fail to implement Commerce's *Timken Notice*, amending the final determination and revoking the *ADD Order*, as well as fail to give effect to *Chang Chun II*. *See* Pl.'s Mot. at 2–3; *see also* Pl.'s Br. at 1–2. Defendant concedes that the Post-Timken Instructions and post-Timken notice liquidation of Open Period entries are not in accordance with law and agrees that Perry is entitled to a refund of cash deposits paid, with interest, for the Open Period entries for which it was the importer. *See* Def.'s Br. at 8–9; *see also* [Def's] Answer at 7, Jan. 10, 2020, ECF No. 82. However, Defendant contends that the AR2 entries for which Chang Chun was the producer and exporter were deemed liquidated prior to the issuance of the *Timken Notice*. *See* Def.'s Letter at 8–9.[11] For the reasons that follow, Commerce's Post-Timken Instructions and the post-Timken notice liquidations of Open Period entries are unlawful, while Commerce's pre-Timken notice liquidations of AR2 and Open Period entries are lawful. *Cf. Perry I*, 43 CIT at __, 375 F. Supp. 3d at 1339. Perry is entitled to a refund of cash deposits paid, with interest, for only those entries that had not liquidated, prior to the *Timken Notice* for which it was the importer and Chang Chun was the producer and exporter.

I. AR2 Entries

Perry contends that the liquidation of AR2 entries, after January 28, 2014, at the rate in effect in the time of entry is unlawful, by failing to give effect to *Chang Chun II* and the *Timken Notice*. *See* Pl.'s Br. at 7–8. Perry seeks reliquidation of those entries without regard to antidumping duties. *Id.* at 9–10. Defendant agrees that Plaintiff would have been entitled to relief if there were any AR2 entries that remained unliquidated, however, it contends all the AR2 entries were deemed liquidated pursuant to 19 U.S.C. § 1504(d) prior to the

[11] In light of Defendant's concession that the AR2 entries are produced and exported by Chang Chun, not [[ ]], the court considers Defendant's argument regarding the identity of the producer and exporter to be moot. *See* Def.'s Br. at 9–12.

Timken Notice. *See* Def.'s Br. at 9–10; Def.'s Letter at 8–9. For the reasons that follow, Perry is not entitled to a reliquidation or refund of cash deposits paid for AR2 entries because those entries were deemed liquidated by operation of law prior to the *Timken Notice*.

Liquidation is the "final computation or ascertainment of duties on entries." 19 C.F.R. § 159.1 (2012). CBP liquidates merchandise based on information entered by the importer of record (or by its agent). *See* 19 U.S.C. § 1484; *see also* 19 C.F.R. §§ 141.0a, 141.4. As a general rule, "entries of merchandise . . . covered by a determination of the Secretary . . . shall be liquidated in accordance with the determination of the Secretary." 19 U.S.C. § 1516a(c)(1). When entries previously suspended by statute or court order are no longer subject to suspension, CBP must liquidate those entries within six months after receiving notice of the removal of suspension on liquidation from Commerce. *Id.* at § 1504(d). Any entries not liquidated within that time frame are deemed liquidated "at the rate of duty . . . asserted by the importer of record." *Id.*[12] Where entries have been lawfully liquidated, a subsequent court decision affecting the duty rate for the relevant period is powerless to alter the duties already assessed. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983).

The liquidation of the AR2 entries at the rate required by the ADD order at the time of entry and asserted by the importer of record on the entry documentation is in accordance with law, because the entries were deemed liquidated prior to the revocation of the ADD order. Specifically, Commerce gave notice on July 18, 2013 of rescission of AR2 and instructed CBP to liquidate all entries of Chang Chun's subject PVA made during the AR2 period at the cash deposit rate at the time of entry, i.e., 3.08%.[13] *See* July Notice at ¶ 1.[14] That notice, which had an effective date of July 1, 2013, started a six-month timeframe for Commerce to liquidate the entries, or, failing that, the entries would be deemed liquidated. *Id.*; 19 U.S.C. § 1504(d). Therefore, those entries were deemed liquidated weeks prior to the issuance of the *Timken Notice* on January 28, 2014.

