

Slip Op. 21-122

UNITED STATES COURT OF INTERNATIONAL TRADE

**PIRELLI TYRE CO., LTD.,
PIRELLI TYRE S.P.A., and
PIRELLI TIRE LLC,**

Plaintiffs,

v.

UNITED STATES,

Defendant,

and

**THE UNITED STEEL, PAPER
AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND
SERVICE WORKERS
INTERNATIONAL UNION, AFL-
CIO, CLC,**

Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge

Court No. 20-00115

OPINION AND ORDER

[Granting Defendant's Motion to Lift the Stay and Voluntarily Remand to the Department of Commerce and granting the Partial Consent Motion to Intervene as of Right as Plaintiff-Intervenor and Respond to Defendant's Motion to Lift the Stay and Voluntarily Remand to the Department of Commerce.]

Dated: September 20, 2021

Daniel L. Porter and Ana Amador, Curtis Mallet-Prevost, Colt & Mosle LLP, of

Washington, D.C., for Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC.

Ashley Akers, Trial Attorney, and Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were Brian M. Boynton, Acting Assistant Attorney General, and Jeanne E. Davidson, Director. Of counsel on the brief was Ayat Mujais, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Roger B. Schagrin, Geert De Prest, and Nicholas J. Birch, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC.

Choe-Groves, Judge: This action concerns the results of the U.S.

Department of Commerce (“Commerce”) in the antidumping administrative review of certain passenger vehicle and light truck tires from the People’s Republic of China (“China”) for the period of August 1, 2017 through July 31, 2018. Compl. at 1, ECF No. 6. Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC (collectively, “Plaintiffs” or “Pirelli”) filed this action pursuant to 28 U.S.C. § 1581(c) contesting Commerce’s final results in Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China (“Final Results”), 85 Fed. Reg. 22,396 (Dep’t of Commerce Apr. 22, 2020) (final results of antidumping duty admin. review; 2017–2018). See id. Plaintiffs bring this suit to challenge (1) whether Commerce had statutory authority to issue a China-wide entity rate, (2) whether Commerce properly applied the applicable legal criteria for analyzing

Plaintiffs' separate rate eligibility, and (3) Commerce's conclusion that Plaintiffs were controlled by the Chinese government through Chem China's ownership.

See id. at 5–7.

Defendant United States (“Defendant”) filed Defendant’s Motion to Lift the Stay and Voluntarily Remand to the Department of Commerce, ECF No. 29 (“Defendant’s Motion” or “Def.’s Mot.”). Defendant-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“Defendant-Intervenor”) supports Defendant’s request to lift the stay and remand. Def.-Interv.’s Resp. Mot. Lift Stay & Voluntarily Remand at 1, ECF No. 35 (“Def.-Interv.’s Resp.”). Plaintiffs support Defendant’s request to lift the stay and oppose Defendant’s request for remand. Pls.’ Opp’n Def.’s Mot. Voluntary Remand at 1–2, ECF No. 30 (“Pls.’ Resp.”). Shandong New Continent Tire Co., Ltd. (“SNC”) filed a Partial Consent Motion to Intervene as of Right as Plaintiff-Intervenor and Respond to Defendant’s Motion to Lift the Stay and Voluntarily Remand to the Department of Commerce, ECF No. 31 (“Motion to Intervene” and “Mot. Intervene”). Plaintiffs consent to SNC’s Motion to Intervene. Mot. Intervene at 3. Defendant-Intervenor opposes SNC’s Motion to Intervene. Def.-Interv.’s Opp’n Shandong New Continent’s Mot. Intervene at 1, ECF No. 36 (“Def.-Interv.’s Opp’n Mot. Intervene”). For the

following reasons, the Court grants Defendant's Motion and grants SNC's Motion to Intervene.

BACKGROUND

Plaintiffs filed their complaint on May 21, 2020. Before dispositive motions were filed, Plaintiffs filed an Unopposed Motion to Stay Proceedings, ECF No. 23 ("Motion to Stay"), on July 27, 2020. Defendant consented to Plaintiffs' request to stay the proceedings until a final decision was rendered in the appeal of China Manufacturers Alliance, LLC v. United States ("China Manufacturers"), 43 CIT ___, 357 F. Supp. 3d 1364 (2019). This Court granted the Motion to Stay on August 6, 2020. See Order, ECF No. 25. The U.S. Court of Appeals for the Federal Circuit issued a decision on June 10, 2021 reversing and remanding China Manufacturers. See China Mfrs. All., LLC v. United States, 1 F.4th 1028 (Fed. Cir. 2021). A mandate was issued on August 2, 2021, after which Defendant filed its motion requesting that the Court lift the stay.

JURISDICTION

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an antidumping duty order.

DISCUSSION

I. Lifting the Stay of Proceedings

Defendant's Motion seeks to lift the stay in this action. See Def.'s Mot. at 4; see also Order, ECF No. 25. Plaintiffs and Defendant-Intervenor do not oppose lifting the stay. See Pls.' Resp. at 1–2; Def.-Interv.'s Resp. at 7–8.

