Slip Op. 22-34

UNITED STATES
COURT OF INTERNATIONAL TRADE

Court No. 22-00032

DONGKUK STEEL MILL CO, LTD.,

Plaintiff,

v.

UNITED STATES,

Defendant,

and

NUCOR CORPORATION,

Defendant-Intervenor.

Before: M. Miller Baker, Judge

OPINION

[Denying motion to intervene as of right.]

Dated: April 14, 2022

Roger B. Schagrin, *Jeffrey D. Gerrish*, and *Kelsey M. Rule*, Schagrin Associates of Washington, DC, on the papers for Movant/Proposed Defendant-Intervenor SSAB Enterprises, LLC.

Jeffrey M. Winton, Winton & Chapman PLLC of Washington, DC, on the papers for Plaintiff Dongkuk Steel Mill Co., Ltd.

Baker, Judge: Stephen Hawking is famously reported to have remarked that "[s]howing up is half the battle." That may be, but in litigation *only* showing up risks losing the battle. Here, SSAB Enterprises, LLC, a domestic steel producer, requested that the Department of Commerce open an administrative review of a countervailing duty order but then sat on the sidelines for the ensuing review. At the review's conclusion, respondent Dongkuk Steel Mill Co., Ltd., a Korean steel producer, brought this action to challenge the countervailing duties imposed by Commerce. SSAB now seeks to intervene on the side of the government to defend those duties, arguing that it may do so as of right because it was a party to the administrative proceeding. Commerce's regulations, however, require that a would-be litigant do more than just show up. Because SSAB did not actively participate in the review, the court denies its motion to intervene.

I

Dongkuk sued under section 516A of the Tariff Act of 1930. *See generally* ECF 15.[1] SSAB now moves under USCIT R. 24(a) to intervene as of right in support of Defendant. ECF 25. The government consents, while Dongkuk opposes. ECF 31.

By statute, "in a civil action under section 516A of the Tariff Act of 1930, . . . an interested party *who was a party to the proceeding in connection with which the*

[1] Jurisdiction rests on 28 U.S.C. § 1581(c).

matter arose may intervene . . . as a matter of right . . . ." 28 U.S.C. § 2631(j)(1)(B) (emphasis added).

SSAB asserts that it can intervene as of right for these reasons:

> The Applicant is a domestic producer of [steel plate] and *participated in the underlying administrative review*. Accordingly, the applicant is an interested party within the meaning of 19 U.S.C. § 1677(9)(C), and it has standing to appear and be heard as a party to the proceeding before this Court pursuant to 19 U.S.C. § 1516a(d) and may intervene as a matter of right pursuant to 28 U.S.C. § 2631(j)(1)(B).

ECF 25, ¶ 2 (emphasis added). Even though SSAB states that Dongkuk does not consent, *id*. ¶ 4, the former offers no further reasoning or argument in support of its opposed motion.

Dongkuk's response concedes SSAB's status as an "interested party" but disputes whether SSAB qualifies as a "party to the proceeding" before Commerce. Dongkuk argues that SSAB did not submit any "factual information or written argument" during the review and thus did not meaningfully participate. ECF 31, at 4–5. In support of that contention, Dongkuk attached all five of SSAB's administrative filings. *See id.* at 4 (describing exhibits).

II

The question presented is whether SSAB was a "party to the proceeding in connection with which

[this] matter arose," as required by 28 U.S.C. § 2631(j)(1)(B). In the absence of any statutory definition, this court has looked to administrative definitions to determine that phrase's scope. *See, e.g.*, *Matsushita Elec. Indus. Co. v. United States*, 529 F. Supp. 664, 668 (CIT 1981) ("[T]he Court is not at liberty to give the term 'party' an expansive meaning, even if it were to deemphasize the I.T.C. rule . . . ."); *see also Nucor Corp. v. United States*, 516 F. Supp. 2d 1348, 1351 (CIT 2007) (citing Commerce's regulations absent any statutory definition).

The relevant Commerce regulation defines "[p]arty to the proceeding" as "any interested party that *actively participates*, through written submissions of *factual information* or *written argument*, in a segment of a proceeding." 19 C.F.R. § 351.102(b)(36) (emphasis added).[2] The definition therefore requires "active" participation and allows a party to satisfy that requirement in either of two ways—submission of "factual information" *or* submission of "written argument." *See Sunpower Corp. v. United States*, 128 F. Supp. 3d 1333, 1339 (CIT 2015) ("There is no requirement that a party provide *both* factual information *and* legal argument.") (emphasis in original). "The addition of relevant information to an otherwise procedural filing changes the character of that filing to meaningful participation in the administrative proceeding." *Id.* Thus,

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[2] "Participation in a prior segment of a proceeding" does "not confer . . . 'party to the proceeding' status in a subsequent segment." *Id*. Thus, any participation by SSAB in previous reviews of the applicable countervailing duty order is irrelevant here.

"[t]hough the movant need not engage in extensive participation, the activity nevertheless 'must reasonably convey the separate status of a party' and 'be meaningful enough "to put Commerce on notice of a party's concerns." ' " *RHI Refractories Liaoning Co. v. United States*, 752 F. Supp. 2d 1377, 1380 (CIT 2011) (quoting *Laclede Steel Co. v. United States*, No. 96-1029, 1996 WL 384010, at *2 (Fed. Cir. July 8, 1996)).[3]

Dongkuk's response shows that SSAB's only filings before Commerce were its request for an administrative review, appearances of counsel, and requests to be placed on the service list. *See* ECF 31, Attachments 1–5.

The procedural filings related to counsel's appearances and the service list are not "meaningful enough to put Commerce on notice of [SSAB's] concerns." *Laclede*, 1996 WL 384010, at *2 (cleaned up). The sole question, then, is whether SSAB's request for a review amounted to "active[] participat[ion], through written submission[ ] of factual information or written

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[3] *Nucor* explained this rule in terms of the need for consistency with the requirement of 28 U.S.C. § 2637(d) that "[i]n any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." *See Nucor*, 516 F. Supp. 2d at 1353 ("Thus, in the normal instance, with only narrow exceptions, a party challenging any aspect of a final Commerce determination first must have presented its arguments to Commerce for decision during the administrative proceeding."). The court noted that treating procedural filings as equivalent to "participation" in the proceeding "would so weaken the 'party to the proceeding' requirement as to render it practically meaningless." *Id.*

argument, in a segment of a proceeding." 19 C.F.R. § 351.102(b)(36).

Commerce's regulations distinguish between "requests" for administrative reviews, "factual information," and "written argument." An interested party can "request" a review. *See* 19 C.F.R. § 351.221(b)(1) (describing how "[a]fter receipt of a timely *request* for a review . . . the [Department] will . . . publish in the Federal Register notice of initiation of the review") (emphasis added). "Before or after publication of notice of initiation of the review," Commerce will "send to appropriate interested parties or other persons . . . questionnaires requesting *factual information* for the review." *Id.* § 351.221(b)(2) (emphasis added).[4] After conducting any verification of such factual information, *id.* § 351.221(b)(3) (citing 19 C.F.R. § 351.307) (referring to verification of "relevant factual information"), and issuing a preliminary determination, *id.* § 351.221(4), the Department will "invit[e] . . . *argument* consistent with § 351.309." *Id.* § 351.221(b)(4)(ii) (emphasis added).

Section 351.309 in turn provides that "*[w]ritten argument* may be submitted during the course of an

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[4] *See also* 19 C.F.R. § 351.102(b)(21)(i), (ii), (iv), (v) (defining "factual information" as "[e]vidence, including statements of fact, documents, and data" submitted for specified reasons); *id.* § 351.102(b)(21)(iii) (defining "factual information" as "[p]ublicly available information submitted to value factors under § 351.408(c) or to measure the adequacy of renumeration under § 351.511(a)(2), or, [sic] to rebut, clarify, or correct such publicly available information submitted by any other interested party").

antidumping or countervailing duty proceeding." 19 C.F.R. § 351.309(a) (emphasis added). In determining "the final results of an administrative review," Commerce "will consider written arguments in case or rebuttal briefs filed within the time limits in this section." *Id.* § 351.309(b)(1). The Department may also "request written argument on any issue from any person or U.S. Government agency at any time during a proceeding." *Id.* § 351.309(b)(2). Thus, "written argument" consists of briefing submitted to Commerce in connection with determining the final results of an administrative review or in response to a request from the Department.

Per Commerce's regulations, SSAB filed a "request" for an administrative review. It provided as follows:

> On behalf of ArcelorMittal USA, LLC, Nucor Corporation, and SSAB Enterprises, LLC ("Petitioners"), we hereby request an administrative review of the above-captioned countervailing duty order, for the period January 1, 2019[,] through December 31, 2019. Petitioners are domestic producers of cut-to-length carbon-quality steel plate and are therefore a domestic interested party pursuant to 19 C.F.R. § 351.102(b)(17) and 19 U.S.C. § 1677(9)(C). We request this review pursuant to the Notice of Opportunity to Request Administrative Review published in the *Federal Register* on February 3, 2020.
>
> This request is for the review of the countervailing duty order on cut-to-length carbon-quality

> steel plate produced or exported by BDP International, Dongkuk Steel Mill Co., Ltd., Hyundai Steel Co., Ltd., Sung Jin Steel Co., Ltd., or any of their affiliates, whether directly to the United States or indirectly through third countries. Petitioners request review of these entities because we believe that these producers and/or exporters received government subsidies during the period of review, and that any estimated cash deposits being collected on imports of subject merchandise from these manufacturers or exporters understate the degree of subsidization that occurred during the period of review.

ECF 31, Attachment 1, at 1–2 (footnotes omitted). The bare-bones request contained no further information or attachments.

SSAB's request did not include any "written argument" within the meaning of Commerce's regulations because it was not submitted in connection with the Department's determination of final results or in response to a request from Commerce. *See* 19 C.F.R. § 351.309(b).

Nor did SSAB's request include any "factual information" within the meaning of the Department's regulations. *See, e.g.*, 19 C.F.R. § 351.102(b)(21)(ii) (defining "factual information" as "[e]vidence, including statements of fact, documents, and data submitted either *in support of allegations*, or, [sic] to rebut, clarify, or correct such evidence submitted by any other interested party") (emphasis added). At most, the request contains an allegation that Dongkuk and others

"received government subsidies during the period of review," ECF 31, Attachment 1, at 2, but the request contains no "factual information" to support that allegation.

As SSAB submitted neither "written argument" nor "factual information" in support of its "allegation," it did not "actively participate" in Commerce's review for purposes of 19 C.F.R. § 351.102(b)(36). Thus, the company was not a "party to the proceeding" for purposes of intervention as of right under 28 U.S.C. § 2631(j)(1)(B).

Conclusion

For the reasons set forth above, SSAB has no right to intervene here. A separate order denying its motion will issue. *See* USCIT R. 58(a).

Dated: April 14, 2022
New York, NY

/s/ *M. Miller Baker*
Judge