Although Perry considers Defendant's position with respect to the AR2 entries to be "concerning" and based on an "ever-shifting presentation of the facts," Perry does not contest the facts underlying the

[12] As the Court of Appeals summarized, for deemed liquidation to occur: "(1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice." *See Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002).

[13] Commerce suspends liquidation in accordance with a request for administrative review. *See* 16 U.S.C. § 1675.

[14] The AR2 entries, as Commerce noted in its instruction, were not enjoined from liquidation. *See* July Notice at ¶ 3.

deemed liquidation of its AR2 entries. *See generally* Pl.'s Resp. Def.'s Letter at 1–3. Perry, instead, requests the court to focus on the CBP's liquidation dates of its AR2 entries as reflected in CBP's spreadsheet records. *Id.* at 2 (citing All POR2 Entries Imported by Perry Chemical Corporation, CD1). However, even if the liquidation dates reflected in those records follow the publication date of the *Timken Notice*, those liquidation dates are meaningless because the entries were already deemed liquidated by statute. *See* 19 U.S.C. § 1504(d); *see also* July Notice at ¶ 1. Perry did not act to forestall liquidation. *Cf. Perry I*, 43 CIT at __, 375 F. Supp. 3d at 1334–39. Therefore, Perry is not entitled to recover with respect to its AR2 entries, which were deemed liquidated prior to January 28, 2014. *Cf. Zenith Radio Corp.*, 710 F.2d at 810.

II. Open Period Entries

With respect to Perry's Open Period entries, the parties agree that Commerce's Post-Timken Instructions unlawfully direct liquidation of Open Period entries at the cash deposit rate required at the time of entry and, further, that Perry is entitled to reliquidation of Open Period entries that were produced and exported by Chang Chun for which Perry was the importer and paid cash deposits. *See* Pl.'s Br. at 5–7; *see also* Def.'s Br. at 8–9; Answer at 7. The court also agrees.

Under section 1516a(c)(1), entries not liquidated at the time Commerce revoked the ADD order would no longer constitute merchandise "covered by a determination of the Secretary." *See* 19 U.S.C. § 1516a(c)(1). It would therefore be unlawful for Commerce to liquidate such entries at the rate established in the ADD order and in place at the time of entry. *See id.*; *see also Timken Co. v. United States*, 893 F.2d 337, 341–42 (Fed. Cir. 1990) (explaining that 19 U.S.C. § 1516a(c)(1) carries a presumption of correctness with respect to Commerce's determinations, but that presumption "disappears" when the Court of International Trade or the Court of Appeals for the Federal Circuit issues a decision contrary to that determination, and that liquidation should be in accordance with the conclusive decision). Where Commerce's liquidation instructions are unlawful, a party may seek reliquidation. *Shinyei*, 355 F.3d at 1309.

Here, Commerce's Post-Timken Instructions unlawfully order liquidation of Open Period entries following the revocation of the *ADD Order*. With the publication of the *Timken Notice* on January 28, 2014, Perry's unliquidated Open Period entries were no longer covered by the *ADD Order*. *See* 19 U.S.C. § 1516a(c)(1). Therefore, Commerce's Post-Timken Instruction to CBP to "assess antidumping duties at the cash deposit rate required at the time of entry" on the

unliquidated Open Period entries is unlawful. Post-Timken Instructions at ¶ 4. Perry is entitled to a refund for the duties paid, plus interest, for the Open Period entries for which it was the importer and paid cash deposits on imports of Chang Chun PVA.[15] *Cf. Perry I*, 43 CIT at __, 375 F. Supp.3d at 1332 (holding that Perry is entitled to assert its claim only with respect to entries for which it was the importer and paid cash deposits).[16]

CONCLUSION

For the foregoing reasons, Plaintiff's motion for judgment on the agency record is granted in part and denied in part. Judgment will enter accordingly.