In light of the U.S. Court of Appeals for the Federal Circuit's decision and mandate in China Manufacturers Alliance, LLC v. United States, 1 F.4th 1028 (Fed. Cir. 2021), this Court concludes that the stay ordered in Order, ECF No. 25, is no longer necessary. The Court grants Defendant's Motion and lifts the stay in this action.

II. Defendant's Request for Remand

Defendant's Motion also seeks a remand to consider new information regarding SNC's invoices allegedly showing inaccuracies in SNC's reported sales prices on imports of passenger vehicles and light truck tires from China during the period of review and significant undervaluation by affiliated companies. Def.'s Mot. at 1–2. Defendant explains in its motion that SNC was the sole mandatory respondent and received a calculated zero rate, which served as the basis for the rate assigned to companies eligible for a separate rate. Id. Plaintiffs oppose Defendant's Motion, arguing that SNC's calculated rate is irrelevant and “the remand request has absolutely nothing to do with Pirelli.” Pls.' Resp. at 2.

Defendant-Intervenor consents to Defendant's Motion. See Def.-Interv.'s Resp. at 1.

The Court has considerable discretion in deciding whether to grant a request by the Government for remand. See SKF USA, Inc. v. United States, 254 F.3d 1022, 1029 (Fed. Cir. 2001); Home Prods. Int'l, Inc. v. United States, 633 F.3d 1369, 1378 (Fed. Cir. 2011). If the agency's concern is substantial and legitimate, a remand may be appropriate. SKF, 254 F.3d at 1029. This Court has concluded that an agency's concern is substantial and legitimate if: (1) the agency has provided a compelling justification for its remand request, (2) the need for finality does not outweigh the agency's justification, and (3) the scope of the remand request is appropriate. See, e.g., Sea Shepherd N.Z. v. United States, 44 CIT ___, ___, 469 F. Supp. 3d 1330, 1335–36 (2020) (quoting Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States, 29 CIT 1516, 1522–26, 412 F. Supp. 3d 1330, 1336–39 (2005)).

Remand is warranted when Commerce establishes an interest in protecting the integrity of its proceedings, particularly when the agency's determination may have been tainted by fraud. See Tokyo Kikai Seisakusho, Ltd. v. United States, 529 F.3d 1352, 1361–62 (Fed. Cir. 2008). An agency "possesses inherent authority to protect the integrity of its yearly administrative review decisions, and to reconsider such decisions on proper notice and within a reasonable time after

learning of information indicating that the decision may have been tainted by fraud.” Id.; see also Ad Hoc Shrimp Trade Action Comm. v. United States, 37 CIT 67, 71, 882 F. Supp. 2d 1337, 1381 (2013) (stating that the need for finality does not outweigh a justification seeking to protect an administrative proceeding from fraud or material inaccuracy). Commerce may not reopen an administrative proceeding while an appeal is pending before this Court until the case has been remanded. See Home Prods. Int’l, 633 F.3d at 1377. The U.S. Court of Appeals for the Federal Circuit has held that it was an abuse of discretion to decline to remand a case to allow Commerce to consider reopening proceedings when presented with clear and convincing evidence of fraud, particularly in light of Commerce’s inability to reopen a proceeding while an appeal is pending and Commerce’s inherent authority to reopen a case to consider new evidence that its proceedings were tainted by fraud. See id.

Defendant seeks a remand based on new information that U.S. Customs and Border Protection provided to Commerce, including inaccuracies in the reported sales prices on imports of passenger vehicles and light truck tires from China during the 2017–2018 period of review, and potential fraud based on significant undervaluation by affiliated companies of approximately \$2.6 million lower than values submitted to Commerce. See Def.’s Mot. at 2. The Court notes that while this action is pending, Commerce is unable to reopen the administrative

proceedings to consider evidence of inaccuracies and potential fraud absent a remand order from the Court. Because Defendant's remand request is based on alleged inaccuracies and potential fraud, and the Government has a substantial and legitimate interest in protecting the integrity of its proceedings from fraud, the Court concludes that Defendant has provided a compelling justification for its remand request.

The Court considers whether the scope of Defendant's remand request is appropriate. The scope of any litigation is confined to the issues raised in a plaintiff's complaint. See Zhaoqing Tifo New Fibre Co. v. United States, 41 CIT __, __, 256 F. Supp. 3d 1314, 1327 (2017) (citing Vinson v. Washington Gas Light Co., 321 U.S. 489, 498 (1944)). Plaintiffs' complaint challenges (1) whether Commerce had statutory authority to issue a China-wide entity rate, (2) whether Commerce properly applied the applicable legal criteria for analyzing Plaintiffs' separate rate eligibility, and (3) Commerce's conclusion that Plaintiffs were controlled by the Chinese government through Chem China's ownership. See Compl. at 5–7. Plaintiffs oppose Defendant's Motion, arguing that SNC's calculated rate is irrelevant and “the remand request has absolutely nothing to do with” Plaintiffs. Pls.' Resp. at 2. Plaintiffs maintain that “the instant action . . . is limited to Pirelli challenging Commerce's refusing to grant Pirelli separate rate status.” Id. at 5. Defendant-Intervenor argues that Plaintiffs' complaint seeks to

reverse Commerce's determination assigning the China-wide entity rate to Plaintiffs and to obtain separate rate status for Plaintiffs. Def.-Interv.'s Resp. at 1–2. Defendant-Intervenor argues that the separate rate that Plaintiffs seek would be based on SNC's calculated rate as the mandatory respondent. Id. The Court agrees that SNC's calculated rate as the sole mandatory respondent could be relevant if Plaintiffs were to succeed on their separate rate claim. Because Defendant has provided a compelling justification for its remand request and the scope of Defendant's remand request is appropriate, the Court grants Defendant's remand request.

III. Motion to Intervene

SNC filed a Motion to Intervene as Plaintiff-Intervenor on August 9, 2021. See Mot. Intervene at 1. SNC moves to intervene as of right out of time under the good cause exception of USCIT R. 24(a)(3)(ii). See id. at 2–3. Plaintiffs consent to the Motion to Intervene. Id. at 3. Defendant-Intervenor opposes the Motion to Intervene. See id. at 4; Def.-Interv.'s Opp'n Mot. Intervene at 1.

A party must seek intervention as a matter of right no later than thirty days after the date of service of the complaint unless the party can show good cause for the delay. See USCIT R. 24(a)(3). To show good cause, a party must show that the motion was made out of time due to: (1) mistake, inadvertence, surprise or excusable neglect; or (2) under circumstances in which by due diligence a motion

to intervene under this subsection could not have been made within the thirty-day period. Id.

SNC claims that it is both an “interested party,” under 19 U.S.C. § 1677(9)(A), and a “party to the proceeding” who may intervene as of right under 28 U.S.C. § 2631(j)(1)(B). See Mot. Intervene at 2. SNC acknowledges that it did not move to intervene within the thirty-day period, but asserts that the good cause exception in USCIT Rule 24(a)(3)(ii) applies to its Motion to Intervene. See id. at 3. SNC asserts that its antidumping duty rate was not at issue in this action until Defendant’s Motion was filed and that, even by exercising due diligence, a motion to intervene could not have been made within the thirty-day period. Id. The Court agrees.

Intervening parties must take a case “as it stands” and are not permitted to enlarge the issues pending before the court in a proceeding. Vinson, 321 U.S. at 498. “The scope of any litigation is confined to the issues raised in the plaintiff’s complaint.” Zhaoqing Tifo New Fibre, 41 CIT at ___, 256 F. Supp. 3d at 1327 (citing Vinson, 321 U.S. at 498). SNC’s antidumping duty rate is relevant to the issues raised in Plaintiffs’ complaint because SNC’s calculated antidumping duty rate as the mandatory respondent serves as the basis for the rates assigned to companies eligible for separate rate status. SNC has made a sufficient showing that it would be adversely affected under 28 U.S.C. § 2631(j)(1)(B) if the Court

remands for Commerce to consider new information, including allegations of fraud, regarding SNC's antidumping duty rate. The Court concludes that SNC may intervene as of right and has shown good cause to permit its intervention out of time. The Court therefore grants SNC's Motion to Intervene and deems as filed Proposed Plaintiff-Intervenor Shandong New Continent Co., Ltd.'s Response to Defendant's Motion to Lift the Stay and Voluntary Remand to the Department of Commerce, ECF No. 31-2 ("SNC's Response").

CONCLUSION

For the foregoing reasons, the Court grants the motion to lift the stay ordered in Order, ECF No. 25. The Court grants Defendant's request for a remand and grants SNC's motion to intervene.

Accordingly, it is hereby

ORDERED that Defendant's Motion, ECF No. 29, is granted; and it is further

ORDERED that the stay in this action is lifted; and it is further

ORDERED that the Final Results are remanded to Commerce for further consideration; and it is further

ORDERED that SNC's Motion to Intervene, ECF No. 31, is granted; and it is further

ORDERED that SNC be entered as a party to this action as Plaintiff-Intervenor; and it is further

ORDERED that SNC's Response, ECF No. 31-2, is deemed filed; and it is further

ORDERED that this action shall proceed according to the following schedule:

- (1) Commerce shall file the remand results on or before January 18, 2022;
 - (2) Commerce shall file the administrative record on or before February 1, 2022;
 - (3) Comments in opposition to the remand results shall be filed on or before March 4, 2022;
 - (4) Comments in support of the remand results shall be filed on or before April 1, 2022;
 - (5) The joint appendix shall be filed on or before April 15, 2022;
- and

(6) Motions for oral argument, if any, shall be filed on or before
April 22, 2022.

/s/ Jennifer Choe-Groves
Jennifer Choe-Groves, Judge

Dated: September 20, 2021
New York, New York