Federal Court Cour fédérale

Date: 20240531

Docket: T-1199-23

Citation: 2024 FC 831

Ottawa, Ontario, May 31, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

ÇOLAKOĞLU METALURJI A.S.,
İÇDAS ÇELIK ENERJI TERSANE VE ULAŞIM A.Ş.,
EKINCILER DEMIR VE ÇELIK SANAYI A.Ş.,
KROMAN ÇELIK SANAYII A.Ş.,
KAPTAN DEMIR ÇELIK ENDÜSTRI VE TICARET A.Ş.,
IRPEX INTERNATIONAL INC. and
URKISH STEEL EXPORTERS' ASSOCIATION

Applicants

and

ALTASTEEL INC.,
ARCELORMITTAL LONG PRODUCTS CANADA, G.P.,
GERDAU AMERISTEEL CORPORATION,
JEBSEN & JESSEN METALS GMBH, and
MAX AICHER (NORTH AMERICA) INC.

Respondents

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] This application for judicial review arises out of a re-investigation by the Canada Border Services Agency [CBSA] of the normal values and export prices of certain rebar originating in, or exported from, the Republic of Turkey [Türkiye]. The re-investigation was undertaken as part of the CBSA's ongoing enforcement of the Canadian International Trade Tribunal [CITT]'s October 2020 order continuing its prior finding that the dumping of Turkish rebar into Canada was threatening to cause injury to Canadian domestic producers. The CBSA concluded its re-investigation on May 10, 2023, and determined the normal values for future shipments of rebar from Türkiye. The Applicants (one importer and several exporters) seek to quash the CBSA's re-investigation on two grounds: (i) legal invalidity; and (ii) reasonableness.

[2] Applying well-settled jurisprudence, this application for judicial review is bereft of any chance of success. The CBSA's re-investigation of normal values is not amenable to judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Act*] because it does not affect legal rights, impose legal obligations, or cause prejudicial effects. Rather, as this Court has held, a re-investigation is simply a preliminary step in a process that may lead to an assessment of anti-dumping duties in the future. On this basis, I am granting the Respondents' motion to strike the Notice of Application.

[3] In the event that a CBSA re-investigation is amenable to judicial review, I have also considered the Respondents' alternative arguments, namely that the Applicants have an adequate

alternative remedy in the statutory appeal regime under the *Special Import Measures Act*, RSC 1985, c S-15 [*SIMA*], and that section 18.5 of the *Act* prevents this Court from reviewing the matter.

[4] In my view, the disposition of whether the Applicants have an adequate alternative remedy under the *SIMA* and whether section 18.5 of the *Act* ousts the Court's jurisdiction depends on the applicant's status, specifically whether they are an importer or an exporter. Under the *SIMA*, only importers have standing to request a re-determination of anti-dumping duties and thus trigger the statutory appeal process. This available recourse is an adequate and effective remedy that the Applicant importer must pursue. On the other hand, the statutory appeal process is not available to the Applicant exporters as they do not have standing in their own right to request a re-determination. Based on this lack of access to the statutory appeal regime, I am similarly not persuaded that section 18.5 of the *Act* can oust the Court's jurisdiction to hear the Applicant exporters' judicial review application.

II. Background

A. *The legislative scheme*

[5] The *SIMA* protects domestic producers against the unfair trading practice known as "dumping". Dumping occurs when foreign producers sell their goods in Canada at a price lower than their selling price in the exporting country or below their cost of production. In order to protect domestic producers, anti-dumping duties may be imposed on foreign goods: *Prairies Tubulars (2015) Inc v Canada (Border Services Agency)*, 2018 FC 991 at para 6 [*Prairies Tubulars*]; *GRK Fasteners v Canada (Attorney General)*, 2011 FC 198 at para 5 [*GRK Fasteners*].

[6] The CBSA and the CITT are jointly responsible for administering the *SIMA*: *Husteel Co. Ltd v Canada (Attorney General)*, 2020 FC 430 at paras 3-4 [*Husteel*]; *Prairies Tubulars* at para 8. The CBSA determines if there has been dumping of goods, while the CITT determines whether the dumping has injured, or threatens to injure, Canadian producers of like goods: *SIMA*, ss 31-41.2, 42-43. If the CBSA makes a final determination of dumping after its investigation and the CITT makes an injury order or finding under the *SIMA*, the domestic industry is entitled to anti-dumping protection for five years: *SIMA*, s 76.03(1).

[7] The CBSA is responsible for determining the amount of duty to be applied: *SIMA*, s 55. Generally, the CBSA calculates the duties owing by determining the actual amount by which imported goods fall below their "normal values" (the selling price in the originating country): *Husteel* at para 8; *GRK Fasteners* at para 7. Normal values are determined in accordance with the *SIMA*: ss 15-23, 29, 30.

[8] Anti-dumping duties are assessed and payable by the importer of record at the time of importation of the goods: *SIMA*, ss 3, 56(1). Pursuant to subsection 56(1) of the *SIMA*, the CBSA makes three determinations at the time of importation. First, the CBSA determines whether an imported good is a "subject good" within the CITT's finding of dumping: *SIMA*, s 56(1)(a). Second, it determines the "normal value" of the imported good: *SIMA*, s 56(1)(b). Third, the CBSA determines the "export price" of the imported good: *SIMA*, s 56(1)(c).

[9] If the CBSA determines that the imported good is of the same description as the goods described in the CITT's injury finding, and the normal value of the good exceeds its export price

to Canada, then an anti-dumping duty is imposed in accordance with subsection 3(1) of the *SIMA*. Duties are imposed on importers of record by way of determinations under subsection 56(1) of the *SIMA*, or deemed determinations under subsection 56(2). Importers will not incur any anti-dumping duties where goods are priced at or above the normal value established by the CBSA: *Acierco KSE Inc*, 2022 CanLII 32520 (CA CITT) at para 41 [*Acierco KSE Inc*].

[10] If an importer disagrees with the determination of duties on any importation of goods, it may request a re-determination by a CBSA officer or a re-determination by the President of the CBSA: *SIMA*, ss 56(1.1), 58(1.1). A re-determination may be appealed to the CITT by "a person who deems himself aggrieved": *SIMA*, s 61(1). Any party to an appeal before the CITT may appeal to the Federal Court of Appeal on a question of law: *SIMA*, s 62(1).

B. *The CBSA's policy of issuing prospective normal values*

[11] The CBSA has a policy of issuing "prospective normal values" and updates normal values through re-investigations and normal value reviews to ensure the effective enforcement of the CITT's orders: CBSA Memorandum D14-1-8, "Re-investigation and Normal Value Review Policy – Special Import Measures Act (*SIMA*)", October 21, 2022 [CBSA Policy]; *Husteel* at para 9; *GRK Fasteners* at para 9.

[12] Both re-investigations and normal value reviews are administrative proceedings that the CBSA conducts on a periodic basis to update normal values during the five-year life of a CITT's injury finding: *Acierco KSE Inc* at para 43. Re-investigations are conducted with respect to all exporters of goods originating in or exported from a country or countries covered by a CITT order,

whereas normal value reviews are conducted with respect to a single exporter subject to a CITT order: CBSA Policy at para 3; *Husteel* at para 26.

[13] Following a re-investigation or a normal value review, the CBSA may re-calculate the applicable normal values and the corresponding anti-dumping duties that may be applied to future shipments of good: *GRK Fasteners* at para 9.

C. *The dumping of Turkish rebar*

[14] As a result of a dumping complaint filed by the then Canadian domestic producers of rebar (which included three of the Respondents to this application under prior names), the CBSA initiated an investigation on June 13, 2014 regarding the alleged dumping of certain rebar originating in or exported from Türkiye, pursuant to subsection 31(1) of the *SIMA*. On June 16, 2014, the CITT initiated an inquiry pursuant to section 42 of the *SIMA*.

[15] On December 10, 2014, the CBSA made a final determination of dumping pursuant to subsection 41(1) of the *SIMA*. On January 9, 2015, the CITT made a finding under subsection 43(1) of the *SIMA* that the dumping of Turkish rebar into Canada was threatening to cause injury to Canadian domestic producers [the Finding]. Based on the Finding, anti-dumping duties were imposed on certain rebar produced in Türkiye and imported into Canada for five years.

[16] Prior to the expiry of the Finding, both the CITT and the CBSA initiated expiry reviews under section 76.03 of the *SIMA*. The CBSA determined that the expiry of the Finding would likely result in the continuation or resumption of dumping of Turkish rebar. By order issued on October

14, 2020, the CITT continued its Finding for a further five years because it determined that the resumption of dumping of Turkish rebar would likely result in material injury to the domestic industry if the Finding was rescinded.

D. *The CBSA's September 2022 re-investigation*

[17] In September 2022, the CBSA initiated a re-investigation in response to a request from the Respondents to urgently initiate normal value reviews of four of the Applicant exporters. The Respondents asserted that the normal values no longer reflected current market pricing and costs.

[18] The CBSA concluded its re-investigation on May 10, 2023, and determined the normal values for future shipments of rebar from Türkiye. It also determined that the normal values may be applied to any importations that had not yet been re-determined and, in certain circumstances, may be applied retroactively.

[19] The CBSA further concluded that a particular market situation existed with respect to the Turkish rebar market, which did not allow a proper comparison with the sales of the goods to the importers in Canada pursuant to paragraph 16(2)(c) of the *SIMA*. This finding of a particular market situation resulted in the CBSA using a different method under the *SIMA* for the determination of normal values.

E. *The judicial review application*

[20] The Applicants are comprised of (i) an importer of Turkish rebar - Irpex International Inc; (ii) Turkish exporters of rebar - Çolakoğlu Metalurji A.S., İçdas Çelik Enerji Tersane Ve Ulaşim A.Ş., Ekinciler Demir Ve Çelik Sanayi A.Ş., Kroman Çelik Sanayii A.Ş., and Kaptan Demir Çelik Endüstri Ve Ticaret A.Ş.; and (iii) a non-profit business organization of steel producers and exporters in the Turkish steel industry - the Turkish Steel Exporters' Association. In these Reasons, the Turkish exporters of rebar and the Turkish Steel Exporters' Association are collectively referred to as "the Applicant exporters". The Respondents are Canadian domestic producers of rebar.

[21] The Applicants challenge the CBSA's May 10, 2023 "decision" with respect to the conclusion of the re-investigation: Notice of Application dated June 9, 2023 [Notice of Application]. They seek an order quashing the decision on two grounds.

[22] First, they allege that the decision is invalid and/or unlawful because the CBSA lacks the requisite legal authority to conduct re-investigations: Notice of Application at paras 12-30. Second, in the alternative, they argue that the decision is unreasonable in that the CBSA erred in determining that a particular market situation existed in Türkiye that did not allow a proper comparison with the sale of goods to importers in Canada: Notice of Application at paras 31-40.

[23] The Respondents brought a motion in writing under Rule 369 of the *Federal Courts Rules*, SOR 98/106 [*Rules*] for an order striking the Notice of Application. They argue that the CBSA's

re-investigation is not a reviewable matter under section 18.1 of the *Act*. Alternatively, the Respondents assert that the Applicants have an adequate alternative remedy since the *SIMA* provides a complete statutory scheme governing challenges to determinations of normal values, and that section 18.5 of the *Act* deprives this Court of jurisdiction.

[24] The Applicants opposed the motion being heard in writing and requested an oral hearing. By Direction dated November 6, 2023, the Court directed that the motion be heard orally and in-person. A hearing was held on February 1, 2024, at which time the parties' counsel made extensive oral submissions. After the hearing, the Court requested that the parties file written representations on the impact, if any, of the Supreme Court of Canada's recent decision in *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 [*Yatar*] on the availability of an adequate alternative remedy, as argued by the Respondents: Direction dated March 28, 2024. Comprehensive written representations were submitted by the parties.

III. Analysis

[25] Judicial review is a discretionary remedy: *Yatar* at paras 51, 54; *Strickland v Canada (Attorney General)*, 2015 SCC 37 at paras 37-38, 40 [*Strickland*]. As the Federal Court of Appeal made clear, it is also a remedy of last resort, available "only when a cognizable administrative law claim exists, all other routes of redress now or later are foreclosed, ineffective or inadequate, and the Federal Court has the power to grant the relief sought": *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc* 2013 FCA 250 at para 101 [*JP Morgan*].

[26] In my view, the CBSA's re-investigation is not a matter that is amenable to judicial review under section 18.1 of the *Act*. On this basis, I find that the application is bereft of any chance of success and should be struck in its entirety. However, if the re-investigation is a reviewable matter, I have also considered whether there is an adequate alternative remedy available to the Applicants, and whether the Court's jurisdiction is ousted by virtue of section 18.5 of the *Act*.

A. *Jurisdiction to strike applications for judicial review*

[27] While the *Rules* do not contemplate a motion to strike in the context of applications, the Court has the plenary jurisdiction to strike an application to restrain the misuse or abuse of the court process: *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33 [*Wenham*]; *JP Morgan* at para 48.

[28] The threshold to strike an application is high: *JP Morgan* at para 48. The onus is on the moving party to demonstrate that the application is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc v Pharmacia Inc (CA)*, 1994 CanLII 3529 (FCA), [1995] 1 FC 588 at 600. It must be established that there is "an obvious, fatal flaw striking at the root of the Court's power to entertain the application": *JP Morgan* at para 47. In other words, the application must be "doomed to fail": *Wenham* at para 33.

[29] An application is doomed to fail where: (i) judicial review is not available under the *Act*: *Wenham* at para 36; *JP Morgan* at para 68; (ii) there is an adequate alternative forum in which the relief may be sought: *Wenham* at para 36(I); *JP Morgan* at paras 84-85; *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30-31, 33 [*CB Powell Limited*]; and (iii)

section 18.5 of the *Act* precludes the Federal Court from hearing the application: *Pier 1 Imports (US), Inc v Canada (Public Safety and Emergency Preparedness),* 2019 FCA 258 at para 19; *JP Morgan* at paras 66, 81.

B. *The CBSA's re-investigation is not a reviewable matter*

[30] To succeed on judicial review, an application must state a "cognizable administrative law claim" that can be brought in the Federal Court: *JP Morgan* at para 66. Cognizable administrative law claims must satisfy two requirements. First, judicial review must be available under the *Act*: *JP Morgan* at paras 68-69. Second, the application must state a known administrative law ground or one that could be recognized in law: *JP Morgan* at para 70. Here, this application fails to satisfy the first requirement, in that judicial review is not available under the *Act*.

[31] While judicial review is available for a wide range of matters, not all administrative action or conduct triggers the right to bring an application under the *Act*. A matter is not reviewable within the meaning of section 18.1 of the *Act* if it does not "affect legal rights, impose legal obligations or cause prejudicial effects": *Reisdorf v Canada (Attorney General),* 2023 FCA 188 at para 6; *Democracy Watch v Canada (Attorney General),* 2021 FCA 133 at paras 23, 29; *Air Passengers Rights v Canada (Transportation Agency),* 2020 FCA 92 at para 22 [*Air Passengers Rights*]; *Canada (Attorney General) v Democracy Watch,* 2020 FCA 69 at para 19; *Air Canada v Toronto Port Authority,* 2011 FCA 347 at paras 28-29 [*Toronto Port Authority*]; *Democracy Watch v Conflict of Interest and Ethics Commissioner,* 2009 FCA 15 at para 10.

[32] I agree with the Respondents that this application is bereft of any chance of success because the CBSA's re-investigation is not a matter that is amenable to judicial review. Applying this Court's jurisprudence, the re-investigation does not affect legal rights, impose legal obligations, or cause prejudicial effects. Furthermore, I am not persuaded by the Applicants' argument that this case is distinguishable such that I am not bound to follow previous jurisprudence based on the principle of horizontal *stare decisis* in accordance with *R v Sullivan*, 2022 SCC 19 [*Sullivan*].

[33] The "nature or substance" of the underlying matter or conduct must be considered to determine whether it triggers a right to judicial review: *Toronto Port Authority* at para 28. Significantly, this Court has already considered the nature and substance of the CBSA's re-investigations in *Prudential Steel ULC v Canada (Attorney General)*, 2015 FC 1077 [*Prudential Steel*] and *GRK Fasteners*, and of the CBSA's normal value reviews in *Husteel.*

[34] In 2011, in *GRK Fasteners*, an importer sought judicial review of a CBSA re-investigation. Justice O'Reilly concluded that it was not amenable to judicial review and dismissed the application:

> [24] Bearing these considerations in mind, I must conclude that the CBSA's re-investigation is not amenable to judicial review. A re-investigation by definition is a preliminary step in the process that may lead to an assessment of duty. A re-investigation may lead to a determination or re-determination that may be appealed to the CITT, and to the Federal Court of Appeal.
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> [25] On the facts here, the impact of the re-investigation on GRK is uncertain, and certainly not immediate. These circumstances, along with the case law cited above, suggest that permitting judicial review of a re-investigation would be inappropriate. It would clearly run afoul of the policy considerations cited by Justice Stratas in *Powell*, above.

> [26] Should it transpire that the duty arrived at under the re-investigation is imposed on GRK, it can seek a re-determination. And from there it can appeal to the CITT and the Federal Court of Appeal. A remedy in the form of judicial review at this early stage of the process set out in *SIMA* would disrupt and distort the remedial scheme Parliament enacted.

[35] In *Prudential Steel* in 2015, an importer brought a motion for an interlocutory injunction staying a CBSA re-investigation. Justice Hughes held that a re-investigation is in the nature of an inquiry process that does not affect legal rights, impose legal obligations, or cause prejudice:

> [36] Dealing with the first ground, one must distinguish between a re-investigation which is in the nature of an inquiry process, and a re-determination which is a decision that may result from that inquiry process. The inquiry process does not affect legal rights or impose legal obligations on [*sic*] cause prejudice; those results only come about when a determinative or re-determination is made. This case is similar to that of the *Toronto Port Authority* case where the Authority issued certain bulletins to the effect that it was going to initiate a process for awarding "slots" at the Toronto Island Airport...

[36] Finally, most recently in 2020, in *Husteel*, Justice Boswell struck an exporter's judicial review application of a CBSA normal value review, finding that it was not amenable to judicial review as it was simply a prospective assessment with no legal effects:

> [25] I agree with the respondents that the Review Decision is not a decision amenable to judicial review under section 18.1 of the *FCA* because it has no legal effects. The issuing of prospective normal values through a normal value review is not an assessment of a duty. A normal value review is a preliminary step in the administrative process that may eventually lead to an assessment of anti-dumping duties when goods are imported into Canada.
>
> …
>
> [30] Although Husteel complains that the Review Decision priced its goods out of the Canadian market and affected the way it does business, this is not a legal effect or consequence such that the

> Review Decision is an administrative action reviewable under section 18.1 of the *FCA*. The Review Decision only purported to prospectively determine the normal value to be used to determine the amount of duties payable on Husteel's goods. It was a decision not amenable to judicial review (*Prudential Steel Ltd v Bell Supply Company*, 2016 FCA 282).
>
> [31] …The Review Decision is only a prospective assessment; the normal value will be assessed and only have legal effect once Husteel's goods are imported into Canada.

[37] Based on the foregoing, this Court has consistently determined that the CBSA's re-investigations and normal value reviews are not reviewable matters under the *Act.* They are simply preliminary steps in the process that may lead to an assessment of anti-dumping duties under the *SIMA* when goods are imported into Canada. As the Respondents articulated at the hearing, the "rubber does not hit the road" until the goods are actually imported and duties are found to be owing. In other words, an importer's liability under the *SIMA*, if any, does not crystalize until that juncture.

[38] If duties are imposed on an importer, the legislated appeal process under the *SIMA* governs. The CBSA's determination of duties may be challenged first by an importer through a request for a re-determination by the CBSA, then by an "aggrieved person" by way of an appeal to the CITT, and ultimately on a question of law to the Federal Court of Appeal by any party who participated in the CITT appeal: *SIMA*, ss 56-62.

[39] A CBSA re-investigation may also be likened to an advance ruling. The jurisprudence is clear that advance rulings do not constitute matters that affect legal rights, impose legal obligations, or cause prejudice: *Air Passengers Rights* at para 23; *Prudential Steel Ltd v Bell Supply*

Company, 2015 FC 1243 at para 38, aff'd 2016 FCA 282 at para 12; *Toronto Port Authority* at para 30; *Rothmans, Benson & Hedges Inc v Canada (Minister of National Revenue)*, 1998 CanLII 7237 (FC). As the Federal Court of Appeal held, advance rulings are not justiciable as they are "nothing more than a non-binding opinion": *Toronto Port Authority* at para 30.

[40] The Applicants' attempts to distinguish this case from *GRK Fasteners, Prudential Steel,* and *Husteel* are without merit. They argue that the Court's decisions in *GRK Fasteners* and *Prudential Steel* are distinguishable because they involved importers seeking judicial review, not exporters. However, the status of the applicant seeking judicial review − whether an importer or an exporter − is of no consequence in determining whether a re-investigation is amenable to judicial review under the *Act*.

[41] Rather, as stated above, the Court must consider the nature and substance of the matter at issue and determine whether the matter "affects legal rights, imposes legal obligations, or causes prejudice". This was the approach taken by the Court in *GRK Fasteners*, *Prudential Steel,* and *Husteel* when it determined that re-investigations and normal value reviews are not reviewable matters. The status of the applicant played no role in the Court's decisions. Notably, while the applicants in *GRK Fasteners* and *Prudential Steel* were importers, the applicant in *Husteel* was an exporter.

[42] The Applicants further argue that the Court's prior decisions do not address one of the main issues raised in this application, namely whether the re-investigation is *ultra vires* the CBSA's statutory authority. On that basis, they state that this application cannot be bereft of any chance of

success because the *vires* issue has never been considered: Applicants' Written Representations at para 81. This argument is fundamentally flawed.

[43] As explained in paragraph 30 above, where this application (as with the ones in *GRK Fasteners*, *Prudential Steel*, and *Husteel*) falls short is that it fails to satisfy the first requirement of stating a "cognizable administrative law claim" because judicial review is not available under the *Act.* There is no dispute that *vires* is a ground of review that is known to administrative law: *JP Morgan* at para 70. However, there is no need to consider the grounds relied upon by the Applicants in support of their application (the second requirement of a cognizable administrative law claim) given that the application fails on the first requirement.

[44] In addition, the Applicants argue that the re-investigation is a reviewable matter because it caused the Applicant exporters loss of sales and business. A similar submission was made and rejected by the Court in *Husteel*. In that case, the exporter alleged that the normal value review "priced its goods out of the Canadian market and affected the way it does business": *Husteel* at para 30. The Court took this claim at face value "as the facts are to be taken as pleaded" on a motion to strike: *Husteel* at para 21. However, Justice Boswell reiterated that a normal value review only purports "to prospectively determine the normal value to be used to determine the amount of duties payable": *Husteel* at para 30. As such, its impact on the exporter's business is not a legal effect or consequence such that "the Review Decision is an administrative action reviewable under section 18.1" of the *Act*: *Husteel* at para 30.

[45] Finally, contrary to the Applicants' argument, *Husteel* is a binding precedent. As the Supreme Court determined in *Sullivan*, prior decisions should be followed unless one of the narrow exceptions set out in *Re Hansard Spruce Mills*, 1954 CanLII 253(BC SC), [1954] 4 DLR 590 (BCSC) applies. The three exceptions are where: (i) the rationale of an earlier decision has been undermined by subsequent appellate decisions; (ii) the earlier decision was reached *per incuriam* ("through carelessness" or "by inadvertence"); or (iii) the earlier decision was not fully considered (for example, taken in exigent circumstances): *Sullivan* at para 75. The Applicants have failed to demonstrate that any of the three criteria apply here. In essence, the Applicants argue that *Husteel* was wrongly decided and that the Court should decline to follow suit.

[46] I also do not agree with the Applicants that the Supreme Court's recent decision in *Yatar* on adequate alternative remedies renders this Court's decision in *Husteel* "no longer good law": Applicants' Supplemental Submissions at para 14. The *Husteel* application was struck on the sole basis that a normal value review is not a reviewable matter under the *Act*. While the availability of an adequate alternative remedy was raised in *Husteel*, the Court made it clear that, given its conclusion on reviewability, "it [was] unnecessary to consider whether Husteel has an adequate alternative remedy": *Husteel* at para 31.

[47] For these reasons, I am satisfied that this application is bereft of any chance of success on the basis that the CBSA's re-investigation does not affect legal rights, impose legal obligations, or cause prejudicial effects. As such, it is not amenable to judicial review under section 18.1 of the Act. I therefore strike the Applicants' application for judicial review in its entirety.

C. *Availability of an adequate alternative remedy*

[48] If the CBSA's re-investigation is amenable to judicial review, the Court may still exercise its discretion and refuse to hear the application on its merits if the Applicants have an adequate alternative remedy available to them to challenge the issues raised in the application.

[49] In determining whether an applicant has an adequate alternative remedy, a court must consider all the circumstances of the case. The list of relevant considerations include, but are not limited to, the convenience of the alternative remedy, the basis of the judicial review application, the nature of the other forum and its remedial capacity, expeditiousness, the relative expertise of the alternative decision-maker, the economical use of judicial resources, and the cost: *Strickland* at para 42. In addition to considering the available alternative remedy, a court must also consider the suitability and appropriateness of judicial review: *Yatar* at para 56; *Strickland* at para 43.

[50] Applications for judicial review should not be struck based on an adequate alternative remedy unless the court is "certain" that: (i) there is recourse elsewhere, now or later; (ii) the recourse is adequate and effective; and (iii) the circumstances pleaded are not the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto: *JP Morgan* at para 91.

[51] In this case, the Respondents argue that the statutory appeal process under the *SIMA* is an adequate alternative remedy for the Applicants to challenge both issues raised in their judicial review application (*vires* and reasonableness). However, in my view, the determination of whether

the *SIMA* appeal regime constitutes an adequate alternative remedy depends on whether the applicant is an importer or an exporter.

(1) The Applicant importer has an alternative remedy

a. Adequate remedy is available under the *SIMA* appeal regime

[52] The issue of whether an importer's right to seek a re-determination under the *SIMA* appeal regime constitutes an adequate alternative remedy to a judicial review of a CBSA re-investigation has already been considered by this Court in *GRK Fasteners*. The Court concluded that "the appeal remedies under SIMA are an adequate alternative to any recourse that [an importer] might otherwise have to judicial review": *GRK Fasteners* at para 20.

[53] In finding that the statutory appeal regime is an adequate alternative remedy for an importer, the Court fully canvassed all the relevant considerations in *GRK Fasteners*. This included consideration of the *SIMA* remedial scheme, as well as the suitability and appropriateness of judicial review:

> [25] On the facts here, the impact of the re-investigation on GRK is uncertain, and certainly not immediate. These circumstances, along with the case law cited above, suggest that permitting judicial review of a re-investigation would be inappropriate. It would clearly run afoul of the policy considerations cited by Justice Stratas in *Powell*, above.
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> [26] Should it transpire that the duty arrived at under the re-investigation is imposed on GRK, it can seek a re-determination. And from there it can appeal to the CITT and the Federal Court of Appeal. A remedy in the form of judicial review at this early stage of the process set out in *SIMA* would disrupt and distort the remedial scheme Parliament enacted.

> [27] GRK argues that the appeal remedies under the *SIMA* are not an adequate alternative to judicial review because the grounds for appeal are narrower than the grounds that may support an application for judicial review. Further, it may have to pay an assessed duty first and appeal later, which would not be the case if a re-investigation could be judicially reviewed. Finally, GRK suggests that the appeal process takes longer than the judicial review.
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> [28] It is clear, however, that the grounds of appeal available under *SIMA* are broad and include issues of procedural fairness (*Toyota*, above; *Spike Marks*, above). It is certainly possible that an importer would be liable to pay duty while a determination is under appeal; it is also possible that an importer might, if a re-investigation could be judicially reviewed, succeed in quashing a decision whose effect on the importer is purely hypothetical. As discussed above, this may be the case in respect of GRK's application. Further, there would be nothing preventing an importer from selling a small amount of goods in Canada in order to trigger a determination and then seek to appeal it – in a sense, a test case. Finally, there is no evidence that the route of judicial review would be faster than an appeal. To recognize recourse to judicial review would accord parties two different remedy streams, effectively doubling the amount of time and resources spent adjudicating disputes over duties.
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> [Emphasis added]

[54] There is no basis upon which to distinguish this case from *GRK Fasteners* as it pertains to the Applicant importer having available, effective recourse under the *SIMA*.

[55] I would add that while an importer's recourse under the *SIMA* would not be available until after the importation of goods, rather than when a re-investigation is concluded, it is nonetheless an adequate alternative remedy. Judicial review is precluded where there is adequate, effective recourse elsewhere, now or at another time [emphasis added]: *JP Morgan* at paras 84, 91. Furthermore, the Supreme Court has emphasized that in order to be "adequate", the alternative

remedy does not need to be the applicant's preferred remedy or identical to what is available on judicial review: *Strickland* at paras 42, 59.

b. Issues can be raised in the *SIMA* appeal process

[56] I am not persuaded by the Applicants' arguments that the particular issues raised in this application – the legal validity of the CBSA's re-investigation and the reasonableness of the CBSA's conclusion that a particular market situation existed – could not be raised in the *SIMA* appeal process. The Applicants argue that the *SIMA* limits the issues that can be raised on a re-determination and a subsequent appeal to the CITT to three issues: (i) whether the goods are subject to the CITT's injury finding; (ii) the normal value of the goods; and (iii) the export prices of the goods. They assert that the two issues raised in this application fall outside this "limited subject matter scope": Applicants' Written Representations at para 68.

[57] However, this Court has held that the available grounds of appeal under the *SIMA* are broad: *GRK Fasteners* at para 28; *Toyota Tsusho America Inc v Canada (Canada Border Services Agency)*, 2010 FC 78 at paras 23-24, aff'd 2010 FCA 262 [*Toyota Tsusho America Inc*]. In addition, a re-determination by the President of the CBSA and an appeal to the CITT are both *de novo* appeals: *Toyota Tsusho America Inc* at para 24.

[58] The Applicants have not pointed to any jurisprudence supporting that an importer cannot challenge the legality of the CBSA's re-investigation when it requests a re-determination of anti-dumping duties under the *SIMA*. On the other hand, the Respondents refer to the following

decisions as illustrative of the breadth of the issues that have been successfully challenged before the CITT.

[59] In *Acierco KSE Inc*, the CITT addressed the appellant's argument that the CBSA acted outside the jurisdiction or authority given to it under the *SIMA*: *Acierco KSE Inc* at paras 82-83. In another appeal, the CITT considered whether the normal values applicable to the subject goods should be those established by the CBSA during its re-investigation or those established during the CBSA's original investigation: *Ferrostaal Metals GmbH*, 2020 CanLII 43521 (CA CITT) [*Ferrostaal Metals GmbH*]. The CITT further addressed other arguments made by the importer that the CBSA had abused its discretion and breached the importer's legitimate expectations in retroactively assessing the importer for duties: *Ferrostaal Metals GmbH* at paras 73, 78-80.

[60] Based on these examples, I am unable to find that the Applicant importer would be precluded from raising the *vires* issue in an appeal to the CITT if duties were imposed in accordance with the normal value determined in the re-investigation. Indeed, it is incumbent on parties to pursue and exhaust all available administrative processes before seeking judicial review. In the context of those administrative processes, it is for the decision-maker to "determine whether it has the jurisdiction to grant the remedy requested": *Viaguard Accu-Metrics Laboratory v Standards Council of Canada*, 2023 FCA 63 at para 5.

[61] In accordance with section 62 of the *SIMA*, the Applicant importer could then appeal any CITT finding on *vires* to the Federal Court of Appeal given that the issue of *vires* is a question of law: *TVA Group Inc v Bell Canada*, 2021 FCA 153 at para 31; *Telecommunications Workers*

Union v Canadian Radio-television and Telecommunications Commission (FCA), 2003 FCA 381 at paras 24-25.

[62] Further, I cannot accept the Applicants' argument that the reasonableness of the CBSA's conclusion that a particular market situation existed in the Turkish rebar market is not an issue that may be raised in the context of a re-determination and a subsequent appeal to the CITT. The CBSA determined that a particular market situation existed such that a proper comparison with the sales of the goods to the importers in Canada in accordance with paragraph 16(2)(c) of the *SIMA* was not possible. As a result of this finding, the CBSA used a different method to determine normal values in the re-investigation. As such, this issue is squarely within scope since it pertains directly to the normal value of the goods. On this basis, the Applicant importer should be required to pursue this issue through the *SIMA* appeal regime.

[63] I acknowledge that, as a mixed question of fact and law, this issue may ultimately not be appealed to the Federal Court of Appeal under section 62 of the *SIMA*. However, that does not relieve an importer from challenging a CBSA finding of a particular market situation and exhausting the legal recourse available to it within the *SIMA* regime up until an appeal to the Federal Court of Appeal. Based on the *Yatar* decision, a judicial review application in this Court may be available at that juncture: *Yatar* at paras 58, 60, 62-66.

[64] For these reasons, if the CBSA's re-investigation is amenable to judicial review, I find that the Applicant importer has an adequate alternative remedy that it should pursue, and that judicial

review is neither suitable nor appropriate in the circumstances. I would therefore exercise my discretion and strike the application with respect to the Applicant importer Irpex International Inc.

(2) The Applicant exporters do not have an adequate alternative remedy available to them

[65] Unlike the Applicant importer, the Applicant exporters do not have standing in their own right to challenge a CBSA determination and request a re-determination under the *SIMA*, and thus are unable to trigger the statutory appeal process. While an exporter may be able to access the appeal regime at the stage of a CITT appeal and file an appeal on a question of law to the Federal Court of Appeal, it simply cannot access the appeal regime through the "front door".

[66] In my view, the availability of the *SIMA* appeal regime as an alternate forum, rather than its adequacy, is the decisive factor in determining whether the Applicant exporters have an adequate alternative remedy. This is sufficient to dispose of this issue given the Applicant exporters' lack of access to the statutory appeal regime from the outset. As such, this is not a situation where the Applicant exporters are attempting to "bypass" the existing statutory regime and seek "early recourse to the courts": *CB Powell Limited* at para 33.

[67] As the Supreme Court held in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the legislature's intent to restrict statutory rights of appeal to certain parties does not on its own preclude judicial review:

> [52] Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that

> may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.
>
> [Emphasis added]

[68] Despite an exporter's inability to directly access the statutory appeal process by seeking a re-determination under the *SIMA*, the Respondents argue that the Applicant exporters should be required to take certain steps to attempt to gain access to the statutory regime before they seek judicial review. More particularly, the Respondents assert that the exporters should: (i) seek to act as a "non-resident importer" under the *SIMA* so that they could import the goods themselves rather then sell them to an importer; and (ii) find an importer to buy their goods and have that importer request a re-determination under the *SIMA*.

[69] The Respondents assert that, having failed to pursue these two avenues, the Applicant exporters have not exhausted the adequate alternative remedies open to them. I do not agree. Requiring the Applicant exporters to "exhaust" these avenues in an effort to gain access to the *SIMA* appeal process extends far beyond what the existing jurisprudence requires of litigants before they can seek judicial review. The Respondents have failed to point to any jurisprudence that supports their approach.

[70] Notably, seeking to act as a non-resident importer is not a straightforward or simple proposition. Subsection 89(1) of the *SIMA* provides that the President of the CBSA may request a ruling from the CITT regarding which of two entities is "in reality" the importer of certain goods: *Oil Country Tubular Goods*, 2022 CanLII 51353 (CA CITT) at paras 1, 14 [*Oil Country Tubular Goods*]. The CITT's decision is subject to reconsideration and may be further appealed to the Federal Court of Appeal: *SIMA*, ss 91(g), 96.1(1)(g). The CITT recently determined that while a physical presence in Canada is not required in order to qualify as an "importer in Canada", the "business practices and legal arrangements of the importer [should] clearly demonstrate some presence in Canada": *Oil Country Tubular Goods* at para 41.

[71] In addition, the Respondents' second proposed avenue would require the Applicant exporters to convince an importer to undertake a "test" case and import the goods, pay the duties, and then request a re-determination. Following the CBSA's re-determination, these Applicants would then be able to access the statutory scheme and appeal the re-determination to the CITT as "an interested person": *SIMA*, s 61.

[72] In the circumstances, I am not persuaded that the Applicant exporters' judicial review application is bereft of any chance of success based on the doctrine of adequate alternative remedy. I would therefore decline to strike their application for judicial review, if the CBSA's re-investigation is a reviewable matter under the *Act*.

D. *Section 18.5 does not bar judicial review*

[73] The Respondents also argue that section 18.5 of the *Act* deprives the Court of jurisdiction because the *SIMA* is a complete code: Respondent's Written Representations at paras 41-43; Reply Written Representations of the Respondents at paras 10-15. Given my determination that the Applicant importer has an adequate alternative remedy to challenge the issues raised in this application, I am only considering the application of section 18.5 of the *Act* with respect to the Applicant exporters.

[74] Section 18.5 of the *Act* provides as follows:

18. 5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	**18.5** Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

[75] Since the Applicant exporters do not have an adequate alternative remedy available to them because they cannot access the *SIMA* appeal regime in their own right, it stands to reason that section 18.5 similarly would not bar judicial review in the circumstances of this case.

[76] This is supported by the Federal Court of Appeal's conclusion that section 18.5 may operate to preclude judicial review "to the extent that there is an available and meaningful remedy allowing the aggrieved party to challenge" the underlying matter or decision [emphasis added]: *Canadian National Railway Company v Scott*, 2018 FCA 148 at para 45. The Court of Appeal has further emphasized that section 18.5 of the *Act* "provides that access to judicial review is foreclosed *only* to the extent a right of appeal is present" [emphasis in original]: *Canada (Attorney General) v Best Buy Canada Ltd*, 2021 FCA 161 at para 88 [*Best Buy Canada Ltd*].

[77] This interpretation also finds support in *Vavilov*, where the Supreme Court held that the existence of a statutory right of appeal does not on its own foreclose judicial review "by individuals who have no right of appeal": *Vavilov* at para 52; see also *Yatar* at para 47; *Best Buy Canada Ltd* at paras 110-111.

[78] In support of their section 18.5 argument, the Respondents rely on this Court's decisions in *Prairies Tubulars* and *Toyota Tsusho America Inc*. However, those cases are distinguishable because they involved importers seeking to judicially review the CBSA's determinations instead of following the appeal mechanism in the *SIMA*. The Court found that in those cases, the importers had not pursued the appeal route – a request for a re-determination by the President of the CBSA and an eventual appeal to the CITT and the Federal Court of Appeal. Here, as I found, the exporters do not have the same access to this regime such that it can be said that they have an adequate alternative remedy available to them.

[79] For these reasons, if the CBSA re-investigation is a reviewable matter under the *Act*, I am not persuaded that section 18.5 of the *Act* ousts this Court's jurisdiction to consider the Applicant exporters' judicial review application.

E. *Privative clause is not in issue*

[80] In the Applicants' supplemental submissions addressing the *Yatar* decision, they refer to the conflicting Federal Court of Appeal jurisprudence concerning the availability of judicial review in the face of statutory privative clauses: Applicants' Supplemental Submissions at paras 27-28. As the Applicants point out, Justice Stratas referred to this as a "serious conflict in the Court's jurisprudence": *Democracy Watch v Canada (Attorney General)*, 2023 FCA 39 at para 5.

[81] The Applicants take the position that the Court should not strike this application given that there is a "debatable issue" that requires resolution: Applicants' Supplemental Submissions at para 28. In response, the Respondents submit that "the effects of the privative clause in the *SIMA*" are not engaged in this case: Respondents' Reply Supplemental Submissions at para 16. I agree with the Respondents that they did not raise the issue of a *SIMA* privative clause precluding judicial review and it is therefore unnecessary for me to consider this issue. The Respondents argument that section 18.5 of the *Act* deprives this Court of jurisdiction to hear the matter is a distinct issue from whether a privative clause in a decision-maker's home statute may bar and/or limit judicial review.

IV. Conclusion

[82] I am granting the Respondents' motion to strike the Applicants' application for judicial review, with my determinative finding being that the application is bereft of any chance of success because the CBSA's re-investigation is not amenable to judicial review under the *Act*.

[83] In the event that a re-investigation is a reviewable matter, I find that the Applicant importer has an adequate alternative remedy in the *SIMA* appeal regime that it could pursue to challenge the issues raised in this application. However, this alternative forum is not similarly available to the Applicant exporters given that they do not have standing in their own right to seek a re-determination and trigger the appeal process under the *SIMA*. For this reason, I am also not persuaded that that section 18.5 of the *Act* deprives the Court of jurisdiction to hear the Applicant exporters' application.

V. Costs

[84] At the hearing, the parties advised me that they had agreed on the quantum of costs such that the successful party would be entitled to $5,000 in costs. I accept that this is a reasonable amount. I therefore award costs in the total amount of $5,000 to be shared by the Respondents collectively.

JUDGMENT in T-1199-23

THIS COURT'S JUDGMENT is that:

1. The Notice of Application is struck in its entirety, without leave to amend, and the application for judicial review is dismissed.

2. The Applicants shall pay the Respondents collectively a total amount of $5,000.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1199-23
STYLE OF CAUSE:	ÇOLAKOĞLU METALURJI A.S., İÇDAS ÇELIK ENERJI TERSANE VE ULAŞIM A.Ş., EKINCILER DEMIR VE ÇELIK SANAYI A.Ş., KROMAN ÇELIK SANAYII A.Ş., KAPTAN DEMIR ÇELIK ENDÜSTRI VE TICARET A.Ş., IRPEX INTERNATIONAL INC. AND TURKISH STEEL EXPORTERS' ASSOCIATION v ALTASTEEL INC., ARCELORMITTAL LONG PRODUCTS CANADA, G.P., GERDAU AMERISTEEL CORPORATION, JEBSEN & JESSEN METALS GMBH, AND MAX AICHER (NORTH AMERICA) INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING	FEBRUARY 1, 2024
JUDGMENT AND REASONS FOR JUDGMENT:	TURLEY J.
DATED:	MAY 31, 2024

APPEARANCES:

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