Dated: July 22, 2020
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Slip Op. 20–104

BUILDING SYSTEMS DE MEXICO, S.A. DE C.V., Plaintiff, v. UNITED STATES, Defendant, and FULL MEMBER SUBGROUP OF THE AMERICAN INSTITUTE OF STEEL CONSTRUCTION, LLC and COREY S.A. DE C.V., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 20–00069

[Denying the motion to stay.]

Dated: July 23, 2020

Matthew R. Nicely, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, for plaintiff Building Systems de Mexico, S.A. de C.V. Also on the brief was *Daniel M. Witkowski*.

In K. Cho, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. Also on the brief were *Michael D. Granston*, Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Brandon J. Custard*, Senior Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

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[15] Perry listed the Open Period entries at issue. *See* Pl.'s Br. at Attach.

[16] In Defendant's reading, Perry's Rule 56.1 motion encompasses all Chang Chun entries made during the Open Period that Perry did not itself import. *See* Def.'s Br. at 8. However, in light of *Perry I*, where the court held that Perry lacked standing with respect to entries for which it was not the importer, Defendant notes that "[t]he disagreement may just be over semantics." *Id.* at 8. Plaintiff confirms in its reply brief that its complaint concerns entries produced and exported by Chang Chun for which Perry paid cash deposits. Reply Br. of Pl. [Perry] at 1–2, Mar. 18, 2020, ECF No. 89.

Alan H. Price, *Christopher B. Weld*, *Stephanie M. Bell*, and *Adam M. Teslik*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor Full Member Subgroup of the American Institute of Steel Construction, LLC.

Diana Dimitriuc-Quaia, *Jessica Rose DiPietro*, *John Marshall Gurley*, Arent Fox LLP, of Washington, DC, for defendant-intervenor Corey S.A. de C.V.

MEMORANDUM AND ORDER

Kelly, Judge:

Before the court are Full Member Subgroup of the American Institute of Steel Construction, LLC's ("AISC") motion for a stay of proceedings pending the final and conclusive outcome of the North American Free Trade Agreement binational panel's ("NAFTA panel") review of the U.S. International Trade Commission's ("ITC") final negative determination in its investigation into whether the domestic industry is materially injured (or threatened with material injury) by imports of fabricated structural steel ("FSS") from Canada, the People's Republic of China ("China"), and Mexico. *See* Mot. to Stay Proceedings, May 28, 2020, ECF No. 22 ("AISC's Mot."); *see also Fabricated Structural Steel From Canada, China, and Mexico*, 85 Fed. Reg. 16,129 (Int'l Trade Comm'n Mar. 20, 2020) (determinations) ("*FSS from Canada, China & Mexico*"). For the reasons that follow, AISC's motion to stay is denied.

BACKGROUND

Plaintiff Building Systems de Mexico, S.A., de C.V. ("BSM") commenced this action pursuant to section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012).[1] *See* Summons, Mar. 30, 2020, ECF No. 1; Compl., Mar. 30, 2020, ECF No. 6. BSM challenges the U.S. Department of Commerce's ("Commerce") final affirmative determination in its less than fair value ("LTFV") investigation of FSS from Mexico. *See* Compl. at ¶¶ 1–2; *see also Certain Fabricated Structural Steel from Mexico*, 85 Fed. Reg. 5,390 (Dep't Commerce Jan. 30, 2020) (final determination of sales at [LTFV]) ("*Final Results*") and accompanying Issues and Decisions Memo. for [*Final Results*], A-201–850, (Jan. 23, 2020), ECF No. 21–6.

