U.S. Customs and Border Protection

Slip Op. 10–30

ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT & EXPORT CORP., et al., Plaintiffs, v. UNITED STATES, Defendant, and THE AMERICAN HONEY PRODUCERS ASSOCIATION AND THE SIOUX HONEY ASSOCIATION, Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 02–00057

[The United States Department of Commerce's results of redetermination pursuant to remand are remanded]

Dated: March 24, 2010

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Bruce M. Mitchell, Mark E. Pardo* and *Ned H. Marshak*), for plaintiffs Zhejiang Native Produce & Animal By-Products Import & Export Corp.; Kunshan Foreign Trade Co., China (Tushu) Super Food Import & Export Corp.; High Hope International Group Jiangsu Foodstuffs Import & Export Corp.; National Honey Packers & Dealers Association; Alfred L. Wolff, Inc.; C.M. Goettsche & Co.; China Products North America, Inc.; D.F. International (USA) Inc.; Evergreen Coyle Group, Inc.; Evergreen Produce, Inc.; PureSweet Honey Farm, Inc.; and Sunland International, Inc.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane C. Dempsey*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (William J. Kovatch, Jr.), of counsel, for defendant.

Kelley Drye & Warren LLP (*Michael J. Coursey* and *R. Alan Luberda*), for defendant-intervenors the American Honey Producers Association and the Sioux Honey Association.

OPINION AND ORDER

Eaton, Judge:

Introduction

This action is before the court following remand for resolution of plaintiffs' USCIT Rule 56.2 motion for judgment upon the agency record.[1] Defendant-intervenors, the American Honey Producers As-

[1] "Plaintiffs" refers collectively to Zhejiang Native Produce & Animal By-Products Import & Export Corp.; Kunshan Foreign Trade Co.; China (Tushu) Super Food Import & Export Corp.; High Hope International Group Jiangsu Foodstuffs Import & Export Corp.; National

sociation and the Sioux Honey Association (together, "defendant-intervenors"), challenge the finding of no critical circumstances in the United States Department of Commerce's ("Commerce" or "the Department") Results of Redetermination Pursuant to Remand (Dep't of Commerce Sept. 5, 2006), *Zhejiang Native Produce & Animal By-Products Import & Export Corp., et al. v. United States*, Court No. 02–00057) ("Remand Redetermination"). The Remand Redetermination resulted from the court's remand order in *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 30 CIT 725, Slip Op. 06–85 (June 6, 2006) (not reported in the Federal Supplement) (the "Remand Order"). Plaintiffs, and defendant the United States on behalf of Commerce, support the redetermination results, and ask the court to affirm the Remand Redetermination. Pls.' Comments Regarding Remand Redetermination ("Pls.' Comm.") 2; Response of the United States to the Comments of Pls. and Def.-Ints. upon the Dep't of Commerce's Final Results of Redetermination Pursuant to Court Order ("Def.'s Resp.") 1.

The court's Remand Order was made following the opinion of the United States Court of Appeals for the Federal Circuit (the "Federal Circuit") in *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 432 F.3d 1363 (Fed. Cir. 2005) ("*Zhejiang II* ").[2] *See* Remand Order, 30 CIT 725, Slip Op. 06–85. In *Zhejiang II*, the Federal Circuit held that Commerce could not use its

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Honey Packers & Dealers Association; Alfred L. Wolff, Inc.; C.M. Goettsche & Co.; China Products North America, Inc.; D. F. International (USA) Inc.; Evergreen Coyle Group, Inc.; Evergreen Produce, Inc.; Pure Sweet Honey Farm, Inc.; and Sunland International, Inc.

[2] In related proceedings, following the issuance of *Zhejiang II*, plaintiffs moved for relief from the judgment in *Zhejiang I*. Pls.' Rule 60(b) Mot. for Rel. from J. ("Pls.' Rule 60(b) Mot.") 1. By their motion, plaintiffs sought an order directing Commerce to find that their sales made during the period of investigation, January 1, 2000 through June 30, 2000, were not made at less than fair value. Pls.' Rule 60(b) Mot. 1-2. The court denied plaintiffs' motion on September 26, 2007. *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, Court No. 02–00057 (Sept. 26, 2007) (order denying plaintiffs's motion for relief from judgment). Plaintiffs appealed the court's order, and the court's proceedings were stayed on January 11, 2008, pending resolution of the appeal. *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, Court No. 02–00057 (Jan. 11, 2008) (order staying proceedings). The Federal Circuit dismissed plaintiffs' appeal holding that, because plaintiffs appealed an interlocutory order, the Court lacked jurisdiction to hear the matter. *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 339 Fed. Appx. 992, 993–94 (Fed. Cir. 2009) ("*Zhejiang III* ") ("Except in a few well-defined circumstances, courts of appeals review final judgments, not particular issues as they arise in the course of trial proceedings."). The Federal Circuit's mandate in *Zhejiang III* was subsequently issued on September 14, 2009.

standard 25 percent method[3] to impute knowledge of below fair market sales to plaintiffs during a period that a suspension agreement was in place. Thus, the Federal Circuit held that Commerce's critical circumstances determination was not supported by substantial evidence. The Federal Circuit then remanded the matter to this Court where it was further remanded to Commerce. *Zhejiang II*, 432 F.3d at 1368; Remand Order, 30 CIT at 725, Slip Op. 06–85 at 2. On remand, Commerce reversed its previous determination and found that critical circumstances were not present during the period of investigation.

Defendant-intervenors argue that the court should once again remand the case to Commerce with instructions for it to determine whether critical circumstances were present by: (1) using a methodology other than the 25 percent method; and/or (2) using a Court No. 02–00057 Page 5 period different from the period of investigation for making its determination. Defendant-Intervenors' Remand Comments ("Def.-Ints.' Comm.") 3.

Jurisdiction is had pursuant to 28 U.S.C. § 1581© (2006) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and (B)(i) (2006). For the reasons set forth below, the Remand Redetermination is remanded.

Background

The facts of this case are fully set forth in the court's prior decision in *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 27 CIT 1827, Slip Op. 03–151 (Nov. 21, 2003) (not reported in the Federal Supplement) ("*Zhejiang I* "), *Zhejiang II*, and the court's Order of September 26, 2007 denying plaintiffs' rule 60(b) motion for relief from judgment. A brief restatement of the case follows in order to place this opinion in context.

In 1994, Commerce conducted an unfair trade investigation of honey from the People's Republic of China ("PRC"). Commerce subsequently halted this investigation and entered into a suspension agreement with the PRC. *See* Honey From the PRC, 60 Fed. Reg. 42,521 (Dep't of Commerce Aug. 16, 1995) (suspension of investigation) (the "Suspension Agreement"). The Suspension Agreement was in effect from August 16, 1995, through August 16, 2000. Honey From the PRC, 65 Fed. Reg. 46,426 (Dep't of Commerce July 28, 2000) (termination of suspended antidumping duty investigation). In 2000, following the Suspension Agreement's termination, and at the urging

[3] Although it has never promulgated regulations, Commerce has adopted, as a general practice, a method for determining whether critical circumstances exist. Using this method, Commerce imputes knowledge of sales at below fair value prices during the period of investigation, to those respondents whose dumping margins are calculated to be greater than 25 percent. *See* Honey From the PRC, 66 Fed. Reg. 24,102, 24,106 (Dep't of Commerce May 11, 2001) (notice of preliminary determination of sales at less than fair value).

of the domestic industry, Commerce commenced a second investigation. Honey from Argentina and the PRC, 65 Fed. Reg. 65,831 (Dep't of Commerce Nov. 2, 2000) (initiation of antidumping duty investigations) (the "Second Investigation"). During the course of the Second Investigation, the petitioners alleged the existence of critical circumstances. *See* 19 U.S.C. § 1673b(e)(1). Commerce identified the period of investigation ("POI") as January 1, 2000, through June 30, 2000, a period during which the Suspension Agreement was in effect. During the course of its proceedings the Department used the POI to determine both if respondents were dumping their merchandise and for purposes of determining if critical circumstances were present. *See* Honey From the PRC, 66 Fed. Reg. 24,101, 24,106 (Dep't of Commerce May 11, 2001) (notice of preliminary determination of sales at less than fair value) ("Preliminary Results").

Following the investigation, Commerce's final determination contained an affirmative dumping finding. Honey From the PRC, 66 Fed. Reg. 50,608, 50,610 (Dep't of Commerce Oct. 4, 2001) (notice of final determination of sales at less than fair value), *as amended by* Honey from the PRC, 66 Fed. Reg. 63,670 (Dep't of Commerce Dec. 10, 2001) (notice of amended final determination of sales at less than fair value and antidumping duty order). The final determination also contained an affirmative finding of critical circumstances based on the 25 percent method's imputation of knowledge of dumping. 66 Fed. Reg. at 50,6010. This imputation of knowledge of dumping was predicated on the Department's practice of considering

> margins of 25 percent or more for [export price] sales sufficient to impute knowledge of dumping . . . . In other words, in cases where, as here, export price is calculated by reference to sales made to unaffiliated purchasers in the United States, and Commerce determines that the antidumping duty margin with respect to those sales is 25% or more, Commerce "imputes" knowledge of dumping to the importer [during the period leading up to the investigation].

Zhejiang I, 27 CIT at 1842–43, Slip Op. 03–151 at 26. (footnote omitted; first alteration in original). Commerce found that, based on the 25 percent method, "there is evidence of the knowledge of dumping . . . [that was] demonstrated by the fact that Zhejiang, Kunshan, High Hope, and the PRC-wide entity all have dumping margins of over 25 percent." *Id.* at 1843, Slip Op. 03–151 at 27 (citation omitted).

Plaintiffs sought judicial review in this Court of Commerce's final determination and, among other things, objected to Commerce's imputation of knowledge, arguing that compliance with the Suspension

Agreement foreclosed a finding of dumping based on substantial evidence. The court rejected plaintiffs' argument and held that the Suspension Agreement did not prevent Commerce from using its 25 percent method. *Id.* at 1849–50, Slip Op. 03–151 at 36–37. Therefore, the court sustained Commerce's affirmative critical circumstances determination. *Id.* at 1851, Slip Op. 03–151 at 39.

Plaintiffs appealed *Zhejiang I* to the Federal Circuit. *See generally Zhejiang II*, 432 F.3d at 1363–64. On appeal, plaintiffs again argued that the existence of the Suspension Agreement prevented the imputation of knowledge of dumping using Commerce's 25 percent methodology. *Id.* at 1366–67. The Federal Circuit found that Commerce could not impute knowledge of dumping using the 25 percent method during the POI because the Suspension Agreement was in effect. Therefore, the Federal Circuit reversed the court's critical circumstances holding, and remanded the case "for appropriate further proceedings." *Id.* at 1368.

