Slip Op. 05–131

RON STEEN, Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 04–00623

[Defendant's Motion to Dismiss for Failure to State A Claim Upon Which Relief May Be Granted is GRANTED.]

Decided: October 3, 2005

Steptoe & Johnson, (*Joel D. Kaufman* and *Tina Potuto Kimble*) for Plaintiff.
Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director, *David S. Silverbrand*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for Defendant.

OPINION

I
Introduction

This case challenges the Department of Agriculture's ("Agriculture") definition of "net farm" or "net fishing" income pursuant to 19 U.S.C. § 2401e(a)(1)(C) (2004). On August 23, 2005, the court held oral argument on Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted ("Defendant's' Motion"). The Court has jurisdiction pursuant to 19 U.S.C. § 2395 (2005). For the following reasons Defendant's Motion is granted.

II
Background

On November 6, 2003, the Foreign Agricultural Service ("FAS") certified that Pacific Salmon fisherman in Alaska and Washington[1]

[1] Defendant notes that the Oregon petition was not certified. Defendant's Reply in Support of Its Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted ("Defendant's Reply") at 14.

were eligible to apply for agricultural trade adjustment assistance ("TAA") pursuant to 19 U.S.C. § 2401a.[2] *Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 62,766 (November 6, 2003). On December 23, 2003 Plaintiff, Ron Steen, a Pacific salmon producer residing in Olympia, Washington, applied for TAA benefits. Complaint at 1; Plaintiff's Response to Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted at 3. Defendant, the United States Department of Agriculture ("Defendant" or "Agriculture") denied his application on the grounds that Plaintiff's net fishing income of $9,915 for 2002 was higher than his net fishing income of $4,573 for 2001. Defendant's Motion at 8. Plaintiff appealed Agriculture's denial to the National Appeals Division of the Department of Agriculture. Defendant's Motion at 4. Once Defendant notified Plaintiff that the denial was final, Plaintiff sought judicial review of Agriculture's determination on December 3, 2004. *Id.* at 4–5.

III
Arguments

Defendant contends Plaintiff failed to state a claim upon which relief may be granted, and requests dismissal of this action arguing it properly denied Plaintiff TAA benefits because Plaintiff failed to meet eligibility requirements. Defendant's Motion at 6–7 (citing 19 U.S.C. § 2401e(a)(1) and 7 C.F.R. § 1580.301(e)(4)). Specifically, Defendant claims that since Plaintiff has failed to demonstrate his net fishing income for the most recent year is not less than his net fishing income for the latest year in which no TAA assistance was received, he is ineligible for benefits and therefore fails to state a claim upon which relief may be granted. *Id.* at 9.

Plaintiff argues he has met the statutory requirements of 19 U.S.C. § 2401e(a)(1) and (b) and should therefore be eligible for TAA assistance. Plaintiff's Response at 5. Plaintiff also argues that Defendant's regulations disregard Congress' statutory scheme and place additional requirements that conflict with the statute. *Id.* Accordingly, Plaintiff asserts Defendant's decision to deny Plaintiff TAA assistance should be overturned.

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[2] This was the first step in a two-step process mandated by Congress for TAA eligibility. "First, pursuant to 19 U.S.C. § 2401a(a), '[a] petition for certification of eligibility to apply for adjustment assistance under this chapter may be filed with the Secretary by a group of agricultural commodity producers or by their duly authorized representative.' If the petition is approved, the producer must file an application for benefits pursuant to 19 U.S.C. § 2401e." Defendant's Motion at 1.

IV
Standard of Review
A
Defendant's Motion to Dismiss

A Defendant is entitled to dismissal under USCIT Rule 12(b)(6) where, accepting factual allegations made in the Complaint and drawing all inferences in favor of Plaintiff, it appears beyond doubt that no set of facts can be proven that would entitle Plaintiff to relief. *See Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 215 (Fed. Cir. 1993); *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1565 (Fed. Cir. 1988); *United States v. Ford Motor Co.*, Slip Op. 05–24 at 5 (CIT Feb. 18, 2005); *Kemet Electronics Corp. v. Barshefsky* 21 CIT 912, 976 F. Supp. 1012, 1027 (1997). In order to determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the Complaint, or incorporated in it by reference. *See Kemet* at 1027. "On a motion to dismiss for failure to state a claim, any factual allegations in the complaint are assumed to be true and all inferences are drawn in favor of the plaintiff." *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000). Nevertheless, the "plaintiff must plead specific facts, and not merely conclusory allegations." *Int'l Custom Prods. v. United States*, Slip Op. 05–00341 2005 Ct. Int'l Trade LEXIS 74, 374 F. Supp. 2d 1311, 1323 (CIT June 15, 2005) (citing *United States v. Inn Foods, Inc.*, 2003 Ct. Int'l Trade LEXIS 49, 264 F. Supp. 2d 1333, 1335 (CIT May 13, 2003).

B
The General Standard of Review in Administrative Law

In administrative proceedings, the court has jurisdiction to affirm or remand the actions of the Secretary of Agriculture "in whole or in part." 19 U.S.C. § 2395(c) (2004). The Department of Agriculture's determination regarding certification of eligibility for TAA will be upheld if it is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 2395(b); *Former Employees of Swiss Indus. Abrasives v. United States*, 17 CIT 945, 947, 830 F. Supp. 637, 639 (1993). In addition, the Administrative Procedures Act ("APA") provides that agency determinations shall be held invalid if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706 (2004). Under the latter standard, an agency's determination will be upheld unless the agency fails to acknowledge applicable law or to demonstrate how it reaches its conclusions of law. *See Arizona Grocery Co., v. Atchison T. & S.F.R. Co.*, 284 U.S. 370, 389 (1932) (holding that an agency may not refuse to recognize its own rules or regulations); *Burlington Truck Lines Co. v. United States*, 371 U.S. 156, 168, 83 S. Ct. 2039, 9 L. Ed. 2d 207

(1962) (holding that an agency finding must show "a rational connection between the facts found and the choice made.")

V
Discussion
A
Parties' Arguments

Defendant contends Plaintiff's Complaint failed to state a claim upon which relief may be granted. Defendant's Motion at 6. In particular, Defendant claims that Plaintiff does not meet the eligibility requirements under 19 U.S.C. § 2401e or 7 C.F.R. § 1580.301.[3] *Id.* at 6–7. Defendant says that while a producer may qualify for TAA assistance using either net farm or fishing income, the producer must to demonstrate that "net farm income (as determined by the Secretary) for the most recent year is *less than* . . . net farm income for the latest year in which no adjustment assistance was received . . . under this chapter." *Id.* at 7–8 (*quoting* 19 U.S.C. § 2401e(a)(1)(C)) (emphasis added); *see also* 7 C.F.R. § 1580.301 (e)(4)) and 7 C.F.R. § 1580.102. Because Plaintiff's net fishing income was higher in 2002 than it was in 2001, Defendant says Plain-

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[3] For an adversely affected agricultural commodity producer to be eligible to receive TAA benefits, 19 U.S.C. § 2401e(a)(1) states:

> Payment of adjustment assistance under this chapter shall be made to an adversely affected agricultural commodity producer covered by a certification under this chapter who files an application for such assistance within 90 days after the date on which the Secretary makes a determination and issues a certification of eligibility under [19 U.S.C. §24016], if the following conditions are met:
>
> (A) The producer submits to the Secretary sufficient information to establish the amount of agricultural commodity covered by the application filed under this subsection that was produced by the producer in the most recent year.
>
> (B) The producer certifies that the producer has not received cash benefits under any provision of this title other than this chapter.
>
> (C) The producer's net farm income (as determined by the Secretary) for the most recent year *is less than the producer's net farm income for the latest year in which no adjustment assistance was received* by the producer under this chapter.
>
> (D) The producer certifies that the producer has met with an Extension Service employee or agent to obtain, at no cost to the producer, information and technical assistance that will assist the producer in adjusting to import competition with respect to the adversely affected agricultural commodity.
>
> * * *
>
> (emphasis added)

and, 7 C.F.R. § 1580.301(e)(4) states:

> e) Producers able to furnish their applications with all the following certifications shall be eligible for adjustment assistance payments:
>
> * * *
>
> (4) Certification that net farm or fishing income was less than that during the producer's pre-adjustment year.

tiff does not qualify for benefits under the TAA program.[4] Defendant's Motion at 8; Defendant's Reply at 1–2.

Plaintiff requests that the court deny Defendant's Motion to Dismiss and remand the instant case to the Secretary. Plaintiff claims that Defendant's regulations implementing the TAA statute and the agency's interpretation of the statute are unreasonable and contrary to Congressional intent. Plaintiff's Response at 1, 5. Plaintiff argues that he has met the statutory criteria set forth in 19 U.S.C. § 2401e(a)(1), that he does not fall within the limitations set forth in 19 U.S.C. § 2401e(b), and was denied TAA benefits erroneously. *Id.* at 5.

B
The Department of Agriculture's Regulations Implementing 19 U.S.C. § 2401e Satisfy the *Chevron* and *Mead* Tests and Is Entitled to Judicial Deference

In determining whether an agency's interpretation and application of a statute is "in accordance with law," the court must undertake a two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The first *Chevron* step is to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. Employing traditional tools of construction, the court first looks to the statutory text. *See Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998). Because the "statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." *Timken Co. v. United States*, 2001 CIT 96, 166 F. Supp. 2d 608, 614 (1996) (quoting *Timex*, 157 F.3d at 882). If however, further examination is needed, then the tools of statutory construction " 'includ[ing] the statute's structure, canons of statutory construction, and legislative history'" must be reviewed. *Id.* (quoting *Floral Trade Council v. United States*, 99 CIT 10, 41 F. Supp. 2d 319, 323 n. 6 (1999).

After applying the first prong of *Chevron* if the court determines that the statute is either silent or ambiguous with respect to the issue at hand, then the question becomes whether or not the agency's interpretation of the statute is permissible. *Chevron* 467 U.S. at 843. This inquiry focuses on the reasonableness of the agency's interpretation of the statute. "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that au-

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[4] Defendant notes that Plaintiff does not dispute that his fishing income was higher in 2002 than it was in 2001. Defendant's Motion at 8 (*quoting* Complaint at 4).

thority." *United States v. Mead Corp.*, 533 U.S. 218, 226, 121 S. Ct. 2164, 2171, 150 L. Ed. 2d 292 (2001). Provided that Agriculture has acted reasonably and rationally in implementing the statute, the court may not substitute its judgment for the agency's. *See Koyo Seiko Co. Ltd. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994).

A review of 19 U.S.C. § 2401e and its legislative history indicates that Congress did not clearly express an intent to limit the "net farm income" requirement solely to income derived from the adversely affected commodity. The pertinent statutory language, "net farm income (as determined by the Secretary [of Agriculture])," remained unchanged throughout the Congressional debate on the bill and amendments thereof. *See generally* 148 Cong. Rec. S4206 (2002), 148 Cong. Rec. H5888, H5892 (2002).

Congress left the definition of "net farm" and "net fishing" income solely to the discretion of the Secretary, although it made clear that the TAA program was intended to provide relief to agricultural producers who experienced great economic hardship as a result of import competition. *See* 19 U.S.C. § 2401e(a)(1)(C).[5] Contrary to Plaintiff's claims that the plain language of 19 U.S.C. § 2401e(a)(1) explicitly ties the eligibility of an agricultural producer *to the agricultural commodity at issue*,[6] the plain language of § 2401e(a)(1)(C) instructs the Secretary to determine the net farm income of any TAA applicant. 19 U.S.C. § 2401e(a)(1) (emphasis added). If Congress had intended otherwise, it would not have inserted language in the statute specifically granting the Secretary of Agriculture the author-

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[5] Congress' intent in creating the TAA program was to ensure that "[w]hen someone loses their job as a result of trade agreements entered into by the U.S. government, [Congress has] an obligation to assist these Americans in finding new employment." 147 Cong. Rec. S7957, S7967 (2001) (statement of Sen. Bingaman); *see also* 148 Cong. Rec. S4793, S4804 (2002) (statement of Sen. Murray). In particular, Congress wanted to amend the TAA program to "recognize the special circumstances faced by family farmers, ranchers and independent fishermen, and . . . to provide assistance and technical support before they lose their businesses." 148 Cong. Rec. S3530, S3536 (2002) (statement of Sen. Wellstone); *see also* 147 Cong. Rec. E2156, 2157 (2001) (statement of Rep. Bentsen). The legislative history and the language of 19 U.S.C. § 2401e support this purpose. *See e.g.* 148 Cong. Rec. at 7819; *see also* 19 U.S.C. § 2401e(a)(1) ("allowance shall be made to an *adversely affected agricultural commodity producer* covered by a certification under this part who files an application for such assistance within 90 days after the date on which the Secretary makes a determination and issues a certification of eligibility") (emphasis added).

[6] Plaintiff argues that because Agriculture must first make a determination of group eligibility based upon whether or not a fisherman is adversely affected by imports of a specific type of fish, *see* 19 U.S.C. § 2401a(a), it therefore stands to reason that the individual fisherman's eligibility for TAA benefits must be tied to a loss in income from the adversely affected agricultural commodity and not based on a decline in net fishing income. Defendant, however, correctly points out that TAA eligibility is a two-step process. First, the group of fishermen must be certified as an adversely affected group pursuant to 19 U.S.C. § 2401a(a). Second, the affected fishermen must individually demonstrate that they suffered a loss in net fishing income as a result of increased imports. *See* 19 U.S.C. § 2401e(1)(C). In no section of the statute does Congress tie the individual fisherman's eligibility to receive benefits to a demonstrable loss in income from a specific species of fish. That determination is done on a group level at the first step of the process.

ity to determine "net farm income." Congress could have explicitly inserted the language "net income from the *adversely affected agricultural commodity*," as it did in § 2401e(a)(1)(A) and § 2401e(a)(1)(D). Defendant's Reply at 5–6, 11 (emphasis added) (*quoting Terry v. Principi*, 367 F. 3d 1291, 1296 (Fed. Cir. 2004)). It chose to do otherwise.

Agriculture implemented the statute in accordance with Congressional intent. Following notice and comment rulemaking[7] where parties' concerns were considered, Agriculture defined "net farm income" and "net fishing income" as "net farm profit or loss, excluding payments under this part, reported to the Internal Revenue Service . . . for the tax year that most closely corresponds with the marketing year under consideration." 7 C.F.R. § 1580.102. By defining "net farm income" and "net fishing income" as income derived from both TAA-eligible and TAA-ineligible products, the agency ensured that the Congressional intent was realized - that relief would be limited to agricultural producers most in need of assistance. These definitions are not as Plaintiff claims "extra-statutory[8] lim-

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[7] The Foreign Agricultural Service ("FAS") proposed "Part 1580 - Trade Adjustment Assistance for Farmers," a rule to implement the Chapter 6 of Title II of the Trade Act of 1974, as amended by the Trade Act of 2002. *Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 39,478 (July 2, 2003). Under the proposed rule, a group of agricultural commodity producers could petition the FAS for TAA. *Id.* at 39,479. If the FAS Administrator determined that "the national average price in the most recent marketing year for the commodity produced by the group is equal to or less than 80 percent of the average of the national average prices in the preceding 5 marketing years and [whether] increases imports of that commodity contributed importantly to the decline in price," it would certify the group as eligible for TAA. *Id.* Upon certification, individual producers of the certified commodity could petition the FSA to receive basic information and technical assistance, and subject to additional eligibility requirements, cash payments. *Id.* The additional eligibility requirements included a "certification that [the individual producers'] net farm income is less than that for the latest year in which no adjustment assistance was received." *Id.* at 39,481 (*quoting* proposed 7 C.F.R. § 1580.301(e)(4)).

After inviting comments on the proposed rule, the final rule addressed respondents' comment regarding the net income requirement. *Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 50,048 (August 20, 2003). Three respondents were concerned that "producers managing diversified farms might not qualify for adjustment assistance payments due to higher earnings from sales of other commodities." *Id.* The FAS countered that TAA's purpose was limited to providing assistance to those producers facing "economic hardship." *Id.* Furthermore, the FAS emphasized that the TAA payments would be excluded from consideration when it determined whether a producer was eligible in subsequent qualifying years. *Id.* After consideration of respondents' comments, FAS continued to define net farm and fishing income as overall income, that is, the income derived from *all* of an individual producer's catch. To date, the FAS has not published an amendment that changes this definition. *See, e.g., Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 62,731 (November 6, 2003).

[8] The court does not accept as valid Plaintiff's argument that Congress only limited TAA benefits in two instances (1) to producers earning less than $2.5 million in adjusted gross income, and (2) by progressively reducing cash payments as the producers adjusted to import competition. Plaintiff's Response at 11–12 (citing 19 U.S.C. § 2401e(a)(2)). These are explicit limits in the statute, whereas the discussion in this case focuses on the statute's grant of authority to the Secretary of Agriculture to define net farm income and net fishing income.

it[s] on the distribution of TAA benefits;" rather they are consistent with Congressional intent since the "regulatory and statutory framework do not provide for a species specific determination." Plaintiff's Response at 12–13; Defendant's Reply at 2.

"The fair measure of [judicial] deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Mead* 533 U.S. at 226 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134,139–40, 65 S. Ct. 161, 89 L. Ed. 124 (1994)). "Considerable weight should be accorded to an [agency's] construction of a statutory scheme it is entrusted to administer. . . ." *Id*. (quoting *Chevron*, 467 U.S. at 844). Defendant's argument that the agency's interpretation and implementation of the TAA statute is consistent with Congressional intent is supported by substantial evidence.

Applying the *Mead* standard, Plaintiff's claim that Agriculture unreasonably required Plaintiff to include income from fish other than Pacific salmon in his application and "[did] nothing to establish whether [Plaintiff has been] adversely affected by import competition as to the certified product" is without merit. Plaintiff's Response at 8. Agriculture was explicitly granted the authority to define "net farm" and "net fishing income" and has consistently applied its definitions when determining a producer's TAA eligibility.[9] 19 U.S.C. §2401e(a)(1)(C); 7 U.S.C. § 1580.102. Several notices prepared by the FSA and distributed to state and county offices of the FSA demonstrate this consistency.[10] *See, e.g.*, *Clarifying Trade Adjustment Assistance (TAA) Policies and Procedures*, USDA FSA Notice SP–12 at 1 (November 26, 2003).

The notice and comment rulemaking process and the FSA notices setting out the TAA guidelines indicate that Agriculture has consistently defined net farm and fishing income as income derived from

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[9] On one occasion, the agency has suggested that net fishing income is limited to income derived from the agricultural commodity at issue. In a letter dated October 22, 2003, the State of Washington office of the FSA stated that "to be eligible to receive cash payments for TAA [a Pacific salmon producer] must . . . [p]rovide acceptable documentation to verify [his] decline in income from commercial pacific salmon fishing for the past two marketing years." Administrative Record at 36–37. The letter, however, predates the notices clarifying the TAA program and was written by an official at the state level and not the federal level.

[10] For example, among the frequently asked questions was whether "net fishing income [was] defined as the net income from only the approved commodity . . . [or whether] it include[s] net income from non-TAA eligible catch." Farm Service Agency, U.S. Dep't of Agriculture, Notice SP–12 at 3, Clarifying Trade Adjustment Assistance Policies & Procedures (Sept. 1, 2004). The FSA responded that net income included net income from non-TAA eligible catch, which would be reported as net profit or loss on IRS Schedules C or C–EZ. *Id*.; Farm Service Agency, U.S. Dep't of Agriculture, Notice SP–5 at 8, Information Regarding Trade Adjustment Assistance for Farmers (Jan. 1, 2005); *see also* 7 C.F.R. § 1580.102. This is a document which is readily available on the FSA website for any applicant to review. *See http://www.fsa.usda.gov/dafp/psd/TAA.htm* (visited August 10, 2005).

both TAA-eligible and TAA-ineligible products. Plaintiff asserts that because the Secretary only certified Pacific salmon, only those fish (and not *all* the fish Plaintiff produces) should count when determining Plaintiff's eligibility for cash payments. Plaintiff's Response at 14–15. This argument directly contradicts the statute and regulations. *See* 7 U.S.C. § 1580.102; *see also* 19 U.S.C. § 2401e(a)(1). Absent proof of an unreasonable interpretation of the applicable statute and implementing regulations by Agriculture, "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity . . . " and is entitled to *Chevron* and *Mead* deference from the reviewing court. *Mead* 533 U.S. at 228.

C
Defendant's Motion Must Be Granted

Plaintiff has failed to state a claim upon which relief may be granted. Accepting all well-pleaded facts as true and viewed in the light most favorable to the Plaintiff, there are insufficient facts to support Plaintiff's claim that Agriculture's negative determination, based upon the definition of "net farm" and "net fishing" income in its regulations, is contrary to the statutory language of 19 U.S.C. § 2401e. *See Conley v. Gibson*, 355 U.S. 41, 45–46. (1957).

The Defendant denied Plaintiff's application for TAA benefits on the basis that his net fishing income for 2002 was higher than his net fishing income for 2001. Defendant's Motion at 8. Plaintiff challenged this determination on the grounds that his "Pacific salmon" income for 2002 was less than his "Pacific salmon" income for 2001.[11] Given that "nothing in the relevant statutes or regulations provides for a determination of [eligibility] . . . based upon earnings according to *individual fish species*," Agriculture acted reasonably and in accordance with law by basing its decision to deny Plaintiff's claim for benefits on his net fishing income. Defendant's Motion at 8 (emphasis in original). As a result, it does not appear "beyond a doubt" that Plaintiff is able to present facts in support of his claim.

VI
Conclusion

For the foregoing reasons, Defendant's Motion is GRANTED.

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[11] The court agrees with Defendant that it is irrelevant to Agriculture's determination whether Plaintiff's fishing income from *Pacific salmon* had decreased by almost 75% in 2002 as compared to 2001. Defendant's Reply at 1.

Slip Op. 05–132

DUFERCO STEEL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg,
Senior Judge
Court No. 05–00389

[Defendant's motion to dismiss granted]

Dated: October 5, 2005

White & Case (*Richard J. Burke* and *Joanna Ritcey-Donohue*) for Plaintiff Duferco Steel, Inc.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; *Stephen C. Tosini*, Attorney, Department of Justice, Civil Division, Commercial Litigation Branch, for Defendant United States.

OPINION

GOLDBERG, Senior Judge: This matter is before the Court on Defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to USCIT R. 12(b)(1). The plaintiff Duferco Steel, Inc. ("Duferco") brought a petition seeking a writ of mandamus to compel certain actions by the U.S. Department of Commerce ("Commerce") and the Bureau of Customs and Border Protection ("Customs"). First, Duferco seeks a writ of mandamus compelling Commerce to instruct Customs to liquidate and/or reliquidate entries of small diameter carbon and alloy seamless standard, line, and pressure pipe ("SLP") for the review period of February 4, 2000 through July 31, 2001. According to Duferco, the liquidation and/or reliquidation instructions should be without regard to antidumping duties, in accordance with Commerce's final results contained in *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Romania, Final Results of Antidumping Duty and Administrative Review*, 68 Fed. Reg. 12,672 (Dep't Commerce Mar. 17, 2003). In addition, Duferco contends Commerce must instruct Customs to refund, with interest, any antidumping duty deposits to Duferco with respect to Entry Numbers 558–1171537–8 and 558–2014403–2 ("the Entries"). Duferco also seeks an order demanding Customs liquidate and/or reliquidate the Entries without regard to antidumping duties. As relief, Duferco requests that Customs refund, with interest, all antidumping duty deposits, in accordance with 19 U.S.C. § 1675(a)(2)(C).

Defendant does not contest that the Court of International Trade has statutory authority to order relief by granting a petition for a writ of mandamus.[1] *See* 28 U.S.C.A. § 2643(c)(1) (1999). Defendant's

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[1] A writ of mandamus is an extraordinary equitable remedy available only "when performance has been refused and no meaningful alternative remedy exists." *Nakajima All Co.,*

objection, however, addresses a logically antecedent question: does the Court have jurisdiction to issue a writ of mandamus ordering Commerce and Customs to liquidate and/or reliquidate the Entries despite Duferco's failure to protest the denial of its 19 U.S.C. § 1520(c) reliquidation request?[2] For the reasons discussed below, the Court finds that it does not possess jurisdiction over Duferco's claim and grants Defendant's motion to dismiss under USCIT R. 12(b)(1).

I. *Background*

On July 22, 2000, Duferco imported two SLP entries from Romanian manufacturer Silcotub. *See Defendant's Motion to Dismiss* ("*Def.'s Motion*"), Ex. 1. Customs issued automatic liquidation instructions for entries subject to the antidumping duty order for SLP from Romania. *Complaint*, at ¶ 15. The instructions were to liquidate all Romanian SLP entries except entries entered by Silcotub. *Id*. The entry forms provided to Customs by Duferco's customs broker designated Duferco as the "manufacturer" of the Entries, and as such Customs, consistent with its own instructions, liquidated the Entries, respectively, on November 8, 2001 and November 30, 2001.[3] *Def.'s Motion*, Ex. 1 at box 21.

On December 9, 2003, Duferco, through its import manager M.G. Maher & Co. ("M.G. Maher"), subsequently filed a reliquidation request for each of the Entries pursuant to 19 U.S.C. § 1520(c). *Def.'s*

Ltd. v. United States, 12 CIT 585, 588, 691 F. Supp. 358, 361 (1988) (*quoting UST, Inc. v. United States*, 10 CIT 648, 653, 648 F.Supp. 1, 5 (1986), *aff'd on other grounds*, 831 F.2d 1028 (Fed. Cir. 1987)). A petitioner must prove the following elements in order to assert successfully a petition for a writ of mandamus: (1) a clear duty on the part of the defendant to perform the act in question; (2) a clear right on the part of the plaintiff to demand the relief sought; and (3) an absence of an adequate alternative remedy. *See Timken Co. v. United States*, 893 F.2d 337, 339 (Fed. Cir. 1990) (*citing Meier v. Orr*, 754 F.2d 973, 983 (Fed. Cir. 1985); *Kerr v. U.S. Dist. Ct. for the N.D. Cal.*, 426 U.S. 394, 402–03 (1976)); *see also Hosiden Corp. v. United States*, 18 CIT 748, 749–50, 861 F. Supp. 115, 117 (1994), *vacated on other grounds*, 85 F.3d 589 (Fed. Cir. 1996). Because the Court disposes of Duferco's complaint for a jurisdictional defect, the Court does not consider the merits of the mandamus petition, noting, however, the substantial overlap between the test for mandamus and the test for residual jurisdiction under 28 U.S.C. § 1581(i) discussed in detail *infra*.

[2] Congress repealed 19 U.S.C. § 1520(c) in December of 2004, and section 1520(c) does not apply to merchandise entered, or withdrawn from warehouse for consumption, on or after December 18, 2004. *See* Pub. L. 108–429, title II, §§ 2105–08, Dec. 3, 2004, 118 Stat. 3598. Since, however, the Entries arrived prior to the repeal, the Court notes that the former section 1520(c) governs these Entries, which were unaffected by the 2004 repeal.

[3] There is a disagreement between the parties as to the legal consequence of designating Duferco, and not Silcotub, as the manufacturer. Whether Duferco incorrectly entered its name as manufacturer, or, as Duferco claims, whether Duferco was merely complying with an industry custom that Customs should have accommodated, is a difficult question not necessary for the Court to determine at this stage. Whatever the cause of the misapplication of antidumping duties, Duferco could have challenged the misapplication–without regard to the fault of either party–under 28 U.S.C. § 1581(a) before invoking residual jurisdiction. Because the issue before the Court is a broader jurisdictional question, the Court need not address the cause or consequence of the alleged wrongful designation.

Motion, Ex. 3. On February 13, 2004, Customs denied the request for exceeding the one year time period from the date of exaction or the date of liquidation within which protests must be filed under that section.[4] *Id*. The M.G. Maher letter requested Customs to consider the date of exaction to be March 17, 2003–the date Commerce issued its final results of the antidumping investigation of Silcotub-and not October 21, 2001, which was the actual date of liquidation of the Entries.[5] *Id*. Such postdating was warranted, according to the M.G. Maher letter, on account of Custom's erroneous liquidation of the goods. *Id*. Following the denial of the 19 U.S.C. § 1520(c) protests, Duferco filed its petition for a writ of mandamus on June 15, 2005. On August 5, 2005, Defendant filed its motion to dismiss for lack of subject matter jurisdiction.

II. *Standard of Review*

Once a defendant moves to dismiss an action under USCIT R. 12(b)(1) for lack of subject matter jurisdiction, the plaintiff has the burden of proving that assertion of jurisdiction is proper. *See United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 247, 248–49, 597 F. Supp. 510, 513 (1984). The Court must limit its inquiry to the jurisdictional question, and avoid examining the merits of a case. *See Syva Co. v. United States*, 12 CIT 199, 201, 681 F. Supp. 885, 887 (1988) (*citing Feudor, Inc. v. United States*, 79 Cust. Ct. 179, 442 F. Supp. 544 (1977)).

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[4] Under 19 U.S.C. § 1520(c)(1), Customs "may, in accordance with regulations prescribed with the Secretary, reliquidate an entry or reconciliation to correct . . . a clerical error, mistake of fact, or other inadvertence . . . when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction. . . ." 19 U.S.C.A. § 1520(c)(1) (1999), *repealed by* Pub. L. 108–429, title II, § 2105, Dec. 3, 2004, 118 Stat. 3598.

[5] The pleadings and accompanying exhibits use both the terms "date of liquidation" and "date of exaction" such that an explanatory note may be in order, though the Court is mindful that it need not address the merits of the section 1520(c) denial. The date of exaction refers to the date of payment of the duties. *See United States Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997). The M.G. Maher letter requests that Customs post date the "date of exaction," but the statute itself bars protests brought to the attention of Customs "within one year after the date of liquidation *or* exaction." 19 U.S.C.A. § 1520(c)(1) (1999) (emphasis added). Since liquidation indisputably occurred in November 2001, the M.G. Maher letter appeared to focus on *exaction* because Duferco knew it would be impossible to argue *liquidation* occurred at a later date. Complicating the matter, however, the Customs section 1520(c)(1) denial form communicated to Duferco that its reliquidation request was untimely because it was not received within the one-year period following *liquidation*. *See Def.'s Motion*, Ex. 3. It is unclear from the record why Duferco believed that the "date of exaction" occurred later than the date of liquidation. For the moment, however, it is enough to appreciate the nature of the postdating argument in the context of a reliquidation request, without examining the difficult factual question of when exaction actually occurred.

III. *Discussion*

28 U.S.C. § 1581 sets forth the jurisdiction of the Court of International Trade. Subsections (a) through (h) of 28 U.S.C. § 1581 grant the court jurisdiction over specific types of disputes that commonly arise before the Court. Subsection (i)–the so-called "residual" grant of jurisdiction[6]–is a general grant of jurisdiction for *any* civil action against the United States, its agencies, or its officers, that arises out of any law of the United States providing for, *inter alia*, "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue . . . [or the] administration and enforcement with respect to the matters referred to in [section 1581]." The issue before the Court is the interaction of the residual grant with the rest of section 1581, and specifically whether there is a "remedy exhaustion" requirement implicit in section 1581(i)'s residual grant.

Duferco contends that the Court has jurisdiction under 28 U.S.C. § 1581(i) to hear its petition for mandamus relief from the agency's denial of its section 1520(c) reliquidation request, despite Duferco's failure to invoke section 1581(a) and the appropriate administrative review procedures. According to Duferco, Defendant misunderstands the nature of its petition, and "has submitted a motion to dismiss a claim Duferco did not make. . . ." *Plaintiff's Response in Opposition to Def.'s Motion*, at 4. Plaintiff also points out that "28 U.S.C. § 1581(a) is not nor could have been available." *Id.* In essence, Plaintiff argues that the Court cannot consider a litigant's seeking redress under section 1581(a) as a precondition for a successful section 1581(i) claim because the latter claim does not implicate the former. Such a position flies in the face of clear precedent that binds this Court.

By its terms, the 28 U.S.C. § 1581(i) gives the court exclusive jurisdiction over

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for–
>
> (1) revenue from imports or tonnage;
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

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[6] Section 1581(i) has been referred to as the Court of International Trade's "residual," or "catch-all" grant of jurisdiction. *See Star Sales & Distrib. Corp. v. United States*, 10 CIT 709, 711–12, 663 F. Supp. 1127, 1129–30 (1987); *American Air Parcel Forwarding Co., Ltd. v. United States*, 5 CIT 8, 10, 557 F. Supp. 605, 607 (1983).

> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

The breadth of the residual jurisdiction could, if not interpreted restrictively, threaten to strip subsections (a) through (h) of any operative force. Courts, cognizant of this interpretive difficulty, have decided that a plaintiff may successfully seek redress under section 1581(i)'s residual jurisdiction only after exhausting its remedies under subsections (a) through (h) of that section. Section 1581(i) is a litigant's port of last resort. If a plaintiff can access the Court of International Trade through section 1581(a)–or any other means short of invoking section 1581(i)–"it must avail itself of [that] avenue of approach, complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i). . . ." *American Air Parcel*, 5 CIT at 10, 557 F. Supp at 607.

Moreover, a plaintiff must exhaust administrative remedies before resorting to residual jurisdiction. *See* 28 U.S.C.A. § 2637 (1999) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003).

The only circumstance wherein a plaintiff may successfully assert a claim under section 1581(i) before invoking an alternative and available method of redress is when such redress is "manifestly inadequate." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987); *Carnival Cruise Lines, Inc. v. United States*, 18 CIT 1020, 1025, 866 F. Supp. 1437, 1441–42 (1994); *Carnation Enterprises Pvt., Ltd. v. U.S. Dept. of Commerce*, 13 CIT 604, 607, 719 F. Supp. 1084, 1087 (1989).

In order to hurdle the exhaustion bar, a remedy must be inadequate both prospectively *and* retrospectively. It is not enough for a plaintiff to allege that section 1581(a) is an inadequate means, *at the time it invokes section 1581(i)*, to protect plaintiff's rights. A plaintiff waives its right to invoke section 1581(i)'s "manifest inadequacy" safe harbor if jurisdiction under another subsection of section 1581 could have been available but no longer is available.

In *Star Sales*, the plaintiff argued in the alternative that should the court find that it did not have jurisdiction under 1581(a), "the Court should find residual jurisdiction for its action under section 1581(i)" because then the section 1581(a) "avenue [would] no longer [be] available [to plaintiff]." *Star Sales*, 10 CIT at 712, 663 F. Supp. at 1130. The court rejected plaintiff's position unambiguously: "In making a determination of whether a particular remedy is manifestly inadequate . . . the Court must consider whether *if properly utilized at the time* such remedy or procedure adequately would serve a remedial function. That plaintiff failed to utilize the ad-

equate and effective procedure originally available to it under section 1581(a) does not render such remedial procedure manifestly inadequate." *Id.* (emphasis added). An earlier failure to avail itself of an available action under 28 U.S.C. § 1581 will estop a plaintiff from subsequently invoking 28 U.S.C. § 1581(i).

Such is the situation in this case. As discussed *supra*, Duferco argues that Customs' alleged error justifies postdating the exaction date so as to allow full consideration of the reliquidation request under 19 U.S.C. § 1520(c). Such an argument may have merit, but the time to litigate it has passed.

According to 28 U.S.C. 1581(a), "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." Section 515 of the Tariff Act of 1930, codified in 19 U.S.C. § 1515, outlines the procedures for Customs to review, *inter alia*, the denial of reliquidation request under 19 U.S.C. § 1520(c). Section 1515 requires an aggrieved party to register a protest under section 1514 as a prerequisite to filing a complaint invoking 1581(a) jurisdiction. *See Mitsubishi Elec. Am. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994); *see also* 28 U.S.C.A. § 2637 (1999). Because a complaint relating to the "refusal to reliquidate an entry under section 1520(c)" is enumerated in section 1514(a), an aggrieved plaintiff must seek redress from that administrative remedy, and register a formal protest under 19 U.S.C. §§ 1514–15, prior to resorting to 28 U.S.C. § 1581.

When Customs refuses to reliquidate, such decision is "final and conclusive upon all persons . . . unless a protest is filed in accordance with [section 1514], or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade." 19 U.S.C.A. § 1514(a) (1999). If Duferco had filed a protest under section 1514, and if the Customs review under section 1515 denied the protest, then Duferco could have sought substantive judicial review, under 28 U.S.C. § 1581(a), of its argument that postdating is appropriate to prevent section 1520(c)'s statute of limitations from barring its reliquidation request. The petition for a writ of mandamus is a tardy request for relief that Duferco could have received in two different settings: first, a Customs protest review under 19 U.S.C. §§ 1514–15; and second (should the protest have been denied), a 28 U.S.C. § 1581(a) review of the denial of the protest in this Court.

Because Duferco could have challenged Customs' denial of its protest earlier by filing a formal protest or invoking the Court's jurisdiction under 28 U.S.C. § 1581(a), an alternative remedy was *available*. In addition to availability, the remedy would have been *adequate* to cause the Court to consider the merits of Duferco's argument that Customs should have postdated the exaction date for purposes of the reliquidation request. When Congress has provided a

specific and detailed framework for parties to challenge Customs' actions under 28 U.S.C. § 1581, it is inappropriate for this Court to permit plaintiffs to circumvent those procedures by invoking section 1581(i).

IV. *Conclusion*

In light of the foregoing, Defendant's motion to dismiss for lack of subject matter jurisdiction is granted. Judgment shall be entered accordingly.