Slip Op. 22-149

UNITED STATES COURT OF INTERNATIONAL TRADE

SENECA FOODS CORPORATION, Plaintiff, v. UNITED STATES, Defendant.	Before: Gary S. Katzmann, Judge Court No. 22-00243

OPINION AND ORDER

[The court denies United States Steel Corporation's Motion to Intervene.]

Dated: December 21, 2022

James M. Smith, Thomas Brugato, Kwan Woo (Kwan) Kim, Covington & Burling LLP, of Washington, D.C., for Plaintiff Seneca Foods Corporation.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, U.S. Department of Justice, Washington, D.C., for Defendant United States. With her on the briefs were Brian M. Boynton, Principal Deputy Assistant Attorney General, Patricia M. McCarthy.

Luke A. Meisner, Jeffrey D. Gerrish, and Michelle R. Avrutin, Schagrin Associates, of Washington, D.C., for Proposed Defendant-Intervenor United States Steel Corporation.

Katzmann, Judge: Before the court is a Motion to Intervene in Seneca Foods Corp. v. United States, Court No. 22-00243, filed by putative Defendant-Intervenor United States Steel Corporation ("U.S. Steel" or "Putative Defendant-Intervenor").

Underpinning Seneca Foods Corp. v. United States is Plaintiff Seneca Foods Corporation

("Seneca" or "Plaintiff")'s challenge[1] to the Department of Commerce's denial of requests for exclusion from tariffs imposed on certain steel articles under Section 232 of the Trade Expansion Act of 1962, as codified at 19 U.S.C. § 1862. See Seneca Compl. ¶ 1, Aug. 19, 2022, ECF No. 6 ("Compl."). The President imposes Section 232 tariffs to remedy assessed threats to national security, in this case an assessed threat to the viability of the U.S. steel and aluminum industries. See Proclamation 9705 of March 8, 2018: Adjusting Imports of Steel into the United States, 84 Fed. Reg. 11,625 (Dep't Commerce Mar. 15, 2018).[2] Seneca -- a fruit and vegetable processor that requires tin mill products consisting of steel to manufacture cans for its vegetables -- maintains it sought exclusions for certain products from the Section 232 tariffs to supplement "shortfalls" in domestic supply. Compl. ¶¶ 7–8, 10. U.S. Steel -- a domestic producer of tin mill products that claims it "can produce the products for which Seneca sought exclusions and/or can produc[e] suitable substitute products" -- opposed Seneca's exclusion requests before Commerce and now contends that it has a right to intervene in the proceedings before this court under CIT Rule 24(a). See U.S. Steel's Mot. to Intervene at 2–3, 4, Oct. 5, 2022, ECF No. 11 ("U.S. Steel's Mot."). In the alternative,

[1] Seneca lodges this challenge under the court's residual jurisdiction pursuant to 28 U.S.C. § 1581(i).

[2] The Federal Circuit recently described the Section 232 scheme as follows:

> Section 232 of the Trade Expansion Act of 1962 authorizes the President to restrict imports of goods to safeguard national security. Pursuant to this authority, in March 2018, the President imposed a 25 percent ad valorem tariff on imports of certain steel products. Domestic importers could request a tariff exclusion, however, either if the imported steel product was not produced in the United States in a satisfactory quality, or for a specific national security consideration. Likewise, any individual or organization that manufactures steel articles in the United States could then object to any such exclusion requests, providing domestic steel producers the opportunity to show that they either have or could have quickly produced a sufficient quantity of the same or similar quality product.

Cal. Steel Indus., Inc. v. United States, 48 F.4th 1336, 1339 (Fed. Cir. 2022) (citations omitted).

U.S. Steels submits that it should be permitted to intervene under CIT Rule 24(b). Id. at 3.

Plaintiff and Defendant United States ("the Government") oppose U.S. Steel's Motion to Intervene in its entirety, arguing that U.S. Steel has no right to intervene under CIT Rule 24(a) and that the court should exercise its discretion to deny permissive intervention under CIT Rule 24(b). See Pl.'s Resp. in Opp. to U.S. Steel's Mot. to Intervene at 4, 11, Oct. 26, 2022, ECF No. 19 ("Pl.'s Resp."); see also U.S. Gov't's Resp. in Opp. to U.S. Steel's Mot. to Intervene at 1, 6–7, Oct. 26, 2022, ECF No. 17 ("Def.'s Resp.").

Upon consideration of U.S. Steel's Motion and all other relevant papers and proceedings, the court denies U.S. Steel's Motion to Intervene as Defendant-Intervenor.

I. Precedent Establishes that U.S. Steel Does Not Satisfy the Requirements for Intervention as of Right under CIT Rule 24(a).

CIT Rule 24(a)(2) affords a right to intervene to "anyone" who "on a timely motion":

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

USCIT R. 24(a)(2). This rule requires a movant to establish:

> (1) the motion is timely; (2) the movant asserts a legally protectable interest in the property at issue; (3) the movant's interest "must be of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment"; and (4) the movant's interest will not be adequately represented by the government.

NLMK Pa., LLC. v. United States, 45 CIT __, __, 553 F. Supp. 3d 1354, 1359 (2021) (quoting Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns, 695 F.3d 1310, 1315 (Fed. Cir. 2012) (emphasis in original)). Failure to satisfy any one of these requirements defeats the movant's right to intervene under CIT Rule 24(a)(2). See Vivitar Corp. v. United States, 7 CIT 165, 167, 585 F. Supp. 1415, 1417 (1984).

While U.S. Steel claims that it meets each of Rule 24(a)(2)'s requirements, see U.S. Steel's

Mot. at 3, Seneca and the Government maintain that Federal Circuit precedent dictates that U.S. Steel may not intervene as of right because, at a minimum, U.S. Steel has no legally protectable interest, see Pl.'s Resp. at 5; see also Def.'s Resp. at 3. Seneca and the Government are correct.

Before this court, U.S. Steel argues that it has "at least three interests" for the purposes of Rule 24(a)(2), including: (1) "a participatory interest in ensuring that Commerce's determinations remain compliant with the Administrative Procedure Act," 5 U.S.C. § 500 et seq.; (2) an economic interest in defending Commerce's denial of exclusion requests that ostensibly benefit U.S. Steel's sales opportunities and price competitiveness; and (3) a status interest "as an expressly identified beneficiary of Section 232 tariffs on steel articles." See U.S. Steel's Mot. at 9. An insurmountable hurdle for U.S. Steel is that the Federal Circuit recently considered and rejected these precise purported interests in California Steel Industries, Inc. v. United States. See 48 F.4th 1336, 1343–44 (Fed. Cir. 2022) ("[P]roposed intervenors contend that they have a legally protectable interest in Commerce's denials of the importers' exclusion requests, considering the proposed intervenors' administrative participation, direct economic stake, and position as intended beneficiaries of the Presidents ad valorem tariff. . . . We disagree." (citations omitted)).

U.S. Steel advises this court "not [to] follow" the Federal Circuit's prior refusal for several reasons. See U.S. Steel's Mot. at 9. First, U.S. Steel attempts to draw a factual distinction, arguing that unlike in California Steel, where "U.S. Steel did not subsequently supply the products at issue to" the importer requesting an exclusion, U.S. Steel's Mot. at 9–10 (emphasis in original) (quoting 48 F.4th at 1340–41), here, "U.S. Steel made multiple tin shipments to Seneca" "in the wake of Seneca's . . . exclusion requests," such that this court's "upholding [of] Commerce's exclusion could provide U. S. Steel with specific sales opportunities," thereby impacting U.S. Steel's interests, see id. at 10. Even accepting the foregoing as true, any such

"specific sales opportunities," id., comprise the type of "'mere[] economic interests'" that the Federal Circuit has repeatedly declared "'[do] not suffice' to establish that a proposed intervenor has a legally protectable interest." Cal. Steel, 48 F.4th at 1344 (first alteration in original) (quoting Wolfsen, 695 F.3d at 1315); see also Am. Mar. Transp., Inc. v. United States, 870 F.2d 1559, 1562 (Fed. Cir. 1989) ("[A] 'legally protectable interest' . . . has been held to require something more than merely an economic interest."). Because Putative Defendant-Intervenor does not articulate a basis to overcome this threshold obstacle, U.S. Steel's attempts to distinguish the case at bar fail, and California Steel's finding of no legally protectable interest controls.[3]

Putative Defendant-Intervenor next advises the court "not [to] follow" the Federal Circuit's prior refusal on the grounds that because U.S. Steel has requested a rehearing en banc of California Steel, "this [c]ourt should not consider the Federal Circuit's decision . . . to be final." U.S. Steel's Mot. at 8, 11. This, of course, the court cannot do. See Aireko Constr., LLC v. United States, 44 CIT __, __, 425 F. Supp. 3d 1307, 1312 (2020) ("Decisions of the Court of Appeals for the Federal Circuit bind this Court, unless overruled by an en banc decision by that court or by the Supreme Court."); Cemex, S.A. v. United States, 384 F.3d 1314, 1321 n.5 (Fed. Cir. 2004) (stating that even other Federal Circuit panels "are bound to follow [their] own

[3] Even if such economic interests could suffice to establish a "legally protectable interest," U.S. Steel's motion would likewise stumble at the third requirement of CIT Rule 24(a)(2). Supra p. 3 (enumerating the additional requirement that a movant's interest "be of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment"). As the Government persuasively explains, the impact -- if any -- on U.S. Steel stemming from this court's resolution of Seneca's underlying challenge will be "necessarily indirect." Def.'s Resp. at 4. This is so, because even if the court were to sustain Commerce's exclusion denial -- as U.S. Steel desires -- Seneca would "not [be] required to purchase any of their steel from" Putative Defendant-Intervenor, but rather would remain free to "make the business decision to purchase foreign steel and pay the tariff to the United States, or not [to] purchase steel at all." Id. The Federal Circuit has instructed that such indirect and contingent "interests" do not satisfy the third requirement of Rule 24(a)(2). See, e.g., Am. Mar. Transp., 870 F.2d at 1561.

precedent unless it is overruled by the Supreme Court or an en banc decision").

Perhaps recognizing that this court is not free to disregard the binding authority of the Federal Circuit, U.S. Steel alternatively asks the court to refrain from "decid[ing] the instant motion to intervene until the Federal Circuit issues a final decision in [California Steel] on any request for a rehearing en banc." U.S. Steel's Mot. at 11. When considering a motion to stay, the court must weigh the competing interests at stake. See Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936). As determined, supra, U.S. Steel has no "legally protectable interest;" by contrast, Seneca has an interest in receiving expeditious refunds of any Section 232 duties erroneously paid, which would be prejudiced by a delay. See NLMK, 553 F. Supp. 3d at 1365. Moreover, any en banc rehearing of California Steel "will not resolve any part of [Seneca's] Complaint," such that "the proposed stay would not conserve any judicial or party resources." Id. at 1366. Accordingly, in light of the balance of equities, the court declines U.S. Steel's invitation to delay resolution of the instant motion.[4]

In sum, adhering to Federal Circuit precedent -- as this court must -- U.S. Steel does not satisfy the requirements for intervention as of right under CIT Rule 24(a).

II. U.S. Steel Is Not Permitted to Intervene under CIT Rule 24(b).

CIT Rule 24(b) instructs, in relevant part, that "[o]n timely motion, the court may permit anyone to intervene who" "is given a conditional right to intervene by a federal statute." USCIT R. 24(b)(1)(A). Paragraph 2631(j)(1) of 28 U.S.C. affords such a "conditional right" to "[a]ny person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade." 28 U.S.C. § 2631(j)(1). "Once a proposed intervenor

[4] Of course, if the Federal Circuit sitting en banc reverses California Steel, U.S. Steel may renew its Motion to Intervene and explain why any such decision warrants a different outcome in the proceedings at bar.

demonstrates that it will be adversely affected or aggrieved, the court must 'consider whether [any such] intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" NLMK, 553 F. Supp. 3d at 1359 (quoting 28 U.S.C. § 2631(j)(2)).

U.S. Steel contends it should be permitted to intervene in the case at bar because it satisfies the requirements of the above rules and because its intervention will not unduly delay or prejudice the adjudication of Seneca's right. See U.S. Steel's Mot. at 11–14. By contrast, Seneca and the Government maintain that "U.S. Steel has no conditional right to intervene by statute because it will not be aggrieved by this action." Pl.'s Resp. at 12; Def.'s Resp. at 6 (substantively similar). Here too, Seneca and the Government are correct.

The court agrees with Seneca that Putative Defendant-Intervenor "misstates the potential [economic] consequences of this case," Pl.'s Resp. at 13 (alteration in original) (quoting NLMK, 553 F.3d at 1363), with its argument that any reversal of Commerce's exclusion determination "would result in an increase in tariff-free imports of directly competitive products" such that U.S. Steel qualifies as "adversely affected or aggrieved" for purposes of 28 U.S.C. § 2631(j)(1) and CIT Rule 24(b)(1)(A), see U.S. Steel's Mot. at 13. As Seneca and the Government explain, the dispute at bar concerns duties that Seneca has already paid and does not involve any requests for prospective relief. See Pl.'s Br. at 13–14; see also Def.'s Resp. at 6. If Seneca were to prevail in the underlying litigation, the United States Government, and not the domestic steel industry, would pay any resultant duty refunds. See Def.'s Resp. at 4. Accordingly, any attendant competitive injury -- if, indeed, there is any -- to U.S. Steel would be too diffuse to render it "adversely affected or aggrieved by a decision" of this court.[5] 28 U.S.C. § 2631(j)(1).

[5] Nor, as previously explained, would the court's affirmance of the exclusion denials by Commerce -- a favorable result in Putative Defendant-Intervenor's estimation -- necessarily result in any benefits to U.S. Steel. Supra p. 5 n.3.

Because Putative Defendant-Intervenor does not meet the requirements under 28 U.S.C. § 2631(j)(1) and CIT Rule 24(b)(1)(A),[6] the court denies U.S. Steel's motion for permissive intervention.

For the foregoing reasons, it is hereby:

ORDERED that U.S. Steel's Motion to Intervene, ECF No. 11, is denied.

SO ORDERED.

/s/ Gary S. Katzmann
Gary S. Katzmann, Judge

Dated: December 21, 2022
New York, New York

[6] Having determined that U.S. Steel does not meet the statutory requirements for permissive intervention under 28 U.S.C. § 2631(j)(1), the court need not consider whether intervention would unduly delay adjudication of Seneca's claim.