On March 20, 2020, the ITC published its final negative determination in its part of the investigation into whether imports of FSS cause (or represent a threat of) material injury to the domestic industry. *See FSS from Canada, China & Mexico*, 85 Fed. Reg. at

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

16,129.[2] On May 21, 2020, various interested parties filed requests with the United States Section of the NAFTA Secretariat for binational review of the ITC's final negative injury determination. *See [NAFTA], Article 1904; Binational Review*, 85 Fed. Reg. 25,388 (Dep't Commerce May 1, 2020) (notice of request for panel review; USA–MEX–2020–1904–04) ("*NAFTA Req.*").[3]

On May 28, 2020, AISC moved to stay the court's review of Commerce's final affirmative determination until 30 days after the NAFTA panel's review of the ITC's negative injury determination. *See* AISC's Mot. at 1.[4] On July 9, 2020, BSM and Defendant filed their responses to AISC's motion to stay.[5] *See* [BSM's] Resp. Opp'n Mot. Stay, July 9, 2020, ECF No. 30 ("Pl.'s Br."); Def.'s Memo. Supp. Mot. Dismiss & Opp'n to Mot. Stay, July 9, 2020, ECF No. 31 ("Def.'s Resp. & Mot. Dismiss").

JURISDICTION AND STANDARD OF REVIEW

The asserted basis for jurisdiction is 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting a final affirmative determination in an antidumping investigation.[6] The power to stay proceedings, however, "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) ("*Landis*"). Although the decision to grant or deny a stay rests within the court's sound discretion, courts must weigh and maintain an even balance between competing interests when decid-

[2] Before an antidumping duty order can issue, both Commerce and the ITC must come to affirmative conclusions in their respective investigations into imports of the subject merchandise. *See* 19 U.S.C. § 1673d(c)(2).

[3] On February 19, 2020, BSM filed its notice of intent to seek judicial review of Commerce's *Final Results*. *See* Compl. at ¶ 15. Thereafter, Defendant-Intervenor Corey S.A. de C.V. filed a request with the United States Section of the NAFTA Secretariat for binational review of Commerce's *Final Results*. *See [NAFTA], Article 1904; Binational Review*, 85 Fed. Reg. 14,462 (Dep't Commerce Mar. 12, 2020) (notice of request for panel review; USA–MEX–2020–1904–01).

[4] On July 1, 2020, United States-Mexico-Canada Agreement entered into force, replacing NAFTA. *See* United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116–113, 134 Stat. 11 (2020); *see also USMCA To Enter Into Force July 1 After United States Takes Final Procedural Steps For Implementation*, Office of the U.S. Trade Representative, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/usmca-enter-force-july-1-after-united-states-takes-final-procedural-steps-implementation (last visited July 22, 2020).

[5] On June 18, 2020, the court granted Defendant's consent motion for an extension of time to respond to AISC's motion to stay the proceedings. *See* Order, June 18, 2020, ECF No. 27.

[6] Defendant has filed a motion to dismiss for lack of jurisdiction. *See generally* Def.'s Resp. & Mot. Dismiss. The Government of Canada appears as amicus curiae in this action and filed a brief in support of Defendant's motion to dismiss. *See* Government of Canada's Amicus Curiae Br. Supp. Def.'s Mot. Dismiss, July 10, 2020, ECF No. 36.

ing whether a stay is appropriate. *See Landis*, 299 U.S. at 254–55; *see also Cherokee Nation v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted).

DISCUSSION

AISC submits that granting the stay would promote judicial economy because, unless and until a NAFTA panel or this Court remands the determination to the ITC, and unless and until the ITC issues an affirmative remand redetermination, any and all challenges to Commerce's final determination are moot.[7] *See* AISC's Mot. at 1–3. BSM counters that granting the stay would cause it considerable hardship and undermine judicial economy. *See* Pl.'s Br. at 1–9. Defendant adds that the court lacks jurisdiction to stay the case.[8] *See* Def.'s Resp. & Mot. Dismiss at 13–14. For the following reasons, AISC's motion to stay is denied.

