Slip Op. 05–143

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

FAG KUGELFISCHER GEORG SCHAFER AG, FAG BEARINGS CORPORATION, SKF USA Inc., SKF GmbH, NTN BEARING CORPORATION OF AMERICA, NTN KUGELLAGERFABRIK (DEUTSCHLAND) GmbH, INA WALZLAGER SCHAEFFLER KG and INA BEARING COMPANY, INC., Plaintiffs and Defendant-Intervenors, v. UNITED STATES, Defendant, and THE TORRINGTON COMPANY, Defendant-Intervenor and Plaintiff.

Consol. Court No.
97–00260

Judgment

This matter comes before the Court pursuant to the decision of the Court of Appeals for the Federal Circuit ("CAFC") in *FAG Kugelfischer Georg Schafer AG v. United States*, 402 F.3d 1356 (Fed. Cir. 2005) and the CAFC's mandate dated May 31, 2005, reversing and remanding the judgment of the Court in *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT 74, 131 F. Supp. 2d 104 (2001) and *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT 1038 (2001) (affirming remand results submitted pursuant to *FAG Kugelfischer Georg Schafer AG*, 25 CIT 74, 131 F. Supp. 2d 104).[1] Based on the CAFC's decision, the Court remanded this matter to the United States Department of Commerce ("Commerce"). Commerce was instructed to allow FAG Kugelfischer Georg Schafer AG and FAG Bearings Corporation (collectively, "FAG Germany") an opportunity to demonstrate that its antidumping duty margin was incorrectly determined because Commerce's use of actual expenses did

[1] The Torrington Company was acquired by the Timken Company in 2003, and is now known as Timken U.S. Corporation. INA Walzlager Schaeffler KG is now known as INA Walzlager Schaeffler HG and INA Bearing Company, Inc. is now known as INA USA Corporation.

not account for United States credit and inventory carrying costs in the calculation of total expenses. *See* Order (July 7, 2005). Commerce filed its *Final Results of Redetermination Pursuant to Court Remands* ("*Remand Results*") on October 5, 2005. Pursuant to the Court's remand, Commerce invited FAG Germany to show that its dumping margin had been incorrectly determined. *See Remand Results* at 3. FAG Germany, however, failed to respond to Commerce's invitation. *See id.* at 3–4.

Commerce determined FAG Germany's antidumping duty margins, some which differed slightly from previously determined margins in response to earlier remands from the Court. *See id.* at 4–5. FAG Germany's weighted-average percentage margins for the period of May 1, 1994, through April 30, 1995, is 13.42 percent for ball bearings and parts thereof, 22.59 percent for cylindrical roller bearings and parts thereof and 12.08 percent for spherical roller bearings and parts thereof.

This Court, having received and reviewed Commerce's *Remand Results*, holds that Commerce duly complied with the Court's remand order and it is hereby

ORDERED that Commerce's *Remand Results* are reasonable, supported by substantial evidence, and is otherwise in accordance with law; and it is further

ORDERED that the *Remand Results* filed by Commerce on October 5, 2005, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

Slip Op. 05–144

TOKYO KIKAI SEISAKUSHO, LTD. and TKS (USA), INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 05–00348

[Defendant's motion to dismiss for lack of subject matter jurisdiction is granted]

Dated: November 7, 2005

Sidley Austin Brown & Wood LLP (*Neil R. Ellis*, *Lawrence R. Walders* and *Peter J. Toren*) and *Law Offices of Hoken S. Seki* (*Hoken S. Seki*) for plaintiffs.

Stuart E. Schiffer, Deputy Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, *Kent G. Huntington*, Trial Attorney, Commercial Litigation Branch, International Trade Field Office, United States Department of Justice; *Elizabeth Cooper Doyle*, Attorney, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

Stanceu, Judge: Defendant United States moves, pursuant to USCIT Rule 12(b)(1), to dismiss for lack of subject matter jurisdiction the complaint of Tokyo Kikai Seisakusho, Ltd. ("TKS") and TKS (USA), Inc. ("TKS (USA)") (collectively "plaintiffs") challenging as unlawful the self-initiation by the United States Department of Commerce ("Commerce" or "the Department") of an antidumping "changed circumstances" review. The changed circumstances review pertains to an antidumping duty order directed to imports of large newspaper printing presses and their components ("LNPPs") from Japan. Commerce had issued the antidumping duty order in 1996 and revoked it in 2002.

Plaintiffs allege that "Commerce ha[d] no legal authority to initiate the review" under the relevant antidumping statute because no antidumping duty order was in effect on LNPPs from Japan when, on May 10, 2005, Commerce published its determination to self-initiate the changed circumstances review. *Compl.* at ¶ 3. Plaintiffs seek a declaratory judgment and an order permanently enjoining Commerce from continuing to conduct any such review. Under 19 U.S.C. § 1675(b)(1) (2000), Commerce is empowered to conduct a changed circumstances review when it receives information sufficient to warrant a review of a final affirmative determination resulting in an antidumping duty order.

As the basis for the changed circumstances review, Commerce cited information developed in a civil case tried in a U.S. district court in which TKS and TKS (USA) were sued by a domestic LNPP producer for violations of the Antidumping Act of 1916. In initiating the changed circumstances review, Commerce stated that the information developed at the trial established that TKS had imposed on one of its customers a fraudulent increase in the price of LNPP merchandise in exchange for the receipt by the customer of secret rebates.

In its motion to dismiss, defendant argues that this court lacks jurisdiction under the provision under which this action has been brought, 28 U.S.C. § 1581(i)(2000), because resort to that jurisdictional provision is permissible only if a remedy under any other provision of § 1581 would be unavailable or manifestly inadequate. Defendant points to § 1581(c), under which, defendant contends, plaintiffs could challenge in this Court any final action that Commerce takes as a result of the changed circumstances review. Defendant also urges dismissal for jurisdictional reasons on grounds of ripeness, standing, and failure to exhaust administrative remedies.

In opposing the motion to dismiss, plaintiffs argue that the act of initiating and maintaining an unlawful agency proceeding is regarded by relevant case law as a final agency action that may be challenged judicially without requiring plaintiffs to pursue their remedies by participating in the agency proceeding itself. Plaintiffs

argue, further, that they have been injured by the decision of Commerce to self-initiate the changed circumstances review and that the issue presented by this case is ripe for judicial review as a purely legal question as to which no further legal development is necessary.

This court concludes that the issue plaintiffs have raised concerning the initiation of the changed circumstances review is not ripe for adjudication by this court. Accordingly, the court will enter judgment granting defendant's motion and dismissing this action for lack of subject matter jurisdiction.

I. BACKGROUND

TKS, a business incorporated in Japan, manufactures and distributes LNPPs in Japan, the Unites States, and other countries through its subsidiaries. TKS (USA), a wholly-owed subsidiary of TKS incorporated in Delaware, markets and sells in the United States LNPPs manufactured by TKS. *See Comp.* ¶ 2.

Commerce issued its antidumping duty order on imports of LNPPs from Japan on September 4, 1996, assessing a dumping margin of 56.28 percent *ad valorem* to imports manufactured and/or exported by TKS. *See Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value for Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan*, 61 Fed. Reg. 46,621, 41,622 (Sept. 4, 1996) ("*Antidumping Duty Order*"). In administrative reviews covering LNPPs from Japan entered for consumption during three consecutive periods of review, September 1, 1997 through August 31, 1998, September 1, 1998 through August 31, 1999, and September 1, 1999 through August 31, 2000, Commerce calculated a weighted-average antidumping duty margin of zero for TKS's entries. *See Final Results of Antidumping Duty Administrative Review and Revocation in Part for Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 67 Fed. Reg. 2,190, 2,191–92 (Jan. 16, 2002). Based on the three consecutive zero margins, Commerce revoked the *Antidumping Duty Order* with respect to all entries of the subject merchandise manufactured or exported by TKS. *See id.* Commerce initiated a five-year sunset review on August 1, 2001 and revoked the *Antidumping Duty Order* with respect to all entries of LNPPs on February 25, 2002 due to insufficient domestic interest in the proceedings. *See Notice of Final Results of Five-Year Sunset Reviews and Revocation of Antidumping Duty Orders on Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan* (*A–588–837*) *and Germany* (*A–428–821*), 67 Fed. Reg. 8,522 (Feb. 25, 2002).

In May 2000, Goss International Corporation ("Goss") brought a civil action in the U.S. District Court for the Northern District of Iowa against TKS and TKS (USA), alleging that the two defendants

violated the Antidumping Act of 1916, codified at 15 U.S.C. § 72 (1994).[1] *See Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 321 F. Supp. 2d 1039, 1042 (N.D. Iowa 2004). On December 3, 2003, a jury returned a verdict in favor of Goss in the amount of $10,539,949, specifically finding that TKS and TKS (USA), with intent of destroying or injuring a domestic industry, caused Goss to lose profits and opportunity costs with respect to three sales of LNPPs that were made to the Dallas Morning News in 1996, the Orlando Sentinel in 1997, and the Newark Star Ledger in 1997. *See Goss Int'l Corp.*, 321 F. Supp. 2d at 1042–43; *see also* Verdict Form for *Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, No. C00–35 (N.D. Iowa filed Dec. 3, 2003) (*Pls.' Combined Opp'n To Mot. To Dismiss & Mem. In Supp. Of Mot. For Summ. J.* Ex. 2 at Ex. A ("*Pls.' Opp'n*")). The jury verdict withstood a motion by TKS and TKS (USA) for a new trial and for judgment as a matter of law. *See Goss Int'l Corp.*, 321 F. Supp. 2d at 1055.

On May 10, 2005, Commerce, relying on its authority under section 751(b)(1) of the Tariff Act of 1930, codified at 19 U.S.C. § 1675(b)(1), self-initiated the changed circumstances review that is the subject of this action. Commerce stated that it was self-initiating the review based upon information contained in the opinion of the District Court issued on May 26, 2004 denying the motion of TKS and TKS (USA) for a new trial and judgment as a matter of law. *See Initiation of Changed Circumstances Review for Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan*, 70 Fed. Reg. 24,514, 24,515–16 (May 10, 2005) ("*Initiation Notice*"). This information consisted of evidence presented at trial that TKS and TKS (USA) "provided false information regarding its sale[ ] to the Dallas Morning News . . . , the subject of the Department's 1997–1998 [administrative] review." *Id.* at 24,516. Such evidence concerned a secret arrangement between TKS and the Dallas Morning News by which TKS imposed a fraudulent "increase" in the price of the 1996 sale to the Dallas Morning News in exchange for rebates to the Dallas Morning News amounting to

---

[1] The Antidumping Act of 1916 provides:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the Unites States, commonly or systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, [t]hat such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

15 U.S.C. § 72 (emphasis in original).

$2,200,000. *See id.*; *see also Goss Int'l Corp.*, 321 F. Supp. 2d at 1044–45. Evidence was presented at trial to establish the intent of this arrangement to conceal the fact that the "1996 sale to the [Dallas Morning News] was made at a dumped price." *Goss Int'l Corp.*, 321 F. Supp. 2d at 1044. Further evidence was presented at trial implicating TKS and its counsel in a "concerted effort to conceal the secret rebates," which involved the falsifying and destruction of documents. *Id.* at 1045; *see also Initiation Notice*, 70 Fed. Reg. at 24,516. Stating that "[t]he final results of the 1997–1998 administrative review were a factor in the Department's decisions to revoke TKS from the antidumping duty order, as well as to sunset the order," the *Initiation Notice* announced that Commerce placed on the record of the changed circumstances review the District Court's opinion in *Goss International Corporation v. Tokyo Kikai Seisakusho, Ltd.*, 321 F. Supp. 2d at 1039, and several public documents obtained from the record of that case. *Initiation Notice*, 70 Fed. Reg. at 24,516. Commerce invited comments from interested parties on the new information and the actions the Department should take with respect to this new information. *See id.*

In their complaint in this action, filed May 11, 2005, plaintiffs challenge Commerce's authority to self-initiate the changed circumstances review and seek a declaratory judgment and an order permanently enjoining Commerce from conducting any such review. *See Compl.* ¶ 20 *et seq.* Defendant United States moved to dismiss the complaint on July 14, 2005, and plaintiffs filed a combined opposition and motion for summary judgment on August 25, 2005, to which defendant replied on September 23, 2005. Prior to the filing of defendant's reply to plaintiffs' opposition, Commerce published the preliminary results of the changed circumstances review. *See Preliminary Results of Changed Circumstances Review for Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 70 Fed. Reg. 54,019 (Sept. 13, 2005) ("*Preliminary Results*"). In the *Preliminary Results*, the Department preliminarily determined that "in order to protect the integrity of the Department's proceedings," Commerce would revise the zero margin assigned to TKS for the 1997–1998 administrative review,[2] rescind the revocation of the *Antidumping Duty Order* for TKS and reconsider the revocation of the *Antidumping Duty Order* under the

---

[2] Commerce preliminarily assigned to the single TKS sale reviewed during the 1997–1998 administrative review (the 1996 sale to the Dallas Morning News) an antidumping duty margin of 59.67 percent, the rate calculated for Mitsubishi Heavy Industries, Ltd., a respondent in the administrative review, in the less-than-fair-value investigation, as amended and recalculated pursuant to a Court-ordered remand redetermination. *See Preliminary Results*, 70 Fed. Reg. at 54,022. This rate of duty, which Commerce proposed to assign under its "facts available" and "adverse inferences" authority under 19 U.S.C. § 1677e (2000), "is the highest calculated for any respondent in the [less than fair value] investigation." *Id.*

sunset review provision 19 U.S.C. § 1675(c) (2000). *See Preliminary Results*, 70 Fed. Reg. at 54,019. Commerce invited interested parties to comment on the *Preliminary Results* by October 13, 2005, thirty days after the publication of the *Preliminary Results* in the Federal Register.

II. Discussion

Plaintiffs have claimed subject matter jurisdiction under 28 U.S.C. § 1581(i), specifically citing subparagraphs (i)(2) and (i)(4), which grant this court exclusive jurisdiction of any civil action commenced against the United States that arises out of any law of the United States providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue" and the "administration of enforcement with respect to" such matters, respectively. *Compl.* ¶ 4. The first argument in defendant's motion to dismiss is that subject matter jurisdiction is unavailable under 28 U.S.C. § 1581(i) because plaintiffs, upon completion of the proceedings before Commerce, could bring a civil action to contest any final results of the changed circumstances review, invoking this court's jurisdiction under § 1581(c) of that title, which grants this court exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930, codified at 19 U.S.C. § 1516a (2000). *See Def.'s Mot. To Dismiss* at 7–10. Defendant relies on the holding of the U.S. Court of Appeals for the Federal Circuit in *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992), that "'[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 *is or could have been available*, unless the remedy provided under that other subsection would be manifestly inadequate.' " (Citing *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (emphasis in original)). Defendant's argument also relies on language in subsection (i) providing that "[t]his subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . by the Court of International Trade under section 516A(a) of the Tariff Act of 1930. . . ." 28 U.S.C. § 1581(i). Defendant argues, in addition, that plaintiffs have not made a showing that a remedy under 28 U.S.C. § 1581(c) would be manifestly inadequate. *See Def.'s Mot. To Dismiss* at 10–12.

Plaintiffs could not validly have asserted their particular claim under section 516A of the Tariff Act of 1930, which provision would authorize judicial review of "[a] *final* determination . . . under section 1675 of this title." 19 U.S.C. § 1516a(a)(2)(B)(iii) (emphasis added). The court does not construe plaintiffs' complaint as an attempt to bring an action under that provision, and the court is aware of no other provision of the Tariff Act of 1930 under which plaintiffs could have brought an action to challenge the initiation and continuation of a changed circumstances review that has not reached a con-

clusion. Although its wording is less than clear in specifying its cause of action, plaintiffs' complaint can be construed to bring a civil action against the United States under the Administrative Procedure Act ("APA"), which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2000). The complaint does not state expressly that plaintiffs are suing under the APA, but it relies on this provision in its allegation of standing. *See Compl.* ¶¶ 6–8. The complaint does not appear to plead a civil action against the United States under any other statute.[3] Accordingly, for purposes of considering defendant's motion to dismiss, the court will construe the complaint to bring an action under the APA.

Construing plaintiff's complaint to bring an action under the APA, however, raises jurisdictional problems that are insurmountable. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. As discussed previously, the Tariff Act of 1930 does not itself authorize an action against the United States for an agency's initiation and continuation of an ongoing changed circumstances review. As a result, the APA would make reviewable an agency's initiation and continuation of a changed circumstances review only if the agency's action constituted "final agency action for which there is no other adequate remedy in a court." *Id.* Concerning the scope and timing of review of agency action, the APA also provides that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." *Id.*

Courts have considered the question of finality of agency action for purposes of review under the APA in the context of the larger judicial doctrine of ripeness. The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1966). The doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc.*

---

[3] The complaint invokes this court's jurisdiction under 28 U.S.C. § 1581(i) but does not assert that its action arises solely thereunder. *See, e.g., Humane Soc'y of the U.S. v. Clinton*, 236 F.3d 1320, 1328 (Fed. Cir. 2001) (stating that § 1581 is both a waiver of sovereign immunity and a grant of jurisdiction). Construing the complaint as alleging a cause of action under 28 U.S.C. § 1581 would not overcome the jurisdictional shortcomings arising from the lack of ripeness and the potential availability of jurisdiction under 28 U.S.C. § 1581(c), for the reasons discussed in this opinion.

Servs., Inc., 509 U.S. 43, 57 n.18 (1993) (citing *Buckley v. Valeo*, 424 U.S. 1, 114 (1976) (*per curiam*) and *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972)).

In determining ripeness for judicial review, the court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. The court concludes that plaintiffs' challenge to the agency action is not yet fit for judicial decision because Commerce's initiation of the changed circumstances review is a preliminary agency action. The court concludes, further, that withholding court consideration will not cause a hardship to plaintiffs because participation in the changed circumstances review requires essentially that plaintiffs file a brief as an interested party in the proceeding. This is not a significant burden, the less so because plaintiffs already have developed their arguments in prosecuting this action before this court. Placing those arguments before Commerce will allow the agency to rule on the relevant issues and will avoid judicial review of an agency action that is subject to change when Commerce issues final results in the review. Each of these conclusions is discussed below.

A. The Challenge to the Initiation of the Changed Circumstances Review Is Not Fit for Judicial Decision

Commerce's initiation of the changed circumstances review and its publication of the *Preliminary Results* each constitute a "preliminary, procedural, or intermediate agency action" within the meaning of 5 U.S.C. § 704. Each would be "subject to review on the review of the final agency action" under the APA were they not directly reviewable under section 516A(a) of the Tariff Act of 1930 upon a review of the final changed circumstances determination. 5 U.S.C. § 704; *see* 19 U.S.C. § 1516a(a)(2)(B)(iii). If plaintiffs are dissatisfied with the outcome of the changed circumstances review, they will have the opportunity to challenge, in an action brought under 19 U.S.C. § 1516a, the authority of Commerce to initiate the review as well as other aspects of a final decision. Dismissing plaintiffs' complaint, therefore, will not deprive plaintiffs of their opportunity to be heard on the merits of their complaint.

Plaintiffs characterize their complaint as challenging the "very act of initiating and conducting a plainly unlawful agency proceeding" and "ask[ ] to be relieved of [their] obligation to participate." *Pls.' Opp'n* at 2, 13. Plaintiffs rely on a line of cases to support the proposition that "a party may challenge the initiation of unlawful action by the Department under 28 U.S.C. § 1581(i)," citing *Dofasco Inc. v. United States*, 28 CIT ___ , ___ , 326 F. Supp. 2d 1340 (2004), *aff'd on other grounds*, 390 F.3d 1370 (Fed. Cir. 2004), *JIA Farn Manufacturing Co., Ltd. v. United States*, 17 CIT 187, 817 F. Supp. 969 (1993), *Asociacion Colombiana de Exportadores de Flores*

(Asocoflores) v. United States, 13 CIT 584, 717 F. Supp. 847 (1989), *aff'd*, 903 F.2d 1555 (Fed. Cir. 1990), and *Carnation Enterprises Pvt. Ltd. v. United States*, 13 CIT 604, 719 F. Supp. 1084 (1989). *Pls.' Opp'n* at 7. Each of the cases on which plaintiffs rely, however, is readily distinguished from the case at bar. All of the cases cited by plaintiffs address the issue of whether the remedy for which jurisdiction is provided under 28 U.S.C. § 1581(c) would be manifestly inadequate in an action challenging an agency determination to initiate, under 19 U.S.C. § 1675(a), a periodic administrative review of an antidumping or countervailing duty order. Critical to the court's conclusion in each of these cases was the burdensome and timeconsuming nature of participation in such an administrative review. *See Dofasco Inc.*, 28 CIT at ___ , 326 F. Supp. 2d at 1345; *JIA Farn Mfg. Co.*, 17 CIT at 189, 817 F. Supp. at 971–72; *Asociacion Colombiana*, 13 CIT at 587, 717 F. Supp. at 850; *Carnation Enters. Pvt. Ltd.*, 13 CIT at 609, 719 F. Supp. at 1088–89. Plaintiffs are challenging judicially the initiation of a changed circumstances review that Commerce has commenced under 19 U.S.C. § 1675(b)(1), not the initiation of a periodic administrative review brought under 19 U.S.C. § 1675(a). The difference between the two procedures is significant with respect to the burden imposed on a participant. Plaintiffs are unable to show that the burden or cost of filing comments to the *Preliminary Results* amounts to anything near the level of burden or cost associated with participating in a periodic administrative review.

Plaintiffs also cite *Abbott Laboratories v. Gardner*, 387 U.S. at 149–50, arguing that this court should take a "pragmatic" and "flexible" approach to determining finality for purposes of judicial review. *See Pls.' Opp'n* at 13. Plaintiffs add that, as did the claim in *Abbott Laboratories*, this challenge to agency action raises a purely legal question fit for judicial determination without further development of a factual record before the agency. *See id.* at 12. *Abbott Laboratories*, however, does not lend authority to the proposition that Commerce has taken an action that is final for purposes of APA judicial review.

In *Abbott Laboratories*, the Supreme Court held that promulgation by the Commissioner of Food and Drugs of regulations requiring prescription drug manufacturers to accompany the brand name of the drug with the government-established name every time the brand name was used on packaging was a final agency action for purposes of 5 U.S.C. § 704. The Court concluded therefore that a judicial challenge to the regulations seeking a declaratory judgment and injunctive relief was ripe for review even though the case arose before the Commissioner of Food and Drugs had brought an enforcement action under the regulations. *See Abbott Labs.*, 387 U.S. at 150–52. In its opinion in *Abbott Laboratories*, the Supreme Court observed that

> the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. As the District Court found on the basis of uncontested allegations, "Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution."

Id. (footnote and citation omitted).

Commerce's initiation of the changed circumstances review and issuance of the *Preliminary Results* do not confront plaintiffs with the obligation to comply with any regulatory requirements or enforcement actions. The ripeness issue presented by this case is thus readily distinguished from the ripeness issue decided by the Supreme Court in *Abbott Laboratories*. The Commerce action challenged here more closely resembles the agency actions challenged in *Federal Trade Commission v. Standard Oil Co.*, 449 U.S. 232 (1980) ("*Standard Oil*"), and *U.S. Association of Importers of Textiles and Apparel v. United States*, 413 F.3d 1344 (Fed. Cir. 2005) ("*U.S. Association of Importers*").

In *Standard Oil*, the Federal Trade Commission ("FTC") issued an administrative complaint against a group of oil companies based upon a "reason to believe" that the Federal Trade Commission Act had been violated. 449 U.S. at 234–35. Prior to the administrative resolution of the complaint, Standard Oil sued the FTC in a U.S. district court "alleging that the [FTC] had issued its complaint without having 'reason to believe' that" a violation of the Federal Trade Commission Act had occurred. *Id.* at 235. The *Standard Oil* Court applied the test established in *Abbott Laboratories* to conclude that the claim was not ripe for judicial review. Under the "fitness for judicial decision" inquiry, the Supreme Court held that the administrative complaint, although "definitive" on the issue of whether the FTC had "reason to believe" that a violation had occurred, nevertheless was a prerequisite for further agency action. *See Standard Oil*, 449 U.S. at 241. The complaint had "no legal force comparable to that of the regulation at issue in *Abbott Laboratories*, nor any comparable effect upon [Standard Oil's] daily business," despite its burdening identified oil companies to respond to the charges made against them. *Id.* at 242.

In *U.S. Association of Importers*, the Court of Appeals for the Federal Circuit applied the Supreme Court's analysis in *Standard Oil* in holding that the acceptance for consideration by the Committee for the Implementation of Textile Agreements, an agency of the Depart-

ment of Commerce, of certain petitions "to request consultations with China under a 'safeguard provision' regarding the importation of textiles in the terms of China's accession to the World Trade Organization" was not a final agency action within the meaning of 5 U.S.C. § 704. *U.S. Ass'n of Imps.*, 416 F.3d at 1346. The Court of Appeals concluded that the acceptance of petitions in *U.S. Association of Importers* "is more analogous to the 'threshold determination' warranting further investigation in *Standard Oil* . . . than to the issuance of a formal regulation after notice and comment constituting a final agency action in *Abbott Laboratories*." *U.S. Ass'n of Imps.*, 413 F.3d at 1349. Commerce's initiation of the changed circumstances review and issuance of the *Preliminary Results* are similar in effect to the acceptance by Commerce of the petitions at issue in *U.S. Association of Importers*. Commerce, in the notices announcing these actions, indicated its intention to conduct further proceedings by which it would reach its final conclusions. *See Initiation Notice*, 70 Fed. Reg. at 24,514; *Preliminary Results*, 70 Fed. Reg. at 54,023.

Plaintiffs argue that even if the court finds that Commerce's "decision to initiate and conduct the changed circumstances review is not 'final agency action,' the Court should nonetheless find that this issue is fit for judicial consideration under the exception for non-final actions that plainly contravene the agency's statutory mandate." *Pls.' Opp'n* at 13. Plaintiffs rely for this exception on *Leedom v. Kyne*, 358 U.S. 184 (1958). The court does not find precedent in *Leedom* for invoking an exception to the finality requirement that would allow judicial review of the agency action challenged by plaintiffs.

Leedom involved a suit brought by the president of an association of engineers and scientists to strike down an order of the National Labor Relations Board that, in certifying a group of workers as appropriate for collective bargaining purposes under the National Labor Relations Act, had included in the group nine non-professional members along with 233 professional members. The Board had certified the group to include the nine non-professionals without a vote of the professional members, in defiance of an express prohibition in the National Labor Relations Act. The case reached the Supreme Court in a posture in which the Board "did not contest the trial court's conclusion that the Board, in commingling professional with nonprofessional employees in the unit, had acted in excess of its powers and had thereby worked injury to the statutory rights of the professional employees." *Leedom*, 358 U.S. at 187. The narrow jurisdictional question, decided by the Supreme Court in the affirmative, was whether the District Court was granted jurisdiction to hear the case by Section 24(8) of the Judicial Code, codified at 28 U.S.C. § 1337, when construed in a manner consistent with the judicial review provisions of the National Labor Relations Act. The Court's conclusion that jurisdiction existed rested on the uncontested fact that the unlawful action of the Board, which was taken despite a statu-

tory provision expressly prohibiting it, had inflicted an injury on the members of the association for which the law, apart from the review provisions in the National Labor Relations Act, afforded a remedy. *See Leedom*, 358 U.S. at 186–89.

Leedom, which did not involve finality for purposes of judicial review under the APA, does not in any event constitute controlling authority for the exercise of subject matter jurisdiction over the case plaintiffs have brought before this court. The critical fact underlying the Supreme Court's holding in *Leedom* was the injury inflicted on the members of the association by a violation by the Board of an express statutory prohibition, for which the law afforded a remedy. Plaintiffs are unable to show how Commerce "inflicted an injury" upon them by the act of initiating the changed circumstances review. Nor have plaintiffs established that Commerce, in initiating the changed circumstances review, committed a violation of an express statutory prohibition for which the law affords a remedy. Read in pertinent part, the statute provides that "[w]henever the administering authority . . . receives information concerning . . . a final affirmative determination that resulted in an antidumping duty order under this subtitle . . . which shows changed circumstances sufficient to warrant a review of such determination . . . the administering authority . . . shall conduct a review of the determination . . . after publishing notice of the review in the Federal Register." 19 U.S.C. § 1675(b)(1). This statutory provision, and the larger statutory scheme of which it is a part, do not grant to a party in the factual situation of TKS or TKS (USA) an enforceable right not to be the subject of a changed circumstances review that has yet to culminate in a regulatory action affecting that party's substantive rights.

Plaintiffs allege that this court, in reviewing the Commerce action, must determine only the narrow legal issue of whether Commerce exceeded the "authority granted [to it] by Congress in the statute or its 'inherent authority' as an administrative agency" by initiating a changed circumstances review pursuant to 19 U.S.C. § 1675(b)(1) while no relevant "antidumping duty order or suspension agreement [was] in effect." *Compl.* ¶ 17; *Pls.' Opp'n* at 13. Plaintiffs' characterization appears to oversimplify the issues that could be relevant to judicial review of an agency action that actually is ripe for such review, when and if that occurs. Commerce, in its *Initiation Notice* and the *Preliminary Results*, alludes to evidence presented during the trial in the matter of *Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd.*, No. C00–35, in which the jury returned a verdict in favor of Goss, and also refers to the District Court's denial of the motion of TKS and TKS (USA) for a new trial and judgment as a matter of law. Commerce's references to those events establish at least a possibility that judicial review would be concerned not only with the fact that no antidumping duty order was in effect at the time the changed circumstances review was initiated but also with the overall

factual circumstances under which the antidumping duty order was revoked with respect to TKS and, subsequently, with respect to all other respondents. Because Commerce has yet to make any conclusive findings of fact or otherwise take any action that constitutes its final regulatory response to the various factual circumstances to which it refers in its notices, the issue plaintiffs urge this court to decide is not justiciable at this time.

B. Withholding Court Consideration Will Not Cause Hardship to the Parties

Plaintiffs fail to show how "withholding court consideration" until the issuance of the final results of the changed circumstances review would amount to a hardship. *See Abbott Labs.*, 387 U.S. at 149. As noted earlier, the *Preliminary Results* invited interested parties to comment through the filing of briefs.[4] The filing of a brief commenting on the administrative proceeding does not appear to require plaintiffs to do significantly more than they already have done by briefing their issues before this court.

Because the court finds that the initiation by Commerce of the changed circumstances review does not constitute a final agency action and does not fall within the exemption allowing judicial review of non-final agency actions, and because the court further finds that plaintiffs will not suffer hardship if the court withholds review of this action, the court need not address the additional arguments raised by defendant in the motion to dismiss. All other motions filed in this action, including the motion of Goss to intervene and for leave to file a reply to plaintiffs' opposition to defendant's motion to dismiss, will be denied as moot.

III. CONCLUSION

The initiation by Commerce of the changed circumstances review does not constitute a final agency action fit for judicial decision, and dismissal of this action will not cause plaintiffs any real hardship. Therefore, this action is not ripe for judicial review. Judgment dismissing this action will be entered accordingly.

---

[4] The *Preliminary Results* directed that any briefs commenting on the review be filed by October 13, 2005, a date that recently has passed. At the time this opinion was issued, Commerce had not yet issued a notice announcing any final conclusions it had reached as a result of the changed circumstances review.

Slip Op. 05–145

INTERNATIONAL CUSTOM PRODUCTS, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Before: Richard K. Eaton,
Judge
Court No. 05–00509

[Plaintiff's Motion for a Preliminary Injunction and Judgment on the Agency Record denied; defendant's Motion to Dismiss for mootness and lack of a justiciable controversy granted]

November 8, 2005

Mayer, Brown, Rowe & Maw, LLP (*Andrew A. Nicely* and *Simeon Munchick Kriesberg*), for plaintiff.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Edward F. Kenny*), for defendant.

MEMORANDUM OPINION

Eaton, Judge: This matter is before the court on the Motion for a Preliminary Injunction and Judgment on the Agency Record[1] of plaintiff International Custom Products, Inc. ("ICP"), and the Motion to Dismiss of defendant United States. By its motion, plaintiff asks the court to (1) grant specified relief with respect to any future entries of its merchandise and (2) grant it attorney's fees and other costs. Defendant asks that plaintiff's motion be denied and makes its own motion to dismiss for mootness and lack of a justiciable controversy. For the reasons set forth below, the court denies plaintiff's motion and grants defendant's motion to dismiss.

BACKGROUND

This dispute has a substantial history. *See Int'l Custom Prods., Inc. v. United States*, 29 CIT ___ , 374 F. Supp. 2d 1311 (2005) ("*ICP I*") and *Int'l Custom Prods., Inc. v. United States*, 29 CIT ___ , slip op. 05–117 (Sept. 1, 2005) ("*ICP II*"). Reference is made to these previously issued opinions for a complete rehearsal of that history. What follows is a brief outline of the facts necessary to decide the instant motions.

Plaintiff is an importer of a milk-fat based white sauce product used as an ingredient in sauces, salad dressings, and other food

---

[1] Plaintiff's motion initially requested a preliminary injunction in its prayer for relief. Following entry of its white sauce on September 19 and 20, however, plaintiff abandoned that request. *See* Letter from Mayer, Brown, Rowe & Maw LLP to U.S. Court of International Trade of 9/22/05 ("On behalf of International Custom Products, Inc. ("ICP"), we write to inform the Court that ICP is withdrawing its request for a preliminary injunction.").

products. On January 20, 1999, the United States Customs Service (now the Bureau of Customs and Border Protection) issued New York ruling letter D86228 ("Ruling Letter"), which classified the white sauce under HTSUS 2103.90.9060 (later numbered 2103.90.9091) as "[s]auces and preparations therefor." Pl.'s Conf. Mem. of Points and Authorities in Supp. of Pl.'s App. for a Temporary Restraining Order and Mot. for a Prelim. Injunction ("Pl.'s Mem.") at 4. The current duty rate for HTSUS 2103.90.9091 is 6.4%. *Id*.

As a result of the earlier litigation, on June 2, 2005, a Declaratory Judgment was issued by this Court which, among other things:

> **ORDERED** that the Notice of Action[2] issued to the Plaintiff by the Bureau of Customs and Border Protection ("Customs") dated April 18, 2005, for entry number 180–05864154, and including a number of entries, is declared null and void, and it is further
>
> **ORDERED** that Customs reliquidate no later than June 27, 2005, any and all entries liquidated pursuant to the above-referenced Notice of Action at tariff classification item 2103.90.9091 and at the rate of duty in effect for that tariff classification item at the time of importation; and it is further
>
> **ORDERED** that New York letter ruling number D86228 dated January 20, 1999 remains in full force and effect for the merchandise described therein until such time as Customs revokes or modifies the ruling in compliance with the procedures set forth in 19 U.S.C. § 1625 and regulations relating thereto. . . .

Decl. J. Order of 6/2/05.

Thereafter, the United States sought to stay the effect of the Declaratory Judgment both in this Court and, as it had appealed to the United States Court of Appeals for the Federal Circuit ("CAFC"), in that Court as well. All stays have now either expired by their terms or have been denied. *See ICP I*, 29 CIT ___, 374 F. Supp. 2d 1311 (USCIT Order of 6/20/05 and CAFC Order of 6/27/05). As a result, the Declaratory Judgment, although on appeal, remains in effect.

On June 13, 2005, Customs' Office of Finance, apparently having been made aware of the Court's Declaratory Judgment, sent a letter to plaintiff requesting a continuous bond of $400,000 on entries of the white sauce.[3] *See* Pl.'s Ex. A–8. On June 17, 2005, however, when plaintiff sought to enter its merchandise, it was informed that in ad-

---

[2] The legality of the Notice of Action, which would have effectively reclassified plaintiff's white sauce under HTSUS 0405.20.3000 with a substantially higher duty, was the subject of the litigation resulting in the June 2, 2005, Declaratory Judgment. *See ICP I*, 29 CIT ____, 374 F. Supp. 2d 1311.

[3] A continuous bond is intended to secure payment of duties, taxes, or other charges on the imported merchandise. *See* 19 C.F.R. § 113.62.

dition to the $400,000 continuous entry bond, it would be required to post a single entry bond for each entry equal to three times the value of the merchandise entered. Thus, for a typical entry valued at $2.1 million, plaintiff would be required to post a single entry bond in the amount of $6.3 million, in addition to the $400,000 continuous entry bond. Pl.'s Mem. at 11. As a result, plaintiff did not enter its merchandise.

On September 12, 2005, plaintiff commenced the present action "to challenge [the] prohibitive bond requirements that were imposed for the unlawful purpose of preventing ICP from importing white sauce in accordance with an advance classification ruling that the company obtained more than six years ago. . . ." Compl. at 1. Plaintiff claimed that by imposing the single entry bond requirement, Customs sought to nullify both this Court's Declaratory Judgment and plaintiff's statutory due process protections by effectively reclassifying plaintiff's white sauce under a classification requiring a higher duty.

On September 15, 2005, this court entered a temporary restraining order which instructed Customs to rescind all single entry bond requirements imposed on plaintiff's white sauce. The temporary restraining order was stayed pending the outcome of court-ordered mediation, but came into full force and effect on September 19, 2005, when the stay was lifted. Thereafter, Customs complied with the court's order, and on September 19 and 20, 2005, all of plaintiff's merchandise subject to the single entry bond requirements was entered into the United States. Plaintiff claims jurisdiction under 28 U.S.C. § 1581(i). Defendant does not dispute this claim.