The court then remanded the matter to Commerce for reconsideration of the critical circumstances issue. *See* Remand Order, 30 CIT at 725–26, Slip Op. 06–85 at 2–3. Pursuant to the Federal Circuit ruling, the court instructed Commerce to further consider "its critical circumstances finding, provided that in no event shall Commerce impute to plaintiffs any knowledge prohibited by the [Federal Circuit]'s decision . . . ." *Id.*

Following remand, Commerce filed its Remand Redetermination, finding that critical circumstances did not exist. *See* Remand Redetermination at 10. Commerce wrote:

> Based on the [Federal Circuit]'s holding that the determination to impute knowledge of dumping [using the 25 percent method] while a suspension agreement was in place was not supported by substantial evidence, and the [Court of International Trade]'s instruction to the Department not to impute to plaintiffs any knowledge prohibited by the [Federal Circuit]'s decision, the Department finds that critical circumstances do not exist with respect to the antidumping investigation of honey from the PRC.

Id. at 8–9.

Standard Of Review

The court must uphold a final determination by the Department in an antidumping proceeding unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Discussion

I. Commerce's Critical Circumstances Determination

The sole matter before the court is whether Commerce erred in concluding that it could not use alternatives to the 25 percent method, or a time period other than the POI, to investigate the presence of critical circumstances in this case.

A. Legal Framework

Section 1673d(a)(3) of Title 19 U.S.C. governs Commerce's final critical circumstances determinations.[4] 19 U.S.C. § 1673d(a)(3). This provision requires that, when Commerce makes an affirmative final antidumping determination and the presence of critical circumstances is alleged under 19 U.S.C. § 1673b(e), the Department's final determination "shall also contain a finding" of whether *either* (1) there is a history of dumping and material injury by reason of dumped imports, *or* (2) the person by whom, or for whose account, the merchandise was imported *knew or should have known* that the exporter was selling the subject merchandise at less than its fair value and that there would be material injury by reason of such sales, *and* (3) there have been massive imports of the subject merchandise over a relatively short period. *See* 19 U.S.C. § 1673d(a)(3)(A)–(B); 19 C.F.R. § 351.206(h) (2009).[5] An affirmative critical circumstances determination permits Commerce to retroactively impose antidumping duties "on merchandise entered up to 90 days before the imposition of provisional measures." *See* 19 C.F.R. § 351. 206(a); *see also* 19 U.S.C. § 1673d(c)(4)(A)–(B).

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[4] *See Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 112 n.38, 44 F. Supp. 2d 229, 252 n.38 (1999) (quoting S. Rep. No. 103–412, 103d Cong., 2d Sess., at 38 (1994)) ("This provision is 'designed to address situations where imports have surged as a result of the initiation of an antidumping or countervailing duty investigation, as exporters and importers seek to increase shipments of the merchandise subject to investigation into the importing country before an antidumping or countervailing duty order is imposed.'").

[5] Commerce's massive imports regulation provides in relevant part:

> (1) In determining whether imports of the subject merchandise have been massive under [19 U.S.C. §§ 1671d(a)(2)(B) or 1673d(a)(3)(B)], the Secretary normally will examine:
>
> (i) The volume and value of the imports;
> (ii) Seasonal trends; and
> (iii) The share of domestic consumption accounted for by the imports.
>
> (2) In general, unless the imports during the "relatively short period" . . . have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive.

19 C.F.R. § 351.206(h) (citation omitted).

B. The 25 Percent Method

In order to make a finding as to whether a respondent knew, or should have known, that merchandise was being sold at less than fair value, Commerce adopted the 25 percent method to impute knowledge of below fair value sales. *See, e.g.*, Certain Cut-To-Length Carbon Steel Plate From The PRC, 62 Fed. Reg. 31,972, 31,978 (Dep't of Commerce June 11, 1997) (preliminary determination of sales at less than fair value); Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Italy, 52 Fed. Reg 24,198 (Dep't of Commerce June 29, 1987) (final determination of sales at less than fair value). It is the method the Federal Circuit found could not be used here because of the Suspension Agreement.

C. Alternative Methodologies and Time Periods

The 25 percent method, however, is not the only way in which Commerce has imputed knowledge in past investigations. Nor for that matter, has the Department restricted itself to the period of investigation in making critical circumstances determinations. Prior to its adoption of the 25 percent method, Commerce found that, with respect to respondents from non-market economies, it would use a case by case determination "using all available information and drawing upon market conditions of the industry subject to the investigation" when imputing knowledge of less-than-fair value sales. Potassium Permanganate From the PRC, 48 Fed. Reg. 57,347, 57,349 (Dep't of Commerce, Dec. 29, 1983) (final determination of sales at less than fair value) ("*Potassium Permanganate* ").

For instance, in *Potassium Permanganate*, Commerce made a number of findings that it deemed relevant to its determination that critical circumstances existed. First, that United States importers were aware that the merchandise purchased at "competitive prices" in the European market and subsequently imported into the United States originated from the PRC, and therefore were aware of the price of PRC-sourced potassium permanganate being sold in both United States and European markets. *Id.* Second, Commerce noted that importers were aware of the pricing of potassium permanganate from non-PRC sources and were therefore aware of the entire range of pricing in a marketplace where pricing was a major factor in determining sales. *Id.* Third, because other foreign producers operated in non-state-controlled countries, importers should have known, at least generally, what the value of the product was in market economy countries, and thus the minimum fair value of the PRC merchandise. *Id.* Fourth, that *during the period between the initiation of the investigation and the preliminary determination*, the unit price of the

merchandise imported from the PRC was 22 percent less than the price imported from the only other foreign nation exporting the product to the United States. Potassium Permanganate From the PRC, 48 Fed. Reg. at 57,349. Lastly, because importers knew that the merchandise from the PRC was priced significantly below that sold for export by the only other non-United States market economy producer, importers should have known that the PRC exports were at less than fair value. *Id.* Commerce's critical circumstances determination was upheld by both this Court and the Federal Circuit in *ICC Industries, Inc. v. United States*, 10 CIT 181, 632 F. Supp. 36 (1986), aff'd 812 F.2d 694 (Fed. Cir. 1987) ("*ICC Industries*").

Other Court of International Trade cases shed more light on practices, other than the 25 percent method, that can be used in making a critical circumstances determination. *See, e.g.*, *Nippon Steel Corp. v. United States*, 24 CIT 1158, 118 F. Supp. 2d 1366 (2000). Specifically, the *Nippon* court listed "numerous press reports, . . . falling domestic prices resulting from rising imports, and domestic buyers shifting to foreign suppliers" as evidence that could support such a determination. *Id.* at 1168, 118 F. Supp. 2d at 1376 (internal quotation omitted).

In addition to demonstrating that the 25 percent method is not the only approach that Commerce has used to impute knowledge of sales at less than fair value, *ICC Industries* also reveals that Commerce has used at least one time period other than the period of investigation as the temporal measure for making a critical circumstances determination. In *ICC Industries*, the period used was "from [i]nitiation of this investigation to [the] Preliminary Determination."[6] *ICC Industries*, 10 CIT at 184, 632 F. Supp. at 38.

Indeed, the *ICC Industries* time period appears to be the period that Congress anticipated would be used in determining critical circumstances when it stated that the purpose of the critical circumstances statute was "to provide prompt relief to domestic industries suffering from large volumes of, or a surge over a short period of, imports and to deter exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States *during the period between initiation of an investigation and a preliminary determination by* [Commerce]." H.R. Rep. 96–317, 96th Cong., 1st Sess. at 63 (1979) (italics added).

In addition, Commerce, in its regulations, is directed to look at a period "beginning on the date the proceeding begins [*i.e.*, the filing of the investigation] and ending at least three months later." 19 C.F.R.

[6] Here, the Suspension Agreement ended on August 16, 2000. The domestic producers filed their petitions on September 29, 2000 and the preliminary results were published on May 11, 2001.

§ 351.206(i). Thus, it is clear that Commerce has the authority to evaluate time periods other than the period of investigation when making critical circumstances determinations.

II. Commerce's Remand Redetermination

Commerce maintains that: (1) because it used the 25 percent method during the POI; and (2) because the Federal Circuit has prohibited the use of this method when the Suspension Agreement was in place, the administrative record lacks substantial evidence that critical circumstances were present during the POI. As a result, defendant insists that Commerce "properly concluded that the record does not support a finding of critical circumstances because no record evidence demonstrates that the importers knew or should have known that honey from the PRC was being imported at less than its fair value." Def.'s Resp. 3 (citing 19 U.S.C. § 1673d(a)(3)(A)(ii)).

Moreover, defendant argues:

> Whether, upon remand, Commerce should have changed its methodology and examined a time period other than the POI to determine whether importers had knowledge of dumping is beyond the scope of the remand order. [Defendant-intervenors'] allegation of error should, therefore, be rejected.

Def.'s Resp. 4. With respect to this last statement, Commerce insists that it "[did] not believe that [it had] the authority to reopen the record and change the time period on which the original finding of knowledge was based in this remand proceeding." Remand Redetermination at 10.

Defendant-intervenors begin their argument in support of the use of other reasonable methodologies for determining the presence of critical circumstances, by taking account of Commerce's history of making critical circumstances determinations and noting Commerce's broad discretion in making such determinations. Def.-Ints.' Comm. 8. Defendant-intervenors insist that the 25 percent method is just one of a range of reasonable methodologies Commerce has at its disposal. Def.-Ints.' Comm. 8. As a result, they reason that the 25 percent method, though Commerce's preferred way of determining knowledge when making a critical circumstances determination, is not its exclusive methodology. Def.-Ints.' Comm. 10. They note that Commerce had conducted critical circumstances inquiries "for years" before first using the 25 percent test and that no court has since

limited Commerce solely to the application of that single test. Def.-Ints.' Comm. 10. They further assert that "Commerce and the reviewing courts have consistently referred to the 25 percent test as a '*general practice*' rule . . . and as the test Commerce will 'normally' apply . . . in the knowledge-of-dumping context." Def.-Ints.' Comm. 10–11 (citing *Zhejiang II*, 432 F.3d at 1366; *see, e.g.*, Certain Cut-to-Length Carbon Steel Plate From the PRC, 62 Fed. Reg. at 31,978; Circular Welded Carbon Steel Pipes & Tubes From Thailand, 51 Fed. Reg. 3384, 3385 (Dep't of Commerce Jan 27, 1986) (notice of final determination)) (emphasis added). The use of language such as "general practice" and "normally" is, according to defendant-intervenors, indicative of Commerce's awareness that, "while the 25 percent test is the agency's preferred knowledge-of-dumping methodology, it is not suitable for every critical circumstances determination, and that there will be circumstances where an alternative methodology would be more appropriate." Def.-Ints.' Comm. 11. They further maintain that both the language and legislative history of 19 U.S.C. § 1673b and § 1673e, as well as Commerce's regulations, support their argument that Commerce may focus its inquiry on the time period *between* the petition's filing and the issuance of the preliminary determination. Def.-Ints.' Comm. 13

Accordingly, defendant-intervenors seek a further remand and a direction from the court that Commerce reopen the record and reconsider whether a finding of knowledge of sales below fair value is supported by substantial evidence under any methodology other than the 25 percent method.