If there is "even a fair possibility that [a] stay" will do damage to the opposing party, the movant "must make out a clear case of hardship or inequity in being required to go forward[.]" *See Landis*, 299 U.S. at 255. The court may also consider whether the stay promotes judicial economy. *See, e.g.*, *Diamond Sawblades Mfrs' Coal. v. United States*, Slip Op. 10–40 at 4–8, 34 CIT 404, 406–08 (2010) ("*Diamond Sawblades*"). Typically, speculative claims regarding the possible impact of a future decision on the disposition of the case at bar do not suffice to warrant a stay. *See e.g.*, *Georgetown Steel Co. v. United States*, 27 CIT 550, 552–56, 259 F. Supp. 2d 1344, 1346–49 (2003) (denying a motion to stay pending resolution of a Court of Appeals for the Federal Circuit case with speculative relevance to the case at bar); *Ethan Allen Global, Inc. v. United States*, Slip Op. 14–76, 2014 WL 2898617 (CIT June 27, 2014) (denying a motion to stay pending the final resolution of a petition for a writ of certiorari to the U.S. Supreme Court). Nonetheless, the court has granted stays pending ongoing litigation of issues that are central to the court's decision. *See*

[7] A request for NAFTA panel review of the ITC's negative determination is currently pending. *See NAFTA Req.*, 85 Fed. Reg. at 25,388.

[8] Defendant argues that the court lacks jurisdiction to entertain this case. *See* Def.'s Resp. & Mot. Dismiss at 13–14. AISC requests the court to grant the stay in part to avoid reaching the jurisdictional issue in this case. *See* AISC's Mot. at 3. BMS submits that the court should deny the stay and resolve the jurisdictional issue. *See* Pl.'s Br. at 7. Defendant insists that the court lacks the power to grant the stay altogether, and submits that the court is required to dismiss the case without deciding the motion to stay. *See* Def.'s Resp. & Mot. Dismiss at 13–14. To the extent that Defendant suggests the court must refrain from denying or granting the stay, and that the court's only option is to dismiss the case for lack of jurisdiction, this position is overly formalistic. Essentially, the Defendant is asking the court to ignore the motion to stay long enough to decide jurisdiction which is the same as denying the stay. The court necessarily has the power to dispose of the motion to stay in order to assess its own jurisdiction. The court declines to ignore the motion.

e.g., *RHI Refractories Liaoning Co. v. United States*, 35 CIT 407, 411–12, 774 F. Supp. 2d 1280, 1284–85 (2011) (granting a stay pending ongoing litigation of an important question of law before the Court of Appeals for the Federal Circuit).

Here, AISC fails to make a strong showing of hardship or inequity in being required to go forward with the proceeding, while staying the case risks causing harm to BSM and undermining judicial economy. As a preliminary matter, the statute indicates that BSM may seek judicial review of Commerce's final determination before the agency issues an ADD order. *See* 19 U.S.C. § 1516a(a)(3). Moreover, should a NAFTA panel or this Court's review of the ITC's determination result in an affirmative remand redetermination, the U.S. Customs and Border Protection will be instructed to suspend liquidation of BSM's entries and to collect cash deposits based on the dumping margins calculated in the *Final Results*. 19 U.S.C. § 1673d(c)(1); 19 C.F.R. § 351.210(d). Thus, to the extent that it could cause a change to BSM's dumping margin, the court's ruling on the present challenge to the *Final Results* would have practical consequences for BSM. A successful challenge to Commerce's *Final Results* may result in a lower (if not a zero or *de minimis*) dumping margin, reducing BSM's cash deposit rate (if not resulting in BSM's exclusion from an ADD order altogether). *See* 19 U.S.C. § 1673d(c)(1); 19 C.F.R. § 351.210(d). Prompt review of the pending challenge to the *Final Results* would allow the court to begin the sometimes-lengthy process of clarifying and remanding any unlawful agency determinations for further explanation or reconsideration. Finally, the court's jurisdiction over this proceeding is presently contested,[9] and it makes little sense to stay the case in the name of promoting judicial economy before assessing whether BSM's challenge is properly before the court.

AISC's attempt to analogize this situation with the facts of *Diamond Sawblades* is not persuasive. AISC's Mot. at 2–3. In *Diamond Sawblades*, the initial motion to stay pending review of the ITC's negative determination before the court in that case was granted on consent. *See* Slip Op. 10–40 at 2, 34 CIT 404 at 405 ("*Diamond Sawblades*"). The court subsequently denied a contested motion to lift the stay pending ongoing litigation before the Court of Appeals for the Federal Circuit ("Court of Appeals") of the ITC's affirmative remand redetermination, noting that the Court of Appeals case was underway and that a ruling would issue soon. *See Diamond Sawblades*, Slip Op. 10–46 at 6, 34 CIT at 407 ("The Federal Circuit's case disposition

[9] Both BSM and Defendant argue in favor of the court reaching and deciding the jurisdictional issue. *See* Pl.'s Br. at 7; *see generally* Def.'s Resp. & Mot. Dismiss at 13–14.

statistics indicate a median docketing-to-disposition time of approximately one year for cases from this court, making a ruling . . . likely in a matter of months.").

Unlike *Diamond Sawblades*, because the parties recently requested the NAFTA panel's review of the ITC's determination, it is unlikely that the NAFTA panel will render a decision within a matter of months. After requesting review, the parties are allowed 30 days from the date of request to appoint two panelists, 45 days from the date of request to exercise peremptory challenges to those appointments, and 55 to 61 days from the date of the request to appoint a fifth panelist. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, annex 1901.2(2)–(3), 32 I.L.M. 289, 687 (1993) ("NAFTA"). Additionally, the NAFTA panel must conduct its review in accordance with Article 1904(14), which allows the parties 30 days to file a complaint, 30 days to file the administrative record, 60 days for complainant to file its brief, 60 days for responses, 15 days for replies, 15 to 30 days for the panel to convene and hear oral argument, and 90 days for the panel to issue its written decision. *See* NAFTA art. 1904(6), (14), 32 I.L.M. at 683–84. This is not to mention the possibility of an extraordinary challenge to the NAFTA panel's decision. *See e.g.*, NAFTA art. 1904 (13), 32 I.L.M. at 683. Unlike in *Diamond Sawblades*, this court does not foresee a decision from a NAFTA panel disposing of the matter soon. As such, the court sees no reason to delay addressing the issues before it and AISC's motion to stay is denied.

CONCLUSION

For the foregoing reasons, it is

ORDERED that AISC's motion to stay is denied.

Dated: July 23, 2020
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 20–105

TOSÇELIK PROFIL VE SAC ENDÜSTRISI A.Ş., Plaintiff, and ZEKELMAN INDUSTRIES, Consolidated Plaintiff, v. UNITED STATES, Defendant, and ZEKELMAN INDUSTRIES, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 17–00018

[Sustaining the U.S. Department of Commerce's third remand results.]

Dated: July 28, 2020

David L. Simon, Law Office of David L. Simon, of Washington, D.C., for Plaintiff Tosçelik Profil ve Sac Endüstrisi A.Ş.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *David W. Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Choe-Groves, Judge:

This action arises out of the final results of the administrative review of welded carbon steel standard pipe and tube products from Turkey. *See Welded Carbon Steel Standard Pipe and Tube Products from Turkey*, 81 Fed. Reg. 92,785 (Dep't Commerce Dec. 20, 2016) (final results of antidumping duty administrative review and final determination of no shipments; 2014–2015), *as amended*, 82 Fed. Reg. 11,002 (Dep't Commerce Feb. 17, 2017) (amended final results of antidumping duty administrative review; 2014–2015). Before the court are the Final Results of Redetermination Pursuant to Third Court Remand, Mar. 16, 2020, ECF No. 96–1 ("*Third Remand Results*"). For the reasons discussed below, the court sustains the *Third Remand Results*.

BACKGROUND

The court presumes familiarity with the facts and procedural history of this action. *Tosçelik Profil ve Sac Endüstrisi A.Ş. v. United States*, 42 CIT __, 321 F. Supp. 3d 1270 (2018) ("*Tosçelik I*"); *Tosçelik Profil ve Sac Endüstrisi A.Ş. v. United States*, 43 CIT __, 375 F. Supp. 3d 1312 (2019) ("*Tosçelik II*"); *Tosçelik Profil ve Sac Endüstrisi A.Ş. v. United States*, 43 CIT __, 415 F. Supp. 3d 1395 (2019) ("*Tosçelik III*").

In *Tosçelik I*, the court remanded to Commerce for reconsideration of Plaintiff Tosçelik's duty drawback adjustment and the circumstance of sale adjustment as to warehousing expenses. *Tosçelik I* at 1281. Following the first remand, Commerce recalculated Tosçelik's duty drawback adjustment under respectful protest and provided an explanation for Tosçelik's warehousing circumstance of sale adjustment. *Final Results of Redetermination Pursuant to Court Remand*, Oct. 4, 2018, ECF No. 61–1, 1–2. In *Tosçelik II*, the court remanded Commerce's modified calculation of Tosçelik's duty drawback adjustment, but sustained Commerce's circumstance of sale adjustment for warehousing expenses. *Tosçelik II* at 1317. Following the second remand, under respectful protest, Commerce made a per-unit adjust-

ment to U.S. price in the full amount of the per-unit duty drawback granted on export as claimed by Tosçelik and an additional circumstance of sale adjustment. *Final Results of Redetermination Pursuant to Second Court Remand*, May 30, 2019, ECF No. 77–1, 1–2. In *Tosçelik III*, the court remanded Commerce's circumstance of sale adjustment because Commerce negated the statutory duty drawback adjustment and incorrectly treated the duty drawback as a direct selling expense. *Tosçelik III* at 1401. The duty drawback adjustment was sustained. *Id.*

In the *Third Remand Results*, under respectful protest, Commerce granted Tosçelik a duty drawback adjustment as claimed and reported by Tosçelik in its U.S. sales data, added an imputed cost for import duties to the cost of production, and made no circumstance of sale adjustment. *Third Remand Results* at 5. Defendant United States and Tosçelik requested that the court sustain the *Third Remand Results*. *Comments of Pl. Tosçelik Profil ve Sac Endüstrisi A.Ş. in Supp. of Final Results of Redetermination Pursuant to Remand, Slip Op. 19–166 (CIT December 18, 2019)*, May 13, 2020, ECF No. 98; *Def.'s Comments in Supp. of the Final Results of Redetermination Pursuant to Ct. Remand*, May 14, 2020, ECF No. 99. No party filed comments opposing the *Third Remand Results*.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The results of a redetermination pursuant to court remand are reviewed also for compliance with the court's remand order. *See ABB Inc. v. United States*, 42 CIT __, __, 355 F. Supp. 3d 1206, 1211 (2018).

DISCUSSION

Commerce's *Third Remand Results* are consistent with the court's prior opinions and orders in *Tosçelik I*, *Tosçelik II*, and *Tosçelik III*. Commerce has, under respectful protest, granted Tosçelik a duty drawback adjustment without making a circumstance of sale adjustment. *Third Remand Results* at 5. The weighted-average dumping margin for Tosçelik has changed from 3.33 percent to 0.00 percent. *Id.* Because the court concludes that the *Third Remand Results* comply with the court's remand order, the court sustains the *Third Remand Results*.

CONCLUSION

The court sustains the *Third Remand Results*.

Judgment will be entered accordingly.

Dated: July 28, 2020
New York, New York

/s/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE