

Slip Op. 11–29

SAHA THAI STEEL PIPE (PUBLIC) COMPANY LTD., Plaintiff, v. UNITED STATES, Defendant, and ALLIED TUBE AND CONDUIT CORP., AND WHEATLAND TUBE COMPANY, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 08–00380

[Holding in abeyance defendant-intervenors' consent motion to lift injunction.]

Dated: March 22, 2011

O'Melveny & Myers LLP (Greyson L. Bryan), for the plaintiff.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane C. Dempsey*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Joanna V. Theiss*), of counsel, for the defendant.

Schagrin Associates (Roger B. Schagrin, Jeffrey E. Farrah, John W. Bohn, and Michael J. Brown), for the defendant-intervenors.

OPINION AND ORDER

Musgrave, Senior Judge:

On February 14, 2011, the Court of Appeals for the Federal Circuit (“Federal Circuit”) affirmed judgment on this case. *Saha Thai Steel Pipe (Public) Co. v. United States*, ___ F.3d ___, 2011 WL 553585 (Fed. Cir. 2011). On March 1, 2011, the defendant intervenors Allied Tube and Conduit Corporation and Wheatland Tube Company filed a consent motion to lift the injunction currently suspending liquidation of entries of merchandise subject to *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 61019 (Dep.’t Comm. Oct. 15, 2008) (“*Final Results*”). See Order on Mot. for Injunction, Oct. 28, 2008, ECF No. 11. The subject merchandise for those entries were produced and exported to the United States by the plaintiff Saha Thai Steel Pipe (Public) Company Ltd. and were entered, or withdrawn from warehouse, for consumption, during the period March 1, 2006 through February 28, 2007 inclusive, and remained unliquidated as of five o’clock p.m. (Eastern Standard Time) on the fifth business day after a copy of this Court’s October 28, 2008 Preliminary Injunction Order was served upon officers of the U.S. Department of Commerce and U.S. Customs and Border Protection. See *id.*

The motion to lift the injunction alleges that all parties to this case have been contacted regarding the motion and that each indicated “they do not intend to appeal this matter to the Supreme Court of the United States, or otherwise pursue any further appeals of this case.” Consent Motion Requesting Order Lifting Injunction Suspending Liquidation ¶ 4. However, a primary purpose of a writ of injunction is to aid jurisdiction. *See* 28 U.S.C. § 1651(a) (“[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”). The Federal Circuit currently maintains jurisdiction over this case (it has yet to issue its mandate), and this Court has a duty to aid such appellate jurisdiction until it is relinquished. *See id.* “Issuance of the mandate formally marks the end of appellate jurisdiction. Jurisdiction [is thereby] return[ed] to the tribunal to which the mandate is directed, for such proceedings as may be appropriate[.]” *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986). *See* Federal Rule of Appellate Procedure (“FRAP”) 41; *see, e.g., United States v. DiLapi*, 651 F.2d 140, 144 (2d Cir.1981), *cert. denied*, 455 U.S. 938 (1982); *Laclede Steel Co. v. United States*, 24 CIT 1293, 125 F. Supp.2d 525 (2000).

While appeal is pending, the Court may *only* modify an injunction in a manner that will preserve the *status quo* in aid of appellate jurisdiction.¹ *See, e.g.,* FRAP 8(a)(1) (“[a] party must ordinarily move first in the district court for . . . (C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending”); USCIT Rule 62(c) (“[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights”). The motion at bar, however, would amount to *vacatur*, not merely modification, and vacation of the injunction prior to issuance of the appellate mandate would amount to improper divestment of appellate jurisdiction over the case. “The date of the certified order is the date of the mandate[.]” Federal Circuit Rule 41, but if immediate lifting of the injunction is the parties’ desired course of action, they have the option to file a consent motion to dismiss at the Federal Circuit in advance of issuance of the mandate.

The motion to lift the injunction will therefore be held in abeyance until receipt of the appellate mandate on the case. If that occurs, the

¹ This Court has “the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent.” *United States v. Swift*, 286 U.S. 106, 114 (1932).

gram in BMB's cost of production ("Count One") and inconsistent statutory interpretation in the application of "zeroing"¹ in the determination of BMB's weighted average dumping margin ("Count Three").

Recent affirmance of *Saha Thai Steel Pipe (Public) Co. v. United States*, Slip Op. 101 (Jan. 4, 2010) __ F.3d __, 2011 WL 553585 (Fed. Cir. Feb. 14, 2011), by the CAFC undercuts argument for stay with respect to Count One. Whether further appeal of that matter will be taken is doubtful but remains to be seen. See *Saha Thai Steel Pipe (Public) Co. v. United States*, 35 CIT __, Slip Op. 11-29 (Mar. 22, 2011); see also 28 U.S.C. § 2101(c).

Regarding *Dongbu Steel Co. v. United States*, 34 CIT __, 677 F. Supp. 2d 1353 (Feb. 4, 2010), *appeal docketed*, No. 2010-1271 (Fed. Cir. Mar 29, 2010), BMB argues a decision by the CAFC is expected that will address the same claim that BMB raises as Count Three of this action, namely the allegedly inconsistent and unlawful agency interpretation of the statutory term "weighted average dumping margin" after abandoning zeroing in investigations. See 19 U.S.C. § 1677(35)(A)-(B). BMB argues a stay will conserve resources on adjudication of Count Three until the precise issue is settled in *Dongbu*.

The government opposes a stay and moves to dismiss Count Three for failure to state a claim for which relief is available. See USCIT Rule 12(b)(5). The parties thus move for entry of conflicting scheduling orders, and BMB has also submitted a further motion for leave to file a surreply to the motion to dismiss. The government's response to that motion is one of partial opposition, in that it takes no position with respect to the discussion of a particular case therein, *SKF USA Inc. v. United States*, 630 F.3d 1365 (Fed. Cir. 2011), but argues that the portions of the surreply that do not discuss *SKF* should be struck because they are simply reiteration of points BMB previously raised on other issues. The government also argues that since it is the movant on the motion to dismiss, it ought to be permitted the final word and the opportunity to file a sur-rebuttal in the event the sur-reply is permitted filing.

Unlike BMB's motion, the government has not actually attempted filing of its proposed sur-rebuttal. But its points are well-taken: the Rules of this Court "should be construed to secure the just, speedy,

¹ Familiarity is here presumed on Commerce's zeroing practice generally and its 2006 announcement that zeroing would be discontinued in investigations. See, e.g., *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007); see also *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722, 77724 (Dep't Comm. Dec. 27, 2006) ("the Department's denial of offsets in certain investigations, when using the average-to-average comparison methodology, was inconsistent with the Antidumping Agreement").

and inexpensive determination of every action and proceeding.” US-CIT R. 1. Further, a “court cannot allow the pre-trial . . . process to become needlessly protracted by endless sur-reply briefs.” *Saha Thai Steel Pipe Co. v. United States*, 11 CIT 257, 259 n.5, 661 F. Supp. 1198, 1201 n.5 (1987). On the other hand, it is also “in the interest of the court to hear all the parties’ arguments expressed as thoroughly and clearly as possible” when dealing with complex issues or issues of statutory interpretation of possibly precedential import. *Borden, Inc. v. United States*, 22 CIT 233, 248 n.11, F. Supp. 2d. 1221, 1234 n.11 (1998). See, e.g., *Diamond Sawblades Mfrs. Coalition v. United States*, 31 CIT 1249, 1252 (2007). On that note, BMB’s motion to file a sur-reply will be granted, but those parts of it that do not concern discussion of *SKF* will be disregarded.

Turning to the motion to stay, such a motion is an appeal to a court’s discretion, which is “not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.” *United States v. Burr*, 25 F. Cas. 30, 35 (No. 14692D) (CC Va. 1807). The stay applicant bears the burden of demonstrating the circumstances entitling it to a stay, e.g., *Nken v. Holder*, ___ U.S. ___, ___, 129 S.Ct. 1749, 1761 (2009), and consideration is typically on (1) whether the applicant has made a strong showing that he is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies. *Id.* And as a practical matter, the standard for both a stay and a preliminary injunction is the same, in that both prevent

some action before the legality of that action has been conclusively determined. But a stay achieves this result by temporarily suspending the source of authority to act -- the order or judgment in question -- not by directing an actor’s conduct. A stay “simply suspend[s] judicial alteration of the status quo,” while injunctive relief “grants judicial intervention that has been withheld by lower courts.”

Id. at 1758 (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986)). As on a motion for preliminary injunction, no single factor is dispositive on a motion for stay, and “the weakness of the showing regarding one factor may be overborne by the strength of the others.” *Diamond Sawblades Mfrs. Coalition v. United States*, 33 CIT ___, Slip Op. 09–128 (Nov. 9, 2009) (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)).

With respect to Count Three, the government argues BMB has not suggested it will suffer economic or any other harm or any legal

prejudice by proceeding with litigation, nor has it argued or demonstrated that there is a “strong likelihood of success on the merits,” or addressed whether a stay will benefit the public interest, or argued that the balance of hardships favor a stay, apart from its argument regarding conservation of parties’ and the court’s resources. Further, the government contends, BMB does not address the likelihood of departure by the CAFC from its line of cases upholding zeroing in administrative reviews; in the most recent case the CAFC observed that the continued practice of zeroing in administrative reviews was “not inconsistent with the statute” discontinuation of the practice in investigations. *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011) (“[e]ven after Commerce changed its policy with respect to original investigations, we have held that Commerce’s application of zeroing to administrative reviews is not inconsistent with the statute”)² (referencing *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007)). Rather, the government argues, case law counsels dismissal of Count Three entirely.

BMB’s sur-reply contends that the precise issue addressed in *SKF*, in the administrative review covered thereby, was the argument that zeroing was improper because zeroing is “prohibited” by the World Trade Organization, whereas the claim in this matter “is that Commerce has acted inconsistently with *U.S. law* by interpreting the same provision of the statute in arbitrary and inconsistent ways under its gap-filling authority.” Pl.’s Sur-Reply to Def.’s Reply in Support of its Motion to Dismiss in Part at 4 (*italics added*). BMB implies *SKF*’s reference to *Corus Staal* should be discounted because *Corus Staal* considered an administrative review that had been completed before Commerce announced the change in its zeroing policy with respect to investigations (and therefore might be said to involve conceptually “uniform” application of policy), whereas *Dongbu* involves an administrative review completed after Commerce announced its change in policy and is expected to address the issue BMB raises in this matter by way of Count Three of its complaint.

The court is persuaded the Federal Circuit has not precisely addressed the issue here. After considering the arguments for and against the motion for stay, the motion will be granted and the government’s motion to dismiss will be held in abeyance pending the exhaustion of appeal in both *Dongbu* and *Saha Thai*. Although recent decisions continue to sustain zeroing in various contexts (*see, e.g.,*

² *But cf. Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 Fed. Reg. 81533 (Dec. 28, 2010) (request for comments on proposed elimination of zeroing in most antidumping duty reviews due to inconsistency with “international obligations”).

SKF, supra; Calgon Carbon Corp. v. United States, Slip Op. 11–21 at 28 (Feb. 17, 2011); *MCC Eurochem v. United States*, Slip Op. 11–13 at 4 (Feb. 4, 2011)), the issue of consistent statutory interpretation is of sufficient import to warrant a stay of this matter. *Cf* note 2, *supra*. Neither the government nor the domestic industry have alleged they would be injured in any way by maintenance of the *status quo* and the *Final Results* are otherwise uncontested. A separate order implementing the foregoing will issue.

Dated: March 22, 2011

New York, New York

/s/ R. Kenton Musgrave

R. KENTON MUSGRAVE, SENIOR JUDGE