III. The Federal Circuit's Opinion in *Zhejiang II*

All of the parties rely on the Federal Circuit's opinion in *Zhejiang II* and the court's subsequent Remand Order in making their arguments. For instance, Commerce maintains that the opinion prevents it from reopening the record and/or using an alternative methodology or considering an alternative time period to determine whether critical circumstances existed. Remand Redetermination at 8–10. For their part, plaintiffs argue that

> [s]ince the Federal Circuit considered all of the evidence of record, and found that the record did not contain evidence to support a finding that importers 'knew or should have known that the exporter was selling the subject merchandise at less than its fair value,' . . . the Department's determination on Remand that substantial evidence does not support a finding of critical circumstances is the only appropriate result.

Pls.' Comm. 3 (footnote omitted). Reviewing both the Federal Circuit opinion and the court's Remand Order, however, the court finds nothing that limits Commerce in the way the Department describes.

The Federal Circuit's holding in *Zhejiang II* in its entirety is as follows:

> Zhejiang argues that the "knew or should have known" requirement for critical circumstances was not met, and that substantial evidence does not support the contrary finding based on imputation. We agree. As Zhejiang states, "it strains credibility to suggest that Commerce could establish minimum prices for honey designed to 'prevent the suppression or undercutting of price levels of the United States honey products' and then determine that U.S. importers purchasing honey in accordance with these pricing guidelines should have known these sales would be found to be at less than fair value." When all factors are considered, there is not substantial evidence to support the finding of critical circumstances.

Zhejiang II, 432 F.3d at 1368 (internal citation omitted). In other words, the Court held that Commerce could not impute knowledge of sales of less than fair value to plaintiffs using the 25 percent method while the Suspension Agreement was in effect. The court did not otherwise limit Commerce's use of alternative methodologies or limit the time period that Commerce could examine to just the POI.

With the Federal Circuit's holding in mind, the court in its Remand Order directed Commerce to "further [consider] its critical circumstances finding, provided that in no event shall Commerce impute to plaintiffs any knowledge prohibited by the [Federal Circuit]'s decision . . . ." Remand Order, 30 CIT at 725–26, Slip Op. 06–85 at 2. The court's instructions to Commerce, therefore, directed it not to use the 25 percent method when the Suspension Agreement was in force. The court's Remand Order, however, did nothing to prevent Commerce from considering other methodologies or other time periods in making its critical circumstances determination. As has been seen, Commerce has used both other methodologies and at least one time period other than the period of investigation when investigating the presence of critical circumstances. Thus, neither the Federal Circuit's holding, nor the Remand Order constrained Commerce in these two areas. As a result, Commerce has the authority to exercise its discretion to apply any other reasonable method or look to any other reasonable time period in making its critical circumstances determination.

Conclusion

Based on the foregoing, the court remands to Commerce and instructs the Department, using its discretion, to reconsider its critical circumstances determination found in the Remand Redetermination. In its Remand Redetermination the Department addressed the possibility of a remand:

> if the court considers that the remand order is sufficiently broad for the Department to consider the merits of the petitioners' argument concerning the time period used to analyze the issue of knowledge, and remands the proceeding to the Department to re-open the record for the submission of information on alternate time periods, we request that the Department be given six months time to complete that remand, as such time would be necessary in order for the Department to request additional information from the parties on alternative time periods, analyze and verify such information, issue a draft redetermination to the parties for comment, and submit a final redetermination to the Court.

Remand Redetermination at 10. With this request in mind, the court's remand order will take into account Commerce's suggested time period to make any further determination with regard to critical circumstances.

The remand results shall be due on September 24, 2010, comments to the remand results shall be due on October 24, 2010, and replies to such comments shall be due on November 8, 2010.

Dated: March 24, 2010
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 10–31

SIOUX HONEY ASSOCIATION, ADEE HONEY FARMS, MONTEREY MUSHROOMS, INC., THE GARLIC COMPANY, AND BEAUCOUP CRAWFISH, INC., dba Riceland Crawfish, Inc. individually and on behalf of all others similarly situated, Plaintiffs, v. HARTFORD FIRE INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, HARTFORD CASUALTY INSURANCE COMPANY, HARTFORD INSURANCE COMPANY OF ILLINOIS, HARTFORD INSURANCE COMPANY OF THE MIDWEST, HARTFORD INSURANCE COMPANY OF THE SOUTHEAST, AEGIS SECURITY INSURANCE COMPANY, AMERICAN CONTRACTORS INDEMNITY COMPANY, AMERICAN HOME ASSURANCE COMPANY, GREAT AMERICAN ALLIANCE INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, INTERNATIONAL FIDELITY INSURANCE COMPANY, LINCOLN GENERAL INSURANCE COMPANY, WASHINGTON INTERNATIONAL INSURANCE COMPANY, XL SPECIALTY INSURANCE COMPANY, UNITED STATES CUSTOMS AND BORDER PROTECTION, ACTING CUSTOMS COMMISSIONER JAYSON P. AHERN, UNITED STATES DEPARTMENT OF COMMERCE, SECRETARY OF COMMERCE GARY F. LOCKE, and Does 1 through 50, inclusive, Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 09–00141

[Dismissing all claims brought solely against the surety defendants and those brought jointly against the surety defendants and the United States]

Dated: March 26, 2010

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Sidley Austin, LLP (*Neil R. Ellis, Lawrence R. Walders, Richard M. Belanger, Jennifer Lee H. McCandless, Jill Caiazzo, Carter G. Phillips*, and *Geoffrey D. Antell*) for defendants Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Insurance Company of Illinois, Hartford Insurance Company of the Midwest, and Hartford Insurance Company of the Southeast.

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Crowell & Moring, LLP (*Theodore R. Posner* and *Alexander H. Schaefer*) for defendants Great American Alliance Insurance Company, Great American Insurance Company, and Great American Insurance Company of New York.

Wolff & Sampson PC (*Armen Shahinian* and *Adam P. Friedman*) for defendant International Fidelity Insurance Company.

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OPINION AND ORDER

Stanceu, Judge:

I. Introduction

Plaintiffs Sioux Honey Association, Adee Honey Farms, Monterey Mushrooms, Inc., The Garlic Company, and Beaucoup Crawfish of Eunice, Inc., dba Riceland Crawfish, Inc. brought this action against the United States, alleging that numerous statutory and regulatory violations by the United States Department of Commerce ("Commerce") and United States Customs and Border Protection ("Customs") impaired antidumping duty collections on products in new shipper reviews spanning more than a decade. As each plaintiff's name indicates, plaintiffs are domestic producers of honey, mushrooms, garlic, or crawfish. They claim that statutory and regulatory violations by Commerce and Customs denied them certain rights due them under the antidumping laws and, specifically, prevented them from obtaining the full amount of distributions to which they are entitled under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment"), 19 U.S.C. § 1675c (repealed 2006).

Seeking monetary damages and equitable relief, plaintiffs also bring claims sounding in contract, tort (based on alleged negligence), and restitution (based on alleged unjust enrichment) against a large number of individual sureties (the "surety defendants"). Plaintiffs allege, *inter alia*, that the surety defendants issued, negligently, single-transaction customs bonds to importers of the merchandise at issue in the new shipper reviews and, on an unjust enrichment theory, claim a right to restitution of certain premiums that these

importers paid to the sureties. *See* Compl. ¶¶ 9,11. Plaintiffs broadly direct their claims to all new shipper reviews that Commerce conducted during a period from January 1, 1995, when new shipper reviews began, to August 18, 2006, after which bonding to secure future antidumping duties on products subject to new shipper reviews was no longer permissible. *Id.* ¶¶ 2–4, 9, 11. They state, however, that "[a]ll or virtually all" of the bonds on which they are suing the surety defendants were issued for imports subject to one of twenty antidumping duty orders on imports from China and that the "vast majority" were issued on imports of Chinese fresh garlic, certain preserved mushrooms, freshwater catfish tail meat, and pure honey. Id. ¶ 4.[1] The complaint includes claims against fifty (50) unnamed surety defendants, which plaintiffs allege "[u]pon information and belief" to have "committed acts substantially similar to the acts by the named Surety Defendants." *Id.* ¶ 30.

Plaintiffs bring this action on their own behalf but also seek to represent the interests of a class consisting of

> [a]ny person or entity that (1) is an affected domestic producer ("ADP") under the . . . CDSOA . . . , under any antidumping order on imports from the People's Republic of China ("China") under which one or more new shipper administrative reviews were conducted between January 1, 1995 and August 18, 2006; or (2) would be an ADP under any such order if the CDSOA's requirement that to qualify as an ADP, a domestic interested party, must have supported the relevant petition to impose [antidumping] duties, is stricken from the CDSOA as unconstitutional.

Id. ¶ 77. The court dismisses all claims plaintiffs bring against the surety defendants. Some claims the court dismisses for lack of standing and others for failure to state a claim upon which relief can be granted. Accordingly, the court dismisses all surety defendants, named and unnamed, from this action. The court dismisses in the entirety those claims brought jointly against the surety defendants and the United States. The court declines to rule at this time on the numerous remaining claims, which plaintiffs assert solely against the United States and which challenge various actions, or failures to act, alleged on the part of Commerce and Customs.

[1] Plaintiffs state that 107 of the 174 new shipper reviews Commerce conducted on Chinese products involved subject imports of Chinese fresh garlic, certain preserved mushrooms, freshwater catfish tail meat, and pure honey. Compl. ¶ 4.

II. Background

A. Customs Bonding for Merchandise Subject to New Shipper Reviews

Upon request, Commerce conducts reviews to establish individual weighted-average dumping margins for foreign exporters or producers of merchandise subject to an antidumping duty order who did not export subject merchandise during the period of the investigation and are not affiliated with a producer or exporter who did so. 19 U.S.C. § 1675(a)(2)(B) (2006). From January 1, 1995 to April 1, 2006, the antidumping law permitted these "new shippers" to post bonds with Customs in lieu of cash deposits to serve, during the time required to conduct the review, as security for the future payment of antidumping duties. *See id.* § 1675(a)(2)(B)(iii) (suspended by Pension Protection Act of 2006, Pub. L. No. 109–280, § 1632(a), 120 Stat. 780, 1165 (2006)). At the center of this action are customs bonds obtained from sureties by importers of Chinese products subject to new shipper reviews. *See id.* § 1623 (authorizing the collection of bonds for protection of the revenue and compliance with laws enforced by Customs); 19 C.F.R. § 113.62 (2009) (setting forth regulations and conditions for basic importation and entry bonds). Plaintiffs estimate that the "new shipper bonds" at issue in this case number in the hundreds and have "an estimated combined face value of several hundred million dollars." Compl. ¶ 2.