DISCUSSION

Although all entries that were the subject of the single entry bonds have now entered the United States, plaintiff still insists that the court grant it relief. The essence of plaintiff's continuing claim is that when it seeks to enter its white sauce in the future, it will be faced with a renewed demand for single entry bonds or the imposition of other "requirements or restrictions." Compl. at 17. As set forth in the Request for Judgment and Relief portion of the complaint, plaintiff seeks to enlist the court on its behalf by seeking a judgment:

> (1) declaring the Bond Requirements null and void *ab initio*, both with respect to shipments of white sauce currently in storage in ICP's Customs bonded warehouse and all future entries of white sauce;
>
> (2) declaring that the continuous-entry bond of $400,000 required by the Office of Finance is the only bond that Customs may impose with respect to ICP's white sauce entries until such time as Defendant revokes NYRL D86228 in ac-

cordance with 19 U.S.C. § 1625(c), 19 C.F.R. § 177.12, the "compelling reason" standard, the APA, and the Constitution;

(3) enjoining Defendant from imposing any bond requirement other than or in excess of the $400,000 continuous-entry bond required by the Office of Finance until such time as Defendant revokes NYRL D86228 in accordance with 19 U.S.C. § 1625(c), 19 C.F.R. § 177.12, the "compelling reason" standard, the APA, and the Constitution;

(4) enjoining Defendant from imposing requirements or restrictions of any kind that would in any way impede ICP's ability to enter additional white sauce, other than those requirements or restrictions that were in place prior to March 1, 2005, until such time as Defendant revokes NYRL D86228 in accordance with 19 U.S.C. § 1625(c), 19 C.F.R. § 177.12, the "compelling reason" standard, the APA, and the Constitution;

(5) vacating all Notices and other actions carried out in accordance with the Bond Requirements;

(6) ordering Defendant to pay to ICP the reasonable attorney fees, expenses, and court costs incurred by ICP and as to which it is entitled under the Equal Access to Justice Act;

(7) ordering that the revocation process for ICP's ruling, which Customs commenced by publishing a notice of proposed revocation in the Customs Bulletin on August 24, 2005, be stayed until Customs rescinds the Bond Requirements, so that ICP is able to import in reliance of its ruling during the notice and comment period, as provided for in Section 1625(c); and

(8) awarding ICP such other and further relief as the Court deems appropriate.

Compl. at 16–18.

Defendant contends, however, that this court lacks subject matter jurisdiction to hear plaintiff's claims based on the doctrines of mootness and justiciability.[4] Defendant insists that:

---

[4] The outer limits of the federal courts' subject matter jurisdiction are set forth in Article III, Section 2 of the U.S. Constitution, which states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Minister and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between and State and Citizens of another State;–between Citizens of different States;–

> In this case, the only entries belonging to ICP which are actually located in the United States and/or for which ICP was required to post single entry bonds were the eleven warehouse entries. No other entries were subject to these single entry bond requirements; no other entries were in fact subject to any type of increased bonding requirements (other than, of course, the [$400,000] continuous entry bond requirement). Indeed, ICP has not even attempted to enter any other merchandise into the United States other than that in the eleven warehouse entries.
>
> Because the temporary restraining order required Customs to permit entry of these eleven warehouse entries without single entry bonds, and Customs did so, **no entry of any nature exists which can be the subject of ICP's present action**, and consequently, this action should be dismissed for lack of justiciable issue and mootness.

Def.'s Resp. to Pl.'s Mots. for Prelim. Injunction and for J. on the Agency R. ("Def.'s Resp.") at 9 (emphasis in original).

With respect to any claim plaintiff might concerning future entries, defendant states:

> As to the other claims made by ICP in its complaint regarding possible future entries, jurisdiction does not lie over these claims. As noted previously, in order to plead a justiciable case or controversy, ICP must have alleged "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be **upon a hypothetical state of facts."**
>
> Here, ICP has not attempted to make any other entries other than the eleven warehouse entries. It indeed claims that the remainder of its merchandise is in a warehouse in New Zealand. Similarly, Customs has not required ICP to provide single entry bonds for any other entry. Therefore, entry by ICP of any other merchandise other than that in the eleven warehouse entries is purely speculative. Whether Customs would require single entry bonds for these speculative entries is hypothetical.

Def.'s Resp. at 12 (citation omitted)(emphasis in original).

---

between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., Art. III; § 2, cl. 1.

I. ___ Plaintiff's Claims Under Paragraphs (1), (5), and (7) of the Request for Judgment and Relief [5] are Moot

Defendant insists that, at least with respect to plaintiff's merchandise that has been entered into the United States, this case is moot.

> In this case, the final relief sought by ICP was entry of its eleven warehouse entries without having to post single entry bonds, and protection for its future entries. In having its application for a temporary restraining order granted, ICP received all of the relief it sought regarding the eleven warehouse entries – its entries were admitted without single entry bonds. ICP received permanent relief on this issue as well through the temporary restraining order, because once its entries were made without single entry bonds, even if [defendant] were to prevail on the merits of the preliminary injunction or ICP's motion for judgment on the administrative record, Customs cannot retroactively seek a higher entry bond because the entries were already made.

Def.'s Resp. at 11–12.

Generally, a case is moot when the relief sought has been attained. In order for a case to escape dismissal for mootness, "[i]t must be a real and substantial controversy admitting of *specific relief* through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins Co. v. Haworth*, 300 U.S. 227, 241 (1937)(emphasis added). Here, because all of the white sauce subject to the single entry bond requirements has been entered, and there is no present demand for single entry bonds, the relief sought in paragraphs (1)(declaring the single entry bond requirements null and void) and (5)(vacating notices and other actions relating to the single entry bond requirements) of the Request for Judgment and Relief has been attained. Likewise, the relief sought in paragraph (7) (seeking a stay of the administrative action to revoke the Ruling Letter until the single entry bond requirements were rescinded) has been attained as well. Plaintiff's case, therefore, insofar as it is contained in those paragraphs, is moot. Because "[m]oot cases do not present live controversies . . . federal courts have no jurisdiction to decide them." *Kimberly-Clark Corp. v. Procter & Gamble Distrib. Co., Inc.*, 973 F.2d 911, 913 (Fed. Cir. 1992). As a result, this court finds that it has

---

[5] While the court references paragraphs from the complaint's Request for Judgment and Relief, these paragraphs correspond to the counts found in the complaint as follows: Count I, paragraphs 1, 5, and 7 of the Request for Judgment and Relief; Count II, paragraphs 1, 5, and 7; Count III, paragraphs 1, 2, 3, 4, and 8; Count IV, paragraphs 1, 2, 3, 4, 5, 7, and 8; Count V, paragraphs 1, 2, 3, 4, 5, 7, and 8; and Count VI, paragraphs 1, 2, 3, 4, 5, 7, and 8.

no jurisdiction to grant the desired relief in paragraphs (1), (5), and (7) of the Request for Judgment and Relief.

II. Plaintiff's Claims under Paragraphs (2), (3), (4), and (8) of the Request for Judgment and Relief Are Based on Speculation and Are Thus Not Ripe and Do Not Present Justiciable Controversies

While one part of a controversy may be rendered moot, other issues in a case may remain alive and the proper subject of this Court's jurisdiction. With respect to certain other requests for relief based on claims made in the complaint, however, the court finds that they are not ripe for adjudication and therefore do not present a justiciable controversy. The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967); *see also Nat'l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 692 (2003). A claim is not ripe for adjudication if it rests upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Texas v. United States*, 523 U.S. 296, 296 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

Here, plaintiff has no merchandise either in the United States ready for entry or in transit. *See* Tr. of 9/15/05 at 17. Nor is it certain that there will be any future imports. Plaintiff may, for instance, decide that it will purchase the white sauce from a domestic producer. Beyond the question of whether there will be any future entries, it is further not known the extent to which plaintiff, at some future time, will be entitled to enter its merchandise subject to the continuous entry bond alone. For instance, there is no way of knowing whether plaintiff, on the future date of a hypothetical white sauce entry, will have a history of timely compliance with Customs' requirements with regard to other merchandise it might import.[6] As a result, it is not known, nor is it knowable, whether Customs' regulatory guidelines dealing with bond requirements will come into play. Similarly,

---

[6] Title 19 C.F.R. § 113.13(b) sets the guidelines for determining the amount of a bond, including:

(1) The prior record of the principal in timely payment of duties, taxes, and charges with respect to the transaction(s) involving such payments;
(2) The prior record of the principal in complying with Customs demands for redelivery, the obligation to hold unexamined merchandise intact, and other requirements relating to enforcement and administration of Customs and other laws and regulations; [and] . . .
(5) The prior record of the principal in honoring bond commitments, including the payment of liquidated damages. . . .

it is within the Port Director's discretion[7] to determine the type of security demand that will be imposed on merchandise based on the facts at the time of entry. Thus, for instance, the Port Director, on the date of a future entry, may have legitimate concerns about whether the duty on the entry ultimately will be paid. Therefore, the Port Director may rightfully conclude that the entry of plaintiff's merchandise would place the revenue of the United States in jeopardy and demand further security.

As the foregoing examples indicate, plaintiff's claims for future relief rest on the premise that the facts with respect to the entry of its merchandise will not change. They are therefore based on "speculative contingencies [that] afford no basis for [the court] passing on the substantive issues the appellants would have [the court] decide. . . ." *Hall v. Beals*, 396 U.S. 45, 49 (1969). For example, paragraph (2) of plaintiff's Request for Judgment and Relief asks the court to declare that the continuous entry bond of $400,000 required by the Office of Finance is the only bond that Customs may impose on its white sauce. This request is thus based on the supposition that there will be future entries and that the facts as to these entries will otherwise remain static. In like manner, the relief requested in paragraphs (3)(seeking an injunction against the imposition of any bond requirement other than the $400,000 continuous bond), (4) (seeking an injunction preventing Customs from imposing requirements or restrictions of any kind that would impede plaintiff from importing its white sauce until the Ruling Letter is revoked), and (8) (seeking other and further relief) are equally speculative. Because the requests for relief in paragraphs (2), (3), (4), and (8) are speculative, the court declines to hear them on the grounds that they are not ripe for adjudication and therefore do not present a justiciable case or controversy. *See Am. Spring Wire Corp. v. United States*, 6 CIT 122, 124, 569 F. Supp. 73, 75 (1983)("Straying into a prediction of future events is no substitute for showing an actual controversy, or even one that is likely to recur."); *see also* Charles Alan Wright, Arthur R. Miller,& Edward H. Cooper, *Federal Practice and Procedure* § 3532, at 112 (2d ed. 2002)(stating that with respect to ripeness, "[t]he central concern is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.").

III. Plaintiff Is Not Entitled to Attorney's Fees and Other Costs Under the Equal Access to Justice Act

Plaintiff cannot be granted the relief sought under paragraph (6) of the Request for Judgment and Relief requesting "attorney['s] fees,

---

[7] Under 19 C.F.R. § 113.13(d), if the Port Director "believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations, he shall require additional security." *Id.*

expenses, and court costs," pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, because the court has found that it does not have jurisdiction over the underlying claims. *See Hudson v. Principi*, 260 F. 3d 1357, 1363 (Fed. Cir. 2001) ("This court and others have established that there cannot be an award of attorneys' fees unless the court has jurisdiction of the action."). Therefore, the court denies so much of plaintiff's motion as seeks this relief.

CONCLUSION

For the foregoing reasons, plaintiff's Motion for Judgment on the Agency Record is denied and defendant's Motion to Dismiss is granted. Judgment shall be entered accordingly.

Slip Op. 05–146

ZHEJIANG NATIVE PRODUCE AND ANIMAL BY-PRODUCTS IMPORT & EXPORT GROUP CORP., Plaintiff, v. UNITED STATES, Defendant, and THE AMERICAN HONEY PRODUCERS ASSOCIATION AND THE SIOUX HONEY ASSOCIATION, Def.-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 04–00268

[Defendant-Intervenors' motion to dismiss denied]

Dated: November 8, 2005

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Mark E. Pardo, Bruce M. Mitchell, Adam M. Dambrov,* and *Paul G. Figueroa*), for plaintiff.

Peter D. Keisler, Assistant Attorney General, United States Department of Justice; David M. Cohen, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice; Patricia M. McCarthy, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department Justice (*David S. Silverbrand*); of counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce (*James K. Lockett*), for defendant.

Collier, Shannon, Scott, PLLC (*Michael J. Coursey, Jennifer E. McCadney, R. Alan Luberda*, and *Adam H. Gordon*), for defendant-intervenors.

OPINION AND ORDER

Eaton, Judge: Before the court is the Motion to Dismiss for Lack of Subject Matter Jurisdiction of Defendant-Intervenors the American Honey Producers Association and the Sioux Honey Association. For the following reasons the motion is denied.

BACKGROUND

A. The 227[1] Filing

On May 5, 2004, the United States Department of Commerce ("Commerce") published a notice of the results of its review of the antidumping order covering "natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey" from the People's Republic of China ("PRC"). *See* Honey From the PRC, 69 Fed. Reg. 25,060, 25,060 (ITA May 5, 2004) (final determination) ("Final Results"). By this publication, Commerce gave notice that the Final Results assigned Plaintiff Zhejiang Native Produce and Animal By-Products Import & Export Group Corporation ("Zhejiang") a weighted-average antidumping duty margin of 68.35%. *See id.* at 25,062. Commerce further gave notice that Zhejiang's margin "shall remain in effect until publication of the final results of the next administrative review." *Id.*

On June 1, 2004, Plaintiff filed a summons with the Court generally stating that it was contesting the Final Results. *See* Summons of 6/1/04 ("227 Summons") at ¶ 2. In that filing, Plaintiff identified 28 U.S.C. § 1581(c) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I), (a)(2)(B)(iii) as the bases of the Court's jurisdiction. *See id.* The Clerk of the Court accepted this filing and assigned it Court Number 04–00227 ("227 Filing"). *See generally* Summons of 6/1/2004. The 227 Summons having been accepted for filing pursuant to statute and the Court's Rules, Plaintiff had 30 days within which to file a complaint, thereby commencing the action. *See* 19 U.S.C. § 1516a,[2] USCIT R. 3(a)(2) ("A civil action is commenced by filing with the clerk of the

---

[1] As an aid to the reader, the court refers to the two filings relevant to its discussion, and the papers filed in conjunction therewith, by the last three digits of the filings' court-assigned docket numbers.

[2] Section 1516a reads, in relevant part:

> (A) In general. Within thirty days after—
>
> (i) the date of publication in the Federal Register of—
>
> (I) notice of any determination described in clause (ii), (iii), (iv), (v), or (viii) of subparagraph (B), . . .
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.
>
> (B) Reviewable determinations. The determinations which may be contested under subparagraph (A) are as follows: . . .
>
> (iii) A final determination, other than a determination reviewable under paragraph (1), by the administering authority or the Commission under [19 U.S.C. § 1675]. . . .

19 U.S.C. § 1516a(a)(2)(A), (B) (2000).

court: . . . [a] summons, and within 30 days thereafter a complaint, in an action described in 28 U.S.C. § 1581(c) . . . .''). On July 1, 2004, 30 days had elapsed from the filing of the 227 Summons without the Plaintiff filing a complaint. On July 30, 2004, the Clerk of the Court dismissed the 227 Filing citing lack of prosecution. *See* Order of Dismissal of 7/30/04 (''[I]t is hereby ordered that this action is dismissed for lack of prosecution pursuant to USCIT Rules 41(b)(2) and 82(b)(7).'').

B. The 268 Filing

On June 10, 2004, Commerce published an amendment to the Final Results. *See* Honey From the PRC, 69 Fed. Reg. 32,494 (ITA June 10, 2004) (am. final determination) (''Amended Final Results''). In the Amended Final Results, Commerce stated that ''we received timely-filed ministerial error allegations from respondent, Zhejiang. . . . We did not receive comments from petitioners. Based on our analysis of Zhejiang's ministerial error allegations, the Department has revised the antidumping duty rate for Zhejiang. Accordingly, we are amending the final results.'' *Id*. (footnote omitted). Commerce cited 19 U.S.C. § 1675(h) as its authority for amending the Final Results.[3] *Id*. As a result of Commerce's amendment, Zhejiang's antidumping duty margin was lowered from 68.35% to 67.70%. *Id*. at 32,495. The notice further stated that ''[t]he amended cash deposit requirement is effective for all shipments of subject merchandise from Zhejiang entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. . . .'' *Id*.

On July 6, 2004, Plaintiff filed a second summons with the Court. *See* Summons of 7/6/04. In this filing Plaintiff generally stated that it was contesting the determination contained in the Final Results as modified by the Amended Final Results. *See id*. at ¶ 2. Again, Plaintiff alleged the bases of the Court's jurisdiction to be 28 U.S.C. § 1581(c) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I), (a)(2)(B)(iii). *See id*. The Clerk of the Court accepted this filing and assigned it Court Number 04–00268 (''268 Filing''). *See id*. at 1. On that same day, Plaintiff filed a complaint to complete the commencement of the action. *See* Compl. of 7/6/04.

---

[3] Section 1675(h) provides:

> The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors. As used in this subsection, the term ''ministerial error'' includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.

19 U.S.C. § 1675(h) (2000); *see also* 19 C.F.R. § 351.224(f) (2004) (setting out the procedures for correction of ministerial errors).

STANDARD OF REVIEW

Where the Court's jurisdiction is challenged, "the plaintiff bears the burden of proving that the court's jurisdiction is invoked properly." *Pentax Corp. v. Robison*, 125 F.3d 1457, 1462 (Fed. Cir. 1997)(citing *Lowa, Ltd. v. United States*, 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983)). At the same time, "the Court assumes that 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.' " *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

DISCUSSION

Defendant-Intervenors advance three main arguments in support of their claim that the court does not have jurisdiction over the 268 Filing. First, they contend that the court cannot base its review on the Amended Final Results because "[an] amendment to the final results is not a 'reviewable' determination for purposes of 19 U.S.C. § 1516a(a)(2)(B)(iii)." Br. in Supp. of Def.-Intervenors' Mot. to Dismiss for Lack of Jurisdiction ("Def.-Intervenors' Mem.") at 6. Second, in an argument related to the first, they contend that the court does not have jurisdiction over the 268 Filing under the doctrine of sovereign immunity. *See id.* at 3. Finally, Defendant-Intervenors argue that the court cannot review any questions arising from the Amended Final Results because, as a result of the dismissal of the 227 Filing, the court has adjudicated all issues relating to the 268 Filing pursuant to USCIT Rule 41. Thus, according to Defendant-Intervenors, the court is barred by the doctrine of *res judicata* from hearing those issues. *See id.* at 12.

A. The Amended Final Results contain a "Final Determination" Subject to Judicial Review

Defendant-Intervenors argue that "19 U.S.C. § 1516a(a)(2)(A) does not permit Zhejiang to use the amended determination found in the Amended Final Results as the basis for the start of the jurisdictional clock," because the determination contained in the Amended Final Results is not a judicially reviewable "final determination" within the meaning of the statute. *See* Def.-Intervenors' Mem. at 5–6.[4] Specifically, they contend that the Amended Final Results cannot serve as the basis of this Court's jurisdiction because "[t]he *Amended Final Results* have no independent legal status under the

---

[4] Defendant United States agrees with Plaintiff's position that the court possesses jurisdiction over the 268 Filing. *See* Def.'s Resp. to Def.-Intervenors' Motion to Dismiss at 3 ("Because Zhejiang filed its summons and complaint within 30 days of the Amended Final Results, pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), this Court possesses subject matter jurisdiction to entertain this action.").

statute apart from the *Final Results* as published on May 5, 2004. The *Amended Final Results* merely exist in reference back to the original *Final Results* which establish the basis for any judicial review." *Id.* at 6 (emphasis in original); *see* 19 U.S.C. § 1516a(a)(2)(A); 19 C.F.R. § 351.210 (2004).[5] Thus, for Defendant-Intervenors the Final Results contain a final determination within the meaning of 19 U.S.C. § 1516a(a) but the Amended Final Results do not.[6]

In response, Plaintiff argues that the Amended Final Results contain a reviewable final determination because "[t]he amended final results established a new dumping duty assessment rate and new deposit rate effective only for entries made on or after the date of publication of this 'final determination' in accordance with Section [1516a (a)(2)(C)]." Pl.'s Br. in Opp'n to Def.-Intervenors' Mot. to Dismiss for Lack of Jurisdiction ("Pl.'s Mem.") at 6–7.

The court finds that the determination contained in the Amended Final Results provides a jurisdictional basis for hearing the issues raised in the 268 Filing for two reasons. First, the determination contained in the Amended Final Results completed the statutorily anticipated process of calculating Plaintiff's antidumping duty margin. In order to properly calculate Plaintiff's margin in accordance with its statutory mandate and in conformity with its regulations, Commerce submitted the calculations underlying the determination contained in the Final Results to interested parties for comment. *See* Amended Final Results, 69 Fed. Reg. at 32,494 (citing 19 U.S.C. § 1675(h); 19 C.F.R. § 351.224(f)). After Commerce received and reviewed the comments from Plaintiff, it found that the determination contained in the Final Results was defective and, therefore, recalculated Plaintiff's margin and published this new determination in the Amended Final Results. *See* Amended Final Results, 69 Fed. Reg. at 32,494. Thus, it is the Amended Final Results that contain Commerce's ultimate determination of the matters contained therein and which serve as the culmination of the administrative process envisioned by the statute and the regulations.

Second, the Amended Final Results contain a final determination for the purpose of judicial review because they changed the determination found in the Final Results. As this Court has recognized, while Commerce publishes notices styled as final determinations in the Federal Register,

---

[5] Commerce's regulations provide that "[a] 'final determination' in an antidumping or countervailing duty investigation constitutes a final decision by the Secretary as to whether dumping or countervailable subsidization is occurring." 19 C.F.R. § 351.210(a). Furthermore, regulations provide that "[t]he Secretary will publish in the Federal Register notice of 'Affirmative (Negative) Final Antidumping (Countervailing Duty) Determination,' including the rates, if any." 19 C.F.R. § 351.210(c).

[6] The court cautions that nothing in this opinion should be construed to suggest that the Final Results do not contain a reviewable final determination. That question is not before the court.

> dumping margin calculations can and do change after the issuance of a final determination. Given Commerce's fairly routine procedure of amending final antidumping duty determinations, it is not a sufficient answer to say that the margin calculated in the Final Determination was binding. Here, the purported final determination was not truly final until the amendment issued approximately six weeks later.

Dupont Teijin Films USA, LP v. United States, 27 CIT ___ , ___ , 297 F. Supp. 2d 1367, 1374 (2003) (citation omitted).[7] In the case at bar, Plaintiff's antidumping duty margin was changed by the Amended Final Results, and that change was effective only following their publication. *See* Amended Final Results, 69 Fed. Reg. at 32,495 ("The amended cash deposit requirement is effective for all shipments of subject merchandise from Zhejiang . . . on or after the date of publication of this notice. . . ."). Because Commerce changed Plaintiff's margin, the determination found in the Amended Final Results, upon publication, became binding and truly final as to Plaintiff. *Dupont*, 27 CIT at ___ , 297 F. Supp. 2d at 1374.

Thus, the determination contained in the Amended Final Results is a final determination properly subject to judicial review and the date of the publication of the Amended Final Results serves as the basis for the start of the jurisdictional clock.[8]

---

[7] The court notes that the facts in *Dupont* and those of the instant action are somewhat different. The parties in *Dupont* were contesting Commerce's determination regarding the issuance of an antidumping order contained in a "final determination" in an investigation, whereas in the 268 Filing the parties are contesting Commerce's final result regarding the periodic review of an existing antidumping order. Whatever the label, however, Commerce generally treats these two administrative proceedings in the same manner. *See* 19 C.F.R. § 351.210(a) ("The procedures for reviews are similar to those followed in investigations."). As Commerce has not specifically created a separate definition of "final result" the court treats the terms "final determination" and "final result" as being identical.

[8] A review of the Federal Register shows that Commerce routinely changes final determinations and bases antidumping duty margins on such changed determinations. *See, e.g.*, Notice of Am. Final Results of Antidumping Duty Admin. Review: Certain Cased Pencils from the PRC, 70 Fed. Reg. 51,337, 51,338 (ITA Aug. 30, 2005) ("The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries based on the amended final results."); Stainless Steel Wire Rod From India: Am. Final Results of Antidumping Duty Admin. Review, 70 Fed. Reg. 47,177, 47,177 (ITA Aug. 12, 2005) ("The . . . deposit requirements will be effective upon publication of these amended final results. . . ."); Am. Final Results of Antidumping Duty Admin. Review: Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Rom., 70 Fed. Reg. 14,648, 14,650 (ITA Mar. 23, 2005) ("The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries based on the amended final results."); Notice of Am. Final Results of Antidumping Duty Administrative Review: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Braz., 70 Fed. Reg. 13,459, 13,460 (ITA Mar. 21, 2005) ("The following antidumping duty deposits will be required on all shipments . . . entered, or withdrawn from warehouse, for consumption, effective on or after the publication date of the amended final results of this administrative review. . . ."); Stainless Steel Sheet and Strip in Coils From Italy: Am. Final Results of Antidumping Duty Admin. Review, 70 Fed. Reg. 13,009, 13,010 (ITA Mar. 17, 2005) ("[T]he Department will determine, and CBP will assess, antidumping duties on all entries of subject

B. The Doctrine of Sovereign Immunity Does Not Bar the Court's Jurisdiction Over the 268 Filing

Having found that the Amended Final Results contain a judicially reviewable final determination pursuant to 19 U.S.C. § 1516a, the court turns to the related contention that the court does not have jurisdiction over the 268 Filing under the doctrine of sovereign immunity. Defendant-Intervenors argue that "[b]ecause 19 U.S.C. § 1516a(a)(2)(A) specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade . . . , the limitations stipulated by statute must be strictly observed." Def.-Intervenors' Mem. at 3–4 (citing *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312–13 (Fed. Cir. 1986)). Put another way, because the United States must specifically waive sovereign immunity to be sued, if the Amended Final Results do not contain a final determination within the meaning of 19 U.S.C. § 1615a(a)(2)(A), then the doctrine of sovereign immunity prohibits the court from exercising subject matter jurisdiction over the 268 Filing.

There is no dispute that the United States must waive sovereign immunity in order to be amenable to suit. As stated by the Court of Appeals for the Federal Circuit: "Waivers of sovereign immunity must be 'unequivocally expressed.' The Supreme Court has found that 'firmly grounded in [their] precedents' is the fact that '[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text' and 'will not be implied.' " *Yancheng Baolong Biochem. Prods. Co. v. United States*, 406 F.3d 1377, 1382 (Fed. Cir. 2005) (citations omitted) (brackets in original). Furthermore, there can be no disagreement that the United States has "unequivocally expressed" its waiver of sovereign immunity as to suits commenced pursuant to 19 U.S.C. § 1516a.[9] As a result, the United States has consented to be sued based on the results found in a final determination. *See* 19 U.S.C. § 1516a(a)(2)(A), (B). Therefore, the court having found that the Amended Final Results contain a final determination for the purpose of judicial review under 19 U.S.C.

---

merchandise . . . in accordance with these amended final results.").

Furthermore, a review of amended final determinations shows that Commerce does not necessarily limit such amendments to correcting mathematical errors. *See, e.g.*, Notice of Am. Final Results of Antidumping Duty Admin. Review: Certain Corrosion-Resistant Carbon Steel Flat Prods. from Ca., 70 Fed. Reg. 22,846, 22,846 (ITA May 3, 2005) (amending final determination where Commerce "identified an inadvertent error in the Final Results regarding the timing of the issuance of assessment instructions.").

[9] The Court of Appeals for the Federal Circuit has held that the United States has explicitly waived sovereign immunity as to actions commenced pursuant to 28 U.S.C. § 1581(c). *See Humane Soc'y of the U.S. v. Clinton*, 236 F.3d 1320 (Fed. Cir. 2001). The Court stated "that § 1581 not only states the jurisdictional grant to the Court of International Trade, but also provides a waiver of sovereign immunity over the specified classes of cases." *Id.* at 1328.

§ 1516a, it necessarily follows that the United States has waived its sovereign immunity with respect to the 268 Filing.

C. The Doctrine of *Res Judicata* Does Not Bar the Court From Hearing This Action

Finally, Defendant-Intervenors argue that the court is precluded from hearing the matters raised in the 268 Filing because it is barred from doing so by USCIT Rule 41(b):

> According to Rule 41(b)(5), a dismissal under Rule 41(b)(2) operates as "an adjudication on the merits." Thus, this Court has issued an adjudication on the merits against Zhejiang for all matters arising out of the *Final Results* published by Commerce on May 5, 2004. Any further actions arising out of the same determination by Commerce are now barred by principles of *res judicata*.

Def.-Intervenors' Mem. at 12–13 (citing *Encon Indus. v. United States*, 18 CIT 867, 869 (1994) (emphasis in original)); *see also* USCIT R. 41(b) (2005).[10] Defendant-Intervenors further contend that "Zhejiang could have raised each of the issues it raises now in its complaint under a timely complaint filed in response to the first summons." Def.-Intervenors' Mem. at 13. Thus, Defendant-Intervenors maintain that the court is barred from hearing the matters raised in the 268 Filing by the doctrine of *res judicata* or "claim preclusion."[11]

---

[10] USCIT Rule 41(b) provides, in relevant part:

(b) Involuntary Dismissal; Effect Thereof.

(1) Actions on the Reserve Calendar or the Suspension Disposition Calendar are subject to dismissal for lack of prosecution at the expiration of the applicable period of time as prescribed by Rules 83 and 85.

(2) Actions commenced pursuant to 28 U.S.C. § 1581(c) by the filing of a summons only are subject to dismissal for failure to file a complaint at the expiration of the applicable period of time prescribed by 19 U.S.C. § 1516a.

(3) Whenever it appears that there is a failure of the plaintiff to prosecute, the court may upon its own initiative after notice, or upon motion of a defendant, order the action or any claim dismissed for lack of prosecution.

(4) For failure of the plaintiff to comply with these rules or with any order of the court, a defendant may move that the action or any claim against the defendant be dismissed.

(5) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, operates as an adjudication on the merits.

USCIT R. 41(b)(1)–(5).

[11] Recently, there has been substantial movement toward treating the doctrine of *res judicata* broadly as encompassing the individually significant phrase "claim preclusion." *See* 18 Charles Alan Wright, Arthur R. Miller,& Edward H. Cooper, *Federal Practice and Procedure* § 4402, at 7 (2d ed. 2002). Currently, "[the] rules defining the matters that ought to have been raised are most conveniently described as the rules of claim preclusion and de-

Plaintiff counters that Defendant-Intervenors' argument "is not supported by the plain language of the Court's Rules, and it seeks an overly expansive and punitive result in this case." Pl.'s Mem. at 10. Specifically, Plaintiff contends that because it did not file a complaint in the 227 Filing, the court's jurisdiction over the 268 Filing is not barred by *res judicata*. Plaintiff explains that,

> [i]t is axiomatic that every court case is limited to those issues which have been properly raised in the particular proceeding. The act of filing an appeal with this Court does not vest a plaintiff with the right to challenge every conceivable issue from the underlying administrative proceeding. The claims that can be raised by a plaintiff are delineated by the counts presented in the complaint. Thus, it would be entirely proper and in accordance with Rule 41(b)(5) to allow Zhejiang to proceed with all claims stated in its complaint in the instant case (04–00268) since none of these claims had been raised in case 04–00227 as of the time that case was dismissed.

Id. at 11 (citation omitted).

The court finds that dismissal of the 227 Filing does not bar it from hearing the matters raised in the 268 Filing. Rule 41(b), relating to involuntary dismissals, is directed toward a range of situations. In some of these, for instance dismissal upon the Court's own initiative, *see* USCIT R. 41(b)(3), or dismissal for failure to comply with the Court's Rules, *see* USCIT R. 41(b)(4), a complaint in all likelihood will have been filed. In those cases, Rule 41(b) truly "operates as an adjudication on the merits," because the complaint has set out the elements or grounds of the suit.[12] In cases where the elements or grounds have not been set out, *i.e.*, where no complaint has been filed, Rule 41(b) does not result in an adjudication on the merits, be-

---

fense preclusion." *See id.* § 4406, at 138. Specifically, the doctrine of claim preclusion establishes that

> when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

See Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948) (citing *Cromwell v. County of Sac*, 94 U.S. (4 Otto) 351, 352 (1876)). There is considerable doubt, however, that involuntary dismissals pursuant to Federal Rule of Civil Procedure 41(b), from which USCIT Rule 41(b)(5) is drawn, are "entitled to claim-preclusive effect." *See Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001).

[12] The "merits" are defined as "[t]he elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case. . . ." *See Black's Law Dictionary* 1010 (8th ed. 2004).

cause there are no specified merits.[13] This being the case, Rule 41(b)(5) is best understood as providing for an adjudication on the merits to the extent that the elements or grounds of the case have been specified. Here, because no complaint was part of the 227 Filing, the merits of the case were never specified, and the doctrine of *res judicata* does not apply.

CONCLUSION

The court finds that Plaintiff has sustained its burden of establishing that this court possesses jurisdiction to review the 268 Filing, and that the doctrine of *res judicata* does not bar the court from hearing the matters raised in that filing.

Therefore, for the foregoing reasons, Defendant-Intervenors' Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied. Judgment shall be entered accordingly.

---

[13] It is also worth noting that, under 19 U.S.C. § 1516a, the 227 Filing did not result in an action being commenced because no complaint was filed. This section reads, in relevant part:

> (A) In general
>
> Within thirty days after—
>
> (i) the date of publication in the Federal Register of—
>
> (I) notice of any determination described in clause . . . (iii) . . . of subparagraph (B),
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint. . . .

See 19 U.S.C. § 1516a(2)(A); *see also* USCIT R. 3(a)(2) ("A civil action is commenced by filing with the clerk of the court: . . . [a] summons, and within 30 days thereafter a complaint, in an action described in 28 U.S.C. § 1581(c) to contest a determination listed in [19 U.S.C. § 1516a(2) or (3)]. . . ."). The Court of Appeals for the Federal Circuit has held this provision to be

> plain and unambiguous. It imposes two requirements for "commenc[ing] an action" in the Court of International Trade . . . : (1) within 30 days of the publication of the determination in the Federal Register, a summons must be filed, and (2) "within thirty days thereafter a complaint" must be filed. The statute requires both steps and imposes precise time limits within which each step must be taken.

See Georgetown Steel, 801 F.2d at 1311. This being the case, the Rule 41(b)(5) dismissal of the 227 Filing merely terminated the initiation of an action, rather than actually dismissing an action.

ERRATA

Zhejiang Native Produce and Animal By-Products Import & Export Group Corp. v. United States, Court No. 04–00268, Slip Op. 05–146, dated November 8, 2005.

Page 1: In the title line, replace "*OPINION AND ORDER*" with "*OPINION*."

November 9, 2005

Slip Op. 05–147

FORMER EMPLOYEES OF MURRAY ENGINEERING, INC., Plaintiffs, v. ELAINE L. CHAO, UNITED STATES SECRETARY OF LABOR, Defendant.

BEFORE: Pogue, Judge
Court No. 03–00219

On July 14, 2005, Mr. Ken Walter, on behalf of the Former Employees of Murray Engineering, Inc. ("Former Employees"), filed a motion for rehearing asserting that the court had not provided the parties a full opportunity to address the question of whether the Former Employees were "affected secondary workers" within meaning of 19 U.S.C. § 2272(b) (West Supp. 2005). The court granted Plaintiffs' motion and after consideration of all the arguments and papers filed in relation thereto, the court affirms its previous decision to sustain Labor's Determination because even if this court were to agree with Plaintiffs' ably stated arguments, the Plaintiffs are without relief.

Trade Adjustment Assistance benefits are limited to those workers "whose last or partial separation from the firm . . . occurred . . . [no] more than one year before the date of the petition on which such certification was granted." 19 U.S.C. § 2273(b)(1). In this case, the date of the petition was January 15, 2003. However, as asserted in the Former Employee's arguments for rehearing, the Former Employees had been terminated more than one year prior to the filing of their petition for Trade Adjustment Assistance. Therefore, pursuant to 19 U.S.C. § 2273(b), they are ineligible for benefits. As such, the Former Employees cannot claim that Commerce's method for assessing whether import competition significantly contributed to their layoffs, i.e., looking to a two year interval prior to the date of the petition, was improper here.

Plaintiffs argue that they were misled by a statement appearing in a State of Michigan unemployment benefits booklet[1] into thinking that they could apply for Trade Adjustment Assistance only after having exhausted their other unemployment benefits. Unfortunately, the law does not provide a remedy for Plaintiffs' reliance on this publication. Although it is regrettable that the Former Employees were led astray, given that 19 U.S.C. § 2273(b) clearly commands that benefits be limited to only those workers who have been totally or partially separated from their employment within a year of petitioning for benefits, therefore, the Judiciary may grant no relief. *See, e.g., Office of Pers. Mgmt v. Richmond*, 496 U.S. 414, 424 (1990).

The court appreciates the arguments of the Former Employees, especially Mr. Ken Walter, who have argued their case through several remands. But in this case, although there may have been a wrong, there is no remedy, and the Court must affirm Labor's Determination.

---

[1] The booklet upon which Plaintiffs rely explains:

> Under the Trade Act of 1974, as amended, you may apply for Trade Adjustment Assistance (TAA) if increased imports have adversely affected your job. The assistance may include Trade Readjustment Allowances (TRA), which provide a weekly income once you exhaust your regular employment benefits if you are still unemployed.

Plaintiff's Br. at Attach 2.