B. Rights of Domestic Producers to Distributions under the CDSOA

The CDSOA directed Customs to deposit collected antidumping (and countervailing) duties into special accounts, to segregate those duties according to the relevant antidumping (or countervailing) duty order, and to distribute, on an annual basis, a ratable share of duties collected for a particular unfairly-traded product to domestic producers who qualified as affected domestic producers ("ADPs") under the CDSOA as reimbursement for incurred qualifying expenditures.[2] 19 U.S.C. § 1675c(e) (repealed 2006). Although Congress repealed the CDSOA in 2006, it permitted the continued distribution of duties "on

[2] Customs initiates the annual Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment") distribution process by publishing a notice of intent to distribute CDSOA funds ("offsets"), along with a list of eligible affected domestic producers ("ADPs") as determined after receiving a list of parties potentially eligible, as compiled by the U.S. International Trade Commission. 19 U.S.C. § 1675c(d)(1),(2) (2000); 19 C.F.R. § 159.62(a) (2009). Customs requests certifications of eligibility from ADPs, which are subject to specific requirements, and then reviews and verifies the ADP certifications. *Id.* ; 19 C.F.R. § 159.63 (2009).

entries of goods made and filed before October 1, 2007." Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006).

C. Judicial Proceedings and Pending Motions

Plaintiffs commenced this action on April 7, 2009. Summons. With the consent of the parties, the court entered a scheduling order on July 1, 2009 and, on three occasions since then, granted unopposed motions to extend dates in the scheduling order. Order, July 1, 2009; Order Aug. 18, 2009; Order, Dec. 11, 2009; Order, Dec. 15, 2009.

All proceedings to date have involved three motions to dismiss the complaint. On September 4, 2009, the surety defendants, including the "Hartford defendants," moved to dismiss the claims against the surety defendants for lack of jurisdiction and failure to state a claim upon which relief can be granted.[3] Surety Defs.' Mot. to Dismiss & Mem. in Supp. of their Mot. to Dismiss ("Surety Defs. Mot."); The Hartford Defs.' Mot. to Dismiss the Compl. ("Hartford Mot."); Mem. of P. & A. in Supp. of the Hartford Defs.' Mot. to Dismiss the Compl. ("Hartford Mem.") On September 25, 2009, the United States filed a corrected motion to dismiss plaintiffs' complaint. United States' Mot. to Dismiss Pls.' Compl. for Lack of Jurisdiction and for Failure to State a Claim upon which Relief May Be Granted ("United States Mot. to Dismiss").

Plaintiffs filed a corrected opposition to the three motions to dismiss on December 3, 2009. Pls.' Opp'n to Defs.' Mots. to Dismiss ("Pls. Opp'n"). Defendants filed replies on January 11, 2010. United States' Reply Br. in Supp. of its Mot. to Dismiss; Reply Mem. in Supp. of the Hartford Defs.' Mot. to Dismiss the Compl.; Reply Mem. in Supp. of Surety Defs.' Mot. to Dismiss. On December 31, 2009, the surety defendants filed a motion for oral argument, to which plaintiffs consented. Surety Defs.' Mot. for Oral Argument; Pls.' Statement of Consent to Surety Defs.' Mot. for Oral Argument. On February 2, 2010, plaintiffs filed a motion for leave to file a sur-reply to reply briefs of the United States and the surety defendants. Pls.' Mot. for Leave to File a Sur-Reply to Defs.' Replies in Supp. of their Mots. to Dismiss. On March 18, 2010, plaintiffs filed a motion for jurisdic-

[3] The "Hartford defendants," Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Insurance Company of Illinois, Hartford Insurance Company of the Midwest, and Hartford Insurance Company of the Southeast, filed a separate motion to dismiss but join in the motion to dismiss filed by the other defendants and incorporate by reference the arguments made in support thereof. The Hartford Defs.' Mot. to Dismiss the Compl. 1 n.1 ("Hartford Mot."); Mem. of P.& A. in Supp. of the Hartford Defs.' Mot. to Dismiss the Compl. 1 n.1, 7 n.4 ("Hartford Mem.").

tional discovery relating to this court's subject matter jurisdiction over plaintiffs' claims against the United States. Pls.' Mot. for Jurisdictional Discovery.

D. Claims Brought Jointly Against the United States and the Surety Defendants

In Counts One, Two, and Six of the complaint, plaintiffs assert claims jointly against the United States and the surety defendants. Compl. ¶¶ 89–117, 141–149.

In Count One, plaintiffs seek a declaratory judgment that they, although admittedly not named as parties in the contracts between the sureties and importers by which the new shipper bonds were issued, nevertheless are entitled to recover under those bond contracts as "intended third-party beneficiaries." *Id.* ¶¶ 89–106. Specifically, plaintiffs submit that the antidumping statute, in previously allowing importers of products subject to new shipper reviews to post bonds instead of cash deposits, and in incorporating the CDSOA, grants plaintiffs their status as third-party beneficiaries of those bond contracts. *Id.* ¶¶ 98–99.

In Count Two, plaintiffs allege that surety defendants, including Hartford defendants, have asserted as a defense to government actions to recover on customs bonds that the CDSOA invalidated those bonds by making ADPs third-party beneficiaries to the bond contracts. *Id.* ¶¶ 108–117. They seek a declaration that neither the passage of the CDSOA nor their claimed status as third-party beneficiaries on the bonds that are the subject of this action had the effect of invalidating those bonds. *Id.* ¶ 117.

In Count Six, plaintiffs allege that the sureties, along with Customs, took actions to compromise, modify, or discharge the liability of principals under bonds issued to importers of merchandise subject to new shipper reviews. *Id.* ¶ 146. Claiming that these actions could not be taken lawfully without their consent as third-party beneficiaries on the bonds, plaintiffs demand that the court declare these actions unlawful, set the actions aside, and enjoin any future such actions. *Id.* ¶ 149.

E. Claims Brought Solely Against the Surety Defendants

In Counts Three, Four, and Five of the complaint, plaintiffs assert claims soley against the surety defendants. Compl. ¶¶ 118–140.

In Count Three of their complaint, plaintiffs proceed against the surety defendants on a breach of contract theory, *see id.* ¶¶ 120–121, seeking a declaratory judgment that each surety defendant against which is pending a demand for bond performance that is no longer

appealable has breached its obligation under the bond and thereby has injured plaintiffs and their proposed class as intended third-party beneficiaries. *Id.* ¶ 121.1 They demand that the court award them damages in an amount to be determined at trial. *Id.* ¶ 122.2.

In Count Four, plaintiffs bring claims on the contingency that any bond at issue in the case is determined to be void, unenforceable, compromised, or cancelled, *id.* ¶¶ 124–126, in which event they urge the court to order the surety defendants to "disgorge to the Court all premiums and collateral [] obtained for issuing the bond, plus accrued interest" and to hold these amounts in trust for the benefit of plaintiffs and the members of the proposed class. *Id.* ¶¶ 127–128.

In Count Five, plaintiffs claim that the surety defendants were negligent in underwriting and deciding to execute the various bonds, *id.* ¶¶ 129–140, and, here also, seek an award of "appropriate damages to be paid by such defendants in an amount to be determined at trial." *Id.* ¶ 140.

F. Claims Brought Solely Against the United States

Plaintiffs' remaining claims, stated in Counts Seven through Fifteen of the complaint, are brought against Customs and Commerce. Compl. ¶¶ 150–235. They allege that Customs denied them due process by not allowing them to participate in the adjudications of administrative protests by the sureties. *Id.* ¶¶ 150–163 (Count Seven). Commerce, they allege, failed in some instances to issue to Customs required instructions to liquidate entries subject to new shipper reviews. *Id.* ¶¶ 164–173 (Count Eight). They claim that Customs unlawfully failed to liquidate some entries within six months of receiving liquidation instructions from Commerce and thereby allowed the entries to be deemed liquidated, thus denying plaintiffs the remedial benefits of the antidumping duty orders and reducing the amount of CDSOA distributions ("offsets") available to plaintiffs as ADPs. *Id.* ¶¶ 174–183 (Count Nine). They claim, further, that Customs failed to distribute some collected antidumping duties as required by the CDSOA, *id.* ¶¶ 184–190 (Count Ten), and failed to issue demands to sureties to recover duties under the new shipper bonds, *id.* ¶¶ 191–197 (Count Eleven). Based on a theory that the statutory power to compromise antidumping duties was transferred from Customs to Commerce in 1980, plaintiffs claim that Customs, in some instances, compromised antidumping duties owed in new shipper reviews although lacking legal authority to do so. *Id.* ¶¶ 198–205 (Count Twelve). They claim, further, that Customs wrote off as uncollectible certain antidumping duties without making an attempt to collect as required by 31 U.S.C. § 3711(a)(1) and 19 U.S.C. § 1631(a), among

other provisions. *Id.* ¶¶ 206–215 (Count Thirteen). Plaintiffs claim that actions by Customs to cancel bonds and charges against bonds were unlawful because Customs failed to publish, as required by law, guidelines on its exercise of bond cancellation authority. *Id.* ¶¶ 216–225 (Count Fourteen). Finally, plaintiffs allege that Customs failed to authorize the Department of Justice to file collection actions against the sureties on certain new shipper bonds despite the requirement in the Customs regulations, 19 C.F.R. § 114.52, that Customs do so within ninety days after liability has accrued. *Id.* ¶¶ 226–235 (Count Fifteen). On these claims brought solely against the United States, plaintiffs seek relief that, *inter alia*, would declare various challenged governmental actions to be contrary to law, set aside those various actions as contrary to law, order Customs and Commerce to cease certain practices, and order Customs to take various affirmative actions involving claims on the bonds. *Id.* ¶¶ 163, 173, 183, 190, 197, 205, 215, 225, 235.

III. Discussion

Before the court are the three motions to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, the consent motion of the surety defendants for oral argument, and plaintiffs' motion for leave to file a sur-reply. In this Opinion and Order, the court considers, and dismisses, the claims that plaintiffs bring against the surety defendants, whether brought jointly against the surety defendants and the United States (as plaintiffs do in Counts One, Two, and Six of the complaint) or brought against the surety defendants alone (as in Counts Three, Four, and Five).

At this time, the court reserves decision on the motion of the United States with respect to dismissal of the remaining claims in the complaint, all of which are brought solely against the United States and stated in Counts Seven through Fifteen of the complaint. The court considers this piecemeal approach appropriate in the circumstances of this case, concluding that plaintiffs may not maintain any of their claims against the surety defendants and that the surety defendants should not be subjected to additional litigation costs and burdens while the pending motion to dismiss the remaining claims is decided. *See* USCIT Rule 1 (instructing that the Rules should be administered to secure the just, speedy, and inexpensive determination of every action). Although the surety defendants have moved for oral argument on their motion to dismiss, the court concludes that oral argument is unnecessary and would impose further costs and burdens on these defendants.

A. Subject Matter Jurisdiction

As noted previously, the court in this Opinion and Order considers only claims brought solely against the sureties and those of the claims brought against the United States that are also brought, jointly, against the surety defendants. The court concludes that the claims brought in Counts One, Two, and Six of the complaint, to the extent that they are asserted against the United States, arise under the antidumping laws and therefore would fall under the court's original subject matter jurisdiction as granted in 28 U.S.C. § 1581(i)(2) (2006). The court concludes, however, for the reasons discussed herein, that plaintiffs lack standing to bring the claims in Counts Two and Six, which they assert jointly against the sureties and the United States. Therefore, jurisdiction is lacking over these claims.

The court concludes that plaintiffs' claims against the surety defendants do not fall within any grant of original jurisdiction to the Court of International Trade, and plaintiffs do not argue to the contrary.[4] Plaintiffs submit, instead, that the Court of International Trade has jurisdiction over its claims against the United States according to 28 U.S.C. § 1581(i) (2006) and, on that basis, argue that the court may exercise supplemental jurisdiction over their claims against the surety defendants according to 28 U.S.C. § 1367 (2006) as made applicable to the Court of International Trade by 28 U.S.C. § 1585 (2006). Pls. Opp'n 62. They argue, in the alternative, that the court may hear these claims under a common law form of supplemental jurisdiction, i.e., under the pendent or ancillary jurisdiction inherent to a court established under Article III of the United States Constitution. Pls. Opp'n 81–87.

Plaintiffs' theory that the court may exercise "common law" supplemental jurisdiction over their claims against the surety defendants under the Court of International Trade's inherent Article III authority is readily dismissed as meritless. Plaintiffs attempt to sweep into this action against the United States, which plaintiffs have brought under 28 U.S.C. § 1581(i), claims against private parties against whom no claim under the court's original jurisdiction could be maintained. Congress enacted 28 U.S.C. § 1367 after the Supreme Court

[4] Original jurisdiction cannot lie under 28 U.S.C. § 1583, which provides:

> In any civil action in the Court of International Trade, the court shall have exclusive jurisdiction to render judgment upon any counterclaim, cross-claim, or third-party action of any party, if (1) such claim or action involves the imported merchandise that is the subject matter of such civil action, or (2) such claim or action is to recover upon a bond or customs duties relating to such merchandise.

28 U.S.C. § 1583 (2006). Against the surety defendants, plaintiffs are not bringing a cross-claim or counterclaim, nor are they asserting a "third-party action," which is in the nature of impleader. *See id.*; USCIT Rule 14.

rejected the exercise by federal courts of "pendent-*party* jurisdiction, that is, jurisdiction over parties not named in any claim that is independently cognizable by the federal court." *Finley v. United States*, 490 U.S. 545, 549 (1989). *Finley* held, specifically, that a district court may not exercise pendent-party jurisdiction against in-state defendants, on state law claims, in a suit brought against a government agency under the Federal Tort Claims Act, under which no claim against those defendants could have been asserted. *Id.* at 555. Previously, the Supreme Court held in *Aldinger v. Howard*, 427 U.S. 1, 12–19 (1975), that a district court may not exercise pendent, or ancillary, jurisdiction over a state-law claim brought against a defendant against whom no claim was cognizable under the Civil Rights Act, 42 U.S.C. § 1983.

Here, plaintiffs could not have asserted any claim against the surety defendants under the federal statutes on which plaintiffs base their claims against the United States, *i.e.*, 28 U.S.C. § 1581(i) and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500–596, neither of which authorizes actions against private parties. Plaintiffs argue, nevertheless, that the exercise of pendent-party jurisdiction in this case "is entirely consistent with the Supreme Court's decisions in *Aldinger* and *Finley*, which addressed so-called 'pendant-party' jurisdiction before the enactment of section 1367." Pls. Opp'n 82. This argument overlooks the essential point that Congress enacted § 1367 after the Supreme Court recognized in *Finley*, if not in its prior decision in *Aldinger*, limitations on the federal courts that preclude the exercise of any form of "common law" supplemental jurisdiction in the circumstances of this case.

Plaintiffs' other theory, that the court may hear the claims against the sureties according to the supplemental jurisdiction of 28 U.S.C. § 1367, is not so easily dismissed. Congress established statutory supplemental jurisdiction by enacting 28 U.S.C. § 1367 as part of the Judicial Improvements Act of 1990.[5] Judicial Improvements Act of 1990, Pub. L. No. 101–650, § 310(a), 104 Stat. 5089, 5113 (1990). It did so a decade after it enacted the Customs Courts Act, which included 28 U.S.C. § 1585 as a component of the legislation establishing and organizing the Court of International Trade. Customs Court Act of 1980, Pub. L. No. 96–417, § 201, 94 Stat 1727, 1728 (1980). Acknowledging that § 1367 specifically identifies only the

[5] In § 1367(a), Congress provided, with certain exceptions, that in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
28 U.S.C. § 1367(a) (2006).

district courts, plaintiffs argue that the Court of International Trade possesses the supplemental jurisdiction of § 1367 by operation of § 1585, under which "[t]he Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585. Summarized briefly, plaintiffs' theory is that the grant to the Court of International Trade of "all the powers in law and equity," as conferred upon the district courts by statute, necessarily includes the grant of the "power" to exercise the supplemental jurisdiction of § 1367, which codified and expanded upon the "common-law" powers to exercise supplemental jurisdiction that were inherent in the district courts as courts established under Article III. Pls. Opp'n 66–68.

The Hartford defendants disagree, arguing that the structure of the Customs Courts Act is inconsistent with plaintiffs' theory of supplemental jurisdiction. Hartford Mem. 8–13. They point out that § 1585 does not mention jurisdiction and that Congress addressed the jurisdiction of the newly-formed Court of International Trade in other sections of the Customs Courts Act (specifically, §§ 1581–1583). *Id.* at 9–12. The court is not persuaded by this argument. Within the Customs Courts Act, §§ 1581 through 1583 defined the new court's *original* jurisdiction, a concept distinct from the discretionary power of an Article III court to exercise jurisdiction over claims that are pendent or ancillary to claims brought under that original jurisdiction, *i.e.*, those claims arising out of the same Article III case or controversy as the claims brought under a federal court's original jurisdiction. *See* 28 U.S.C. §§ 1581–1583. In support of their argument, the Hartford defendants posit that "[i]f 'power' meant 'jurisdiction,' then § 1585 would incorporate every provision that creates jurisdiction in the district courts." Hartford Mem. 12. But because original jurisdiction and supplemental jurisdiction are different concepts, plaintiffs' jurisdictional theory does not require that § 1585 be construed to expand the original jurisdiction of the Court of International Trade or to signify that the court is affected by future changes Congress may make to the original jurisdiction of the district courts. Any such readings of § 1585 would render meaningless the Customs Courts Act's carefully drawn jurisdictional division between the Court of International Trade and the district courts.

The legislative history of the Customs Courts Act reveals that Congress had more than one purpose in mind when crafting § 1585. The bill in the 96th Congress that later became the Customs Courts Act, H.R. 7540, contained § 1585 in the form in which it was later enacted and in which it remains in effect today. H.R. 7540, 96th Cong. (2d Sess. 1980). The House Report discusses the purpose of § 1585

within the larger context of statutory revisions "to clarify the present status, jurisdiction and powers" of the predecessor court, the U.S. Customs Court. H.R. Rep. No. 96–1235, at 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731. Apparently referring to original jurisdiction, the report explains that a purpose of H.R. 7540 was to provide "aggrieved parties better access to judicial review of a civil action arising out of an import transaction" and that "[s]uch access is not presently assured due to jurisdictional conflicts caused by the ill-defined division of jurisdiction between the Customs Court and the federal district courts." *Id.* In the following sentence, the report addresses the "status" and "powers" of the newly created court in language that sheds some light on one of the intended purpose of § 1585: "Most importantly, H.R. 7540 perfects the status of the Customs Court by providing it with *all the necessary remedial powers* in law and equity possessed by other federal courts established under Article III of the Constitution." *Id.* (emphasis added). Thus, this portion of the House Report, rather than discussing the purpose of § 1585 in terms suggesting supplemental jurisdiction, discusses that purpose as one of providing the new court all the "necessary" powers to effect remedies commensurate with those of other Article III courts.

Although the emphasis the House Report placed on remedial powers is indicative of congressional intent, it would be a mistake to conclude that granting powers that are remedial in nature was the *only* purpose Congress sought to fulfill by enacting § 1585. The language Congress chose for § 1585 is not confined to remedial powers, and other language in the House Report suggests a broader intent by discussing the purpose of § 1585 as follows:

> Proposed section 1585 provides that the Court of International Trade shall possess all the powers in law and equity of, or conferred by statute upon, a district court. In the past, there has been some doubt as to whether or not the Customs Court possessed this *full judicial authority*. It is the Committee's intent to make clear that the Customs Court's successor, the United States Court of International Trade, does possess the same *plenary powers* as a federal court [*sic*] district court.

H.R. Rep. No. 96–1235, at 50, *reprinted in* 1980 U.S.C.C.A.N. at 3762 (emphasis added). This language, including in particular the use of the terms "full judicial authority" and "plenary powers," strongly counsels against a narrow reading of § 1585 under which the provision is confined in scope to remedial powers in law and equity.

Admittedly, neither the text of § 1585 nor the House Report reveals a specific intent with respect to common-law supplemental jurisdic-

tion, a form of jurisdiction that might be considered to reside in the Court of International Trade even without § 1585, as a result of the establishment of the Court of International Trade under Article III. *See* 28 U.S.C. § 251(a) (2006). Moreover, the powers of a district court in law and equity, which Congress appears to have considered to be too numerous to identify specifically in § 1585, would include some that are neither remedial nor associated with the proper exercise of supplemental jurisdiction by an Article III court. For these reasons, it is not a certainty that Congress, in crafting § 1585, necessarily *had* to have been referring to the authority to exercise supplemental jurisdiction as it existed in 1980, at the time the Customs Courts Act was enacted. Nevertheless, the House Report suggests that such powers may have been among those Congress contemplated when drafting § 1585.

As the court observed above, the House Report indicates that § 1585 was intended to refer to remedial powers, among other powers. *See* H.R. Rep. No. 96–1235, at 20, *reprinted in* 1980 U.S.C.C.A.N. at 3731. Because it refers to the powers in law and equity of Article III trial courts in existence at the time it was enacted, *i.e.*, the district courts, § 1585, when construed according to the House Report, would grant the Court of International Trade the powers to order, for example, monetary relief extending beyond the powers expressly granted by 28 U.S.C. § 2643(a)(2) to enter money judgments "for or against the United States or any other party in any counterclaim, cross-claim, or third-party action under section 1583 of this title." 28 U.S.C. § 2643(a)(2) (2006). In that regard, the court notes that § 2643(a) does not expressly *limit* the Court of International Trade's powers to enter money judgments to those specified in that subsection. In contrast, § 2643(c)(1) provides that the Court of International Trade has general powers to order any *non*-monetary form of relief that is appropriate to a civil action but makes that general authority subject to the four specific exceptions stated in § 2643(c)(2)-(5). *See id.* § 2643(c). If it were presumed that § 1585 was not intended to include the power to exercise supplemental jurisdiction as exercised by district courts, a question would arise as to why the House Report saw the need to clarify that the powers conferred by § 1585 included *any* remedial powers, when Congress in § 2643 already provided for a broad range of remedial powers and expressed those powers in terms relating to the Court of International Trade's original jurisdiction.[6] It is at least

[6] Those expressly granted remedial powers included, in § 2643(a), powers to order the monetary relief that would be needed in all cases heard under the court's original jurisdiction as provided in 28 U.S.C. §§ 1581 through 1583, and general powers (subject to four exceptions that apply in specific instances in which the Court of International Trade exercises its original jurisdiction) to award any form of non-monetary relief.

plausible to conclude that the powers to order monetary relief as granted by § 1585 extending beyond those specifically identified in § 2643(a) were intended for the exercise of common-law supplemental jurisdiction, as there appear to be no other instances in which such powers would be required.

For these various reasons, the court concludes that the Court of International Trade has the power to exercise common-law supplemental jurisdiction under 28 U.S.C. § 1585, when read in conjunction with § 251(a), which provides that the Court of International Trade is established under Article III. The next question, then, is whether, as plaintiffs argue, §§ 1367 and 1585 together confer upon the Court of International Trade the authority to exercise the statutory supplemental jurisdiction that § 1367 describes. Although it is a close question, the court concludes that they do. The court reaches this decision based largely on the broad language and purposes of § 1585, as apparent in the plain meaning of the provision and as discussed in the legislative history of the Customs Courts Act.

In resolving the jurisdictional issue posed by plaintiffs' claims against the sureties, the court has considered the reference made by the Court of Appeals for the Federal Circuit ("Court of Appeals") in *B-West Imports, Inc. v. United States*, 75 F.3d 633, 635 (Fed. Cir. 1996), that § 1367(a) is "made applicable to the Court of International Trade by 28 U.S.C. § 1585." While instructive, the reference need not be read as constituting a controlling precedent on the jurisdictional question presented here. The reference occurs only in a parenthetical, and no reasoning is presented on the supplemental jurisdiction issue. The parenthetical appears in a description of the decision being affirmed below, *id.*, in which the Court of International Trade rejected on the merits a claim that revocation of an import permit by the Bureau of Alcohol, Tobacco and Firearms violated the Takings and Due Process clauses of the Fifth Amendment. *B-West Imports, Inc. v. United States*, 19 CIT 303, 315 n.15, 880 F. Supp. 853, 864–65 n.15 (1995). In the decision below, the Court of International Trade had held that jurisdiction over the Fifth Amendment claim existed either under 28 U.S.C. § 1581(i) (if the import restrictions at issue were viewed as an "embargo") or alternatively under the supplemental jurisdiction granted by 28 U.S.C. § 1367. *Id.*

Even though it appears to be less than a binding precedent, the reference to the Court of International Trade's supplemental jurisdiction in *B-West Imports* is nevertheless relevant to the narrow jurisdictional question presented here. As it is in any case, the Court of Appeals in *B-West Imports* was under an obligation to determine the Court of International Trade's, and therefore its own, subject matter

jurisdiction over the claim in question (the lack of which jurisdiction could not be waived) before affirming the Court of International Trade's rejection of that claim on the merits. *See, e.g., Dowd v. United States*, 713 F.2d 720, 726 (Fed. Cir. 1983). Therefore, the reference to the Court of International Trade's supplemental jurisdiction in *B-West Imports*, 75 F.3d at 635, however brief, signifies at least that the Court of Appeals did not disagree with the stated premise that § 1367(a) is made applicable to the Court of International Trade by 28 U.S.C. § 1585.[7]

Read according to plain meaning, § 1585 confers on the Court of International Trade those district court powers that expressly are conferred by statute and those that are not. The latter must be seen as those recognized in centuries of Supreme Court jurisprudence addressing the nature and scope of the powers of Article III courts. The common-law authority to exercise supplemental jurisdiction has been recognized in Supreme Court jurisprudence as stemming from the power of an Article III court to decide an entire case or controversy, which in some circumstances may encompass a state law claim that forms part of the same constitutional "case" as does a claim arising under the Constitution, laws, or treaties of the United States. *See Finley*, 490 U.S. at 548–49 (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)).

With respect to powers resulting from statutes, § 1585 provides that the Court of International Trade "shall possess *all* the powers in law and equity of, *or as conferred by statute upon*, a district court of the United States." 28 U.S.C. § 1585 (emphasis added). Had Congress not included the phrase "or as conferred by statute upon," the Court of International Trade, at least arguably, still would possess both the powers in law and equity that are expressly granted the district courts by statute and those that are not. That much seems apparent

[7] The Hartford defendants argue that the Court of Appeals for the Federal Circuit, since *B-West Imports, Inc. v. United States*, 75 F.3d 633 (Fed. Cir. 1996), "[t]ellingly" has "expressly declined to address whether § 1367 applies to the [Court of International Trade]." Hartford Mem. 10 n.7. (citing *Salmon Spawning & Recovery Alliance v. U.S. Cust. & Border Prot.*, 550 F.3d 1121, 1133 n.12 (Fed. Cir. 2008), and *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1053 n.2 (Fed. Cir. 1996)). In neither case, however, was there even a need to decide the question of the Court of International Trade's supplemental jurisdiction under § 1367. In *Salmon Spawning*, the Court of Appeals declined to consider a jurisdictional question that did not affect the outcome of the appeal and that had not been fully briefed. *Salmon Spawning*, 550 F.3d at 1133 n.12. Similarly, there was no need to consider supplemental jurisdiction in *Hanover*, even though the Court of International Trade had cited § 1367 as well as its inherent authority to determine the effect of, and to enforce, its own judgments. *See* 82 F.3d at 1053 n.2. There, the Court of Appeals, citing 28 U.S.C. § 1585, held that the Court of International Trade, like the district courts, "has the inherent power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments." *Id.* at 1054.

from the use of the unqualified words "all the powers in law and equity," which encompass the plenary powers of district courts, however derived.

Although it might be argued that the words "shall possess all the powers in law and equity of, or as conferred by statute upon" must be construed as "frozen in time," *i.e.*, as granting only those powers already granted to district courts as of the 1980 date of enactment of the Customs Courts Act, such a reading would give no effect to the words "or as conferred by statute upon" as used in § 1585. Moreover, this narrow reading soon would lead to an outcome in which the "powers" of the Court of International Trade and the district courts would not be in parallel. Such a result would appear to frustrate the intent of § 1585 as clarified by the House Report, which spoke of granting the newly-created court the "full judicial authority" and "plenary powers" of the district courts, including those as conferred upon the district courts by statute. *See* H.R. Rep. No. 96–1235, at 50, *reprinted in* 1980 U.S.C.C.A.N. at 3762. This is not to suggest that Congress could not confer a power solely on the district courts by excepting explicitly the Court of International Trade and confer such a power without repealing or amending § 1585. In that situation, the obligation to give effect to the later-in-time statute would dispel any notion that such power, by operation of § 1585, would extend to the Court of International Trade. In contrast to such a situation, the legislative history of the Judicial Improvements Act of 1990, which included § 1367, reveals no intent specific to the question of whether § 1367 supplemental jurisdiction may be exercised by the Court of International Trade. To the contrary, the report of the House Committee on the Judiciary associated with the Judicial Improvements Act of 1990 states that, in light of the Supreme Court's holding in *Finley*, legislation "is needed to provide the *federal courts* with statutory authority to hear supplemental claims." H.R. Rep. No. 101–734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874 (emphasis added). No reason is given for why the text of the new provision mentions only the district courts. *See id.* Thus, § 1585, for which a general "frozen in time" construction would not serve the intended purpose as indicated in the plain language and legislative history, may be read in harmony with § 1367, for which Congress displayed no specific intent to preclude exercise by the Court of International Trade of the newly resulting, statutory "district court" power. Section 1367 established that statutory power by codifying, defining, expanding in some ways, and qualifying in other ways, supplemental jurisdiction as it had existed prior to the 1990 enactment. *See id.* at 27–30, 1990 U.S.C.C.A.N. at 6873–76. The court concludes that § 1585 and

§ 1367, when construed together and according to their respective purposes as revealed in legislative history, confer upon the Court of International Trade the statutory form of supplemental jurisdiction that resulted from the 1990 enactment. Although it does not appear to constitute a binding precedent, the reference to supplemental authority in *B-West Imports* provides further support for this conclusion. *See B-West Imports*, 75 F.3d at 635.

The court may exercise supplemental jurisdiction according to 28 U.S.C. § 1367 over claims plaintiffs assert against the surety defendants that "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Plaintiffs' claims against the surety defendants, including those brought jointly against the surety defendants and the United States, arise out of the customs bonds that are the main focus of their action. With respect to defendant United States, plaintiffs contest, under 28 U.S.C. § 1581(i) and the APA, various government actions and inactions involving those same bonds. Because plaintiffs' claims against the surety defendants and many of their claims against the United States arise out of the same case or controversy, the court concludes that it possesses § 1367 supplemental jurisdiction that is sufficient to allow it to examine further, for purposes of ruling on the motions to dismiss, the claims against the sureties. The court also concludes, however, that plaintiffs lack standing according to Article III with respect to a number of these claims, as to which, strictly speaking, there is no justiciable case of controversy for purposes of Article III or § 1367. In contrast, the claims plaintiffs bring in Counts One and Five of the complaint may not be dismissed for lack of standing. The court examines below each of the claims plaintiffs bring against the sureties and sets forth the reasons that each claim must be dismissed.

B. Analysis of Plaintiffs' Individual Claims Against the Surety Defendants

Dismissal for lack of standing is required if a plaintiff cannot establish facts under which the court may find the existence of a case or controversy justiciable under Article III. Establishing standing according to Article III requires a plaintiff to demonstrate that it suffered an "injury in fact," which the Supreme Court has described as an invasion of a legally protected interest which is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

Dismissal for failure to state a claim upon which relief can be granted is required if plaintiffs' factual allegations are not "enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation omitted).

1. Declaratory Judgment that Plaintiffs Are Intended Third-Party Beneficiaries (Count One)

In Count One of the complaint, plaintiffs seek a declaratory judgment that they and the class they seek to represent are "intended third-party beneficiaries of each new shipper bond that secures the payment of [antidumping] duties on imports subject to the relevant NSR [*i.e.*, new shipper review] Order, and as such have rights and benefits under each such bond as if each were a named party to such bond." Compl. ¶ 106. Plaintiffs cite a section of the Restatement of Contracts under which, in certain circumstances, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties.[8] *Id.* ¶ 93 (*citing Restatement (Second) of Contracts* § 302 (1981)). Despite their apparent reliance upon principles embodied in the Restatement of Contracts which refers to the intention of parties, plaintiffs concede as a factual matter that the bond contracts on which they seek to enforce rights are "silent as to the parties' intention to benefit a third party."[9] *Id.* ¶ 96.

Plaintiffs argue, however, that "[w]here, as with the new shipper bonds, a contract mandated by federal law is silent as to the parties' intention to benefit a third-party, it is appropriate to inquire into the

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[8] In pertinent part, the restatement provides: Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Restatement (Second) of Contracts § 302 (1981).

[9] Plaintiffs submit that the issue of whether they are intended third-party beneficiaries is to be decided by "Federal common law." Compl. ¶ 95. Because plaintiffs seek to represent a large class of plaintiffs and are suing a large number of defendants, including some fifty defendants whose identities they do not know, their claims against the sureties that are grounded in contract law may raise choice of law issues. However, the court need not delve into a choice of law analysis in this case because plaintiffs concede the fact that the bond contracts on which they seek to sue are silent as to any intention to benefit them. *See id.* ¶ 96. Therefore, the principles summarized in the Restatement of Contracts are unavailing to plaintiffs absent the effect they attribute to provisions in the antidumping laws.

governing statute and its purpose on the issue of intent." *Id.* In essence, plaintiffs claim that two specific provisions of the antidumping law compel the court to conclude that they are intended third-party beneficiaries under the bonds they identify as being at issue in this case. First, they submit that "[b]y allowing the estimated AD duty deposit requirement on imports from exporters undergoing a NSR to be met by a new shipper bond, Congress intended that the domestic producers being protected by a specific AD order would be intended third-party beneficiaries of all new shipper bonds issued to secure the payment of AD duties under that order." *Id.* ¶ 98. Second, they state that "[t]he passage of the CDSOA confirmed that Plaintiffs and Class members under each of the China NSR Orders are intended third-party beneficiaries of all new shipper bonds issued on imports subject to that order." *Id.* ¶ 99. The court will consider each of these legal theories in turn.

The since-suspended provision of the antidumping law that allowed new shippers to post bonds, 19 U.S.C. § 1675(a)(2)(B)(iii), was added by the Uruguay Round Agreements Act among a set of procedures establishing new shipper reviews.[10] Because it refers to "the Customs Service" and to "bond or security . . . for each entry," the provision must be read in conjunction with 19 U.S.C. § 1623, under which Customs exercises general authority to administer importation and entry bonds. *See* 19 U.S.C. § 1623; 19 C.F.R. § 113.62. As plaintiffs appear to acknowledge, the named parties to the bond contracts, according to the implementing regulations for § 1623, are the surety, the principal (*i.e.*, the importer), and Customs, as an intended third-party beneficiary. Compl. ¶¶ 90, 92; 19 C.F.R. Part 113. Plaintiffs argue that § 1675(a)(2)(B)(iii), read in the context of other provisions of the antidumping law, compels the conclusion that they, as petitioners or domestic like product producers, are also intended third-party beneficiaries of those contracts. *Id.* ¶¶ 98–99. However, neither § 1675(a)(2)(B)(iii) nor any other provision governing new shipper reviews provides or suggests that Congress was altering the ordinary relationships among parties to the customs bonds that were authorized in lieu of cash deposits. *See* 19 U.S.C. § 1675(a)(2)(B).

The court finds nothing in the legislative history of the new shipper review provisions supporting plaintiffs' argument that Congress

[10] The provision reads as follows:

> The administering authority shall, at the time a review under this subparagraph is initiated, direct the Customs Service to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise.

19 U.S.C. § 1675(a)(2)(B)(iii) (2006) (suspended by Pension Protection Act of 2006, Pub. L. No. 109–280, § 1632(a), 120 Stat. 780, 1165 (2006)).

made them intended third-party beneficiaries of bond contracts. The Statement of Administrative Action ("SAA") associated with this legislation explains that the institution of new shipper reviews was intended to solve a specific problem identified in the Uruguay Round negotiations. The problem was that all merchandise covered by an antidumping duty order and exported from a particular country is subject to antidumping duty liability, even though no individual margin can be established for shippers who did not export subject merchandise during the period of investigation and who were not affiliated with any producer or exporter in the exporting country who did so. As the SAA explains, "[d]uring the negotiations, there was an attempt to exempt new shippers from duty liability by requiring an entirely new antidumping investigation (along with a separate finding of injury) for each new shipper." *The Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316 (Vol. 1), at 876 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4203 ("SAA"). The SAA explains, further, that "[t]he United States agreed to a more reasonable proposal . . . to provide new shippers with an expedited review that will establish individual dumping margins for such firms on the basis of their own sales." *Id.*

The argument that the CDSOA confirmed plaintiffs' status as intended third-party beneficiaries fares no better. The CDSOA, in 19 U.S.C. § 1675c, does not mention bonds or another form of security for the collection of antidumping duties. To the contrary, the CDSOA provides that antidumping duties assessed on entries of merchandise subject to antidumping duty orders and findings are to be deposited into special accounts, from which Customs makes distributions each year to ADPs for qualifying expenditures. 19 U.S.C. § 1675c(e) (repealed 2006). Contrary to the claim stated in Count One, the court concludes that nothing in the CDSOA provides or suggests that ADPs are intended third-party beneficiaries of customs bonds issued to importers of merchandise involved in new shipper reviews, or any other customs bonds.

The court finds nothing in 19 U.S.C. § 1623 or the regulations effectuating § 1623, codified as 19 C.F.R. Part 113, providing that any party other than Customs is to be an intended third-party beneficiary to a bond required under these authorities. *See* 19 U.S.C. § 1623; 19 C.F.R. § 113.62. Instead, § 1623 delegates authority to prescribe the forms of bonds, bond conditions, and limits of liability. 19 U.S.C. § 1623(b)(1). Authority is also granted to approve sureties. *Id.* § 1623(b)(2). There is no mention in § 1623 of any obligation or discretion to create rights in any private party or confer a benefit upon a private party. Nor do the Customs regulations, which impose jointly

and severally on the principal and surety the obligation to deposit estimated duties and pay additional duties later determined to be owed, identify any beneficial interest such as that postulated by plaintiffs. *See* 19 C.F.R. § 113.62(a)(1)(i)–(ii). The principal and surety are jointly liable to Customs, not a third party, in the event of default of the obligation to deposit estimated duties. *See id.* § 113.62(l)(4).

Ruling on the motions to dismiss the claim in Count One has required the court to consider this claim on the merits. In doing so, the court concludes that neither the new shipper provisions in the antidumping law, the CDSOA provisions, 19 U.S.C. § 1623, nor 19 C.F.R. § 113.62 makes plaintiffs intended third-party beneficiaries of the customs bonds that they seek to place at issue in this case. Therefore, Count One of plaintiffs' complaint against the surety defendants and the United States must be dismissed according to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. The court, even when assuming all factual allegations made in Count One are true, cannot conclude that plaintiffs have any right to relief on these claims. *See Bell Atlantic Corp*, 550 U.S. at 555.

2. Declaratory Judgment that New Shipper Bonds Were Not Voided by CDSOA (Count Two)

In support of the claim in Count Two of their complaint, plaintiffs state that defendant sureties Hartford and International Fidelity Insurance Company ("IFIC") have asserted as a defense to government actions to recover on customs bonds that the CDSOA invalidated those bonds by making ADPs third party beneficiaries to the bond contracts. Compl. ¶¶ 108–112. Plaintiffs, "[t]o prevent the Surety Defendants from refusing to honor their obligations under the new shipper bonds on the basis of this defense," *id.* ¶ 116, the "CDSOA Bond Voidance Defense," *id.* ¶ 108, seek a declaratory judgment that neither the passage of the CDSOA nor their claimed status as third-party beneficiaries on the bonds that are the subject of this action had the effect of invalidating those bonds. *Id.* ¶ 117.

Plaintiffs' claim in Count Two seeks to confirm, through a declaratory judgment, the validity of certain contracts under which they seek, in other claims brought by their complaint, to assert various rights. But as discussed above, plaintiffs are neither named parties nor intended third-party beneficiaries under the bond contracts they identify. The surety defendants are parties to those contracts, but plaintiffs, lacking status as intended third-party beneficiaries, may not assert rights under those contracts. The other parties to those contracts, who are the principals on the bonds and the importers of merchandise subject to antidumping duty orders and new shipper reviews, are neither parties to this action nor in privity with plain-

tiffs. The court concludes in these circumstances that plaintiffs have no standing under Article III of the Constitution to seek a declaratory judgment confirming the validity of the bond contracts they seek to place into controversy. Pursuant to USCIT Rule 12(b)(1), the court dismisses Count Two of the complaint for lack of jurisdiction.

3. Demand for Declaratory Judgment and Damages for Breach of Contract (Count Three)

In Count Three of their complaint, plaintiffs demand a declaratory judgment that each surety defendant against whom is pending a demand for bond performance that is no longer appealable has breached its obligation under the bond and thereby has injured plaintiffs and their proposed class as intended third-party beneficiaries. Compl. ¶ 122.1. They demand that the court "[a]ward Plaintiffs and Class members that are intended third-party beneficiaries of such bond appropriate damages to be paid by such defendant in an amount to be determined at trial." *Id.* ¶ 122.2.

Again, plaintiffs are not third-party beneficiaries of the bond contracts on which they seek to assert rights to declaratory relief and damages for breach of contract. They therefore lack standing for the claims they bring in Count Three, which must be dismissed under USCIT Rule 12(b)(1).

4. Demand for Recovery of Bond Premiums on an Unjust Enrichment Theory (Count Four)

Plaintiffs address Count Four in their complaint to the possibility that any of the bonds that they seek to place at issue in this case, *i.e.*, the new shipper bonds, is "adjudged to be void, unenforceable, or otherwise compromised or cancelled." Compl. ¶ 125. For any such bond, plaintiffs claim to be entitled to the premiums that the principal paid to the surety defendants. *See id.* Plaintiffs' stated theory is that

> it would be inequitable to allow the Surety Defendant that issued the bond to retain the premiums and/or collateral it received for issuing that bond, because this would unjustly enrich that defendant at the expense of Plaintiffs and Class members, which, as the intended third-party beneficiaries of that bond . . . would have received any payments made under the bond, had it been enforceable.

Id. The surety defendants argue, in support of dismissal of this claim, that no unjust enrichment action could be maintained on the facts as pled because the amounts plaintiffs seek to recover were paid by the

principals on the bonds, not the plaintiffs. Surety Defs. Mot. 28. As the surety defendants also argue, plaintiffs' claim fails because plaintiffs are not third-party beneficiaries on the bond contracts. *Id.* at 27. Because plaintiffs are not third-party beneficiaries, they lack standing to assert their unjust enrichment claim. Because standing is jurisdictional, the court must dismiss the unjust enrichment claim in Count Four according to USCIT Rule 12(b)(1) and therefore does not reach the merits of the unjust enrichment claim for purposes of deciding the alternate motions to dismiss according to USCIT Rule 12(b)(5).

5. Claim for Damages Due to Alleged Negligence by the Sureties in Issuing Bonds (Count Five)

In Count Five, plaintiffs demand that the court hold the surety defendants liable for causing injury to plaintiffs and their proposed class, alleging, in effect, that the surety defendants negligently issued new shipper bonds to importers who were not creditworthy. Compl. ¶¶ 129–140. With respect to a duty of care, plaintiffs posit that each surety defendant "had a duty to each Plaintiff and Class member to use due care under the circumstances in issuing the new shipper bonds." *Id.* ¶ 139. Their theory as to causation-in-fact is that absent the issuance of these bonds, the importers could not have imported subject merchandise at "steeply dumped prices," which merchandise they claim to have caused each of them, and the members of the class they seek to represent, "hundreds of millions of dollars in sales revenue and substantial shares of the relevant U.S. markets." *Id.* ¶ 137. Their theory as to proximate cause is that the injury they suffered was clearly foreseeable from the sureties' issuance, without "due care," of single-transaction customs bonds to importers that did not meet what plaintiffs claim to be industry-wide underwriting standards for such bonds. *Id.* ¶¶ 134, 139. Plaintiffs seek "appropriate damages to be paid by such defendants in an amount to be determined at trial." *Id.* ¶ 140.

The court is aware of no authority or principle under which it could conclude that the surety defendants, on the facts plaintiffs allege, owed plaintiffs a duty of care and thereby assumed liability for "negligently" issuing customs bonds to importers of subject merchandise involved in new shipper reviews. The court could not find such a duty without acting legislatively. Moreover, the injuries plaintiffs allege to have suffered, *see id.* ¶ 137, are the very types of injuries to domestic industries that the antidumping duty laws are intended to redress through the administration of an antidumping duty order (and, for the time period at issue in this case, through the CDSOA). Plaintiffs

appear to be inventing a new tort that would provide them a private remedy for claimed injurious effects caused by the presence in the U.S. market of unfairly traded imports. The remedy plaintiffs seek to enforce directly against the private-party sureties would be in addition to the remedies already afforded by the antidumping statute for those subject imports and, as a practical matter, would act to discourage those imports. That the imports in question were subject to antidumping duty orders—a fact plaintiffs readily admit—demonstrates that plaintiffs already have availed themselves of their statutory remedies.

Plaintiffs' negligence claims are also flawed with respect to a theory of "fault." Plaintiffs' claims essentially are that the surety defendants are liable to plaintiffs for allowing U.S. importers to import subject merchandise who, not being creditworthy, should not have been permitted to do so, even though Congress explicitly authorized the posting of a bond in the instance of a new shipper review and thus intended importers to have an alternative to the posting of a cash deposit. *See* 19 U.S.C. § 1675(a)(2)(B)(iii). Moreover, in advancing their negligence claims, plaintiffs would ignore the role of the surety in the import transaction. The existence of the bond contract addresses a possible inability of an importer to satisfy the duty obligation. A surety that "negligently" issues a single-transaction bond to an importer who is not creditworthy bears the entire risk of the consequences of the importer's default on the duty obligations, up to the limit of liability on the bond.[11] *See* 19 C.F.R. § 113.62.

In summary, there is no basis in law to support plaintiffs' argument that the surety defendants owed a duty of care to plaintiffs with respect to the issuance of bonds to importers with less than perfect creditworthiness. The court concludes, therefore, that plaintiffs' negligence claims against the sureties, though creatively formulated, must be dismissed according to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. The court, even when assuming all factual allegations made in Count Five are true, cannot conclude that plaintiffs have any right to relief on these claims. *See Bell Atlantic Corp.*, 550 U.S. at 555.[12]

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[11] Additionally, the injury of which plaintiffs complain, the economic effects of the unfairly traded imports in the marketplace, also occurs when creditworthy importers bring in subject merchandise. Plaintiffs' demand for a remedy in Count Five thus appears to hinge on an allegation that they were *more* injured than they would have been had the U.S. market contained only subject merchandise imported by creditworthy importers.

[12] Although it can be argued that plaintiffs, not being owed a duty of care, lack standing to bring the claims in Count Five of the complaint, plaintiffs identify injuries caused by the presence of unfairly traded imports in the U.S. marketplace, *see* Compl. ¶ 137, and in this respect may be said to have incurred an "injury in fact" to a "legally protected interest." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

6. Claim Against Sureties for Compromise, Modification, or Discharge (Count Six)

In Count Six of the complaint, plaintiffs allege that the sureties, along with Customs, have acted unlawfully in compromising, modifying, or discharging liability of principals under bonds issued to importers of merchandise subject to new shipper reviews. Compl. ¶ 146. With respect to Customs and the surety defendants, plaintiffs demand that the court declare these alleged actions unlawful, set the alleged actions aside, and enjoin future such actions. *Id.* ¶ 149. Plaintiffs premise their right to demand this relief on their status as intended third-party beneficiaries on the bonds. *See id.* ¶¶ 142, 145, 147. They maintain that Customs and the sureties lacked any authority to compromise, modify, or discharge any liability on a new shipper bond "without the consent of the Plaintiffs and the Class members that are intended third-party beneficiaries of that bond." *Id.* ¶ 145. The claims in Count Six must be dismissed according to USCIT Rule 12(b)(1) because plaintiffs, lacking the status of intended third-party beneficiaries on the bonds plaintiffs describe in this action, have no standing to enforce the rights under those bonds that they seek to assert in this count of their complaint.

IV. Conclusion

Having considered all arguments made by plaintiffs in opposition to dismissal of the claims brought against the surety defendants, the court will grant plaintiffs' motion to file a sur-reply to defendants' reply briefs. After consideration of the motions to dismiss and arguments in opposition, and upon due deliberation, the court deems it necessary to dismiss all claims brought against the surety defendants in this action, whether brought jointly against the surety defendants and the United States or brought solely against the surety defendants. For the reasons discussed in this Opinion and Order, the claims in Counts One, Two, Three, Four, Five, and Six of the complaint must be dismissed. The court reserves decision on the motion of the United States to dismiss Counts Seven through Fifteen. The court denies as moot the motion of the surety defendants for oral argument.

ORDER

Upon consideration of all papers and proceedings herein, it is hereby

ORDERED that the motion of plaintiffs for leave to file a sur-reply to defendants' reply briefs be, and hereby is, GRANTED; it is further

ORDERED that the motions to dismiss filed by the surety defendants be, and hereby are, GRANTED to the extent that these motions seek dismissal of all claims brought against the surety defendants; it is further

ORDERED that all claims stated in Counts Two, Three, Four, and Six of the complaint be, and hereby are, dismissed according to USCIT Rule 12(b)(1) because standing does not exist as to any of these claims; it is further

ORDERED that all claims stated in Counts One and Five of the complaint be, and hereby are, dismissed according to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted; it is further

ORDERED that the named "surety defendants," identified individually as Aegis Security Insurance Company, American Contractors Indemnity Company, American Home Assurance Company, Great American Alliance Insurance Company, Great American Insurance Company, Great American Insurance Company of New York, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, Hartford Insurance Company of Illinois, Hartford Insurance Company of the Midwest, Hartford Insurance Company of the Southeast, International Fidelity Insurance Company, Lincoln General Insurance Company, Washington International Insurance Company, XL Speciality Insurance Company and the unnamed defendants identified in the complaint as "DOES 1 through 50," be, and hereby are, dismissed as parties defendant from this action; it is further

ORDERED that the motion of the surety defendants for oral argument be, and hereby is, DENIED as moot; and it is further

ORDERED that the Clerk of the Court be, and hereby is, directed to amend the caption in this case to read as follows: "SIOUX HONEY ASSOCIATION, ADEE HONEY FARMS, MONTEREY MUSHROOMS, INC., THE GARLIC COMPANY, and BEAUCOUP CRAWFISH, INC., dba RICELAND CRAWFISH, INC., individually and on behalf of all others similarly situated, Plaintiffs, v. UNITED STATES, Defendant."

Dated: March 26, 2010
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 10–32

MITTAL STEEL POINT LISAS LIMITED, Plaintiff, v. UNITED STATES, -and- Defendant, GERDAU AMERISTEEL CORP. et al., Intervenor-Defendants.

Before: Senior Judge Aquilino
Court No. 02–00756

ORDER

The U.S. Court of Appeals for the Federal Circuit ("CAFC") having misread this court's opinion herein *sub nom. Caribbean Ispat Ltd. v. United States*, 29 CIT 329, 366 F.Supp.2d 1300 (2005), to the effect that it "prohibited" the defendant International Trade Commission ("ITC") from "considering the effects of LTFV imports of non-CBERA countries when it assessed imports from Trinidad and Tobago" [*Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336, 1341 (Fed.Cir. 2006)] and having thereupon vacated this court's judgment of dismissal and remanded the matter for the ITC to "make a specific causation determination and in that connection . . . directly address whether [other LTFV imports and/or fairly traded imports] would have replaced [Trinidad and Tobago's] imports without any beneficial effect on domestic producers", *id.*, quoting from *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1373 (Fed.Cir. 2006); and this court having entered an order of remand *in haec verba*, 30 CIT 1519 (2006); and the ITC in compliance with that order having determined that an industry in the United States is not materially injured or threatened with material injury by reason of imports of certain wire rod from Trinidad and Tobago that is sold in the United States at less than fair value; and this court having affirmed that determination *sub nom. Mittal Steel Point Lisas Ltd. v. United States*, 31 CIT 1041, 495 F.Supp.2d 1374 (2007), and entered an amended final judgment of dismissal; and the intervenor-defendants having appealed therefrom and induced the CAFC to opine, among other things, *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 877 (Fed.Cir. 2008), that it does

> not regard the decision in *Bratsk* as requiring the Commission to presume that producers of non-subject goods would have replaced the subject goods if the subject goods had been removed from the market. Although we stated there, and reaffirm here, that the Commission has the responsibility to consider the causal relation between the subject imports and the injury to the domestic injury, that responsibility does not translate into a presumption of replacement without benefit to the domestic industry[ ]

and also that the "problem may stem from a lack of sufficient clarity in [its] prior opinion", 542 F.3d at 879; and the CAFC having determined to vacate yet again this court's judgment of dismissal, notwithstanding the ITC's "scrupulous attention to the terms of this court's remand instructions", *id.*, and remand the matter yet again "for further consideration of the material injury issue in light of [it]s opinion" and also "for further proceedings with respect to the threat of material injury", *id.*; and the mandate of the CAFC having issued in regard thereto; and the Clerk of this court having reopened this matter on March 24, 2010; Now therefore, after due deliberation, it is

ORDERED that this matter be, and it hereby is, remanded to the defendant International Trade Commission, which may have until June 25, 2010 to attempt to comply with the CAFC's reasoning, as set forth in its foregoing, more recent opinion, and to report to this court any results of this mandated remand; and it is further hereby

ORDERED that the other parties hereto have until July 30, 2010 to file comments on any such results.

Dated: March 29, 2010
New York, New York

/*s*/ *Thomas J. Aquilino, Jr.*
SENIOR JUDGE

Slip Op. 10–33

AMES TRUE TEMPER, Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 09–00109

[Defendant's Motion to Dismiss is GRANTED.]

Dated: March 30, 2010

Wiley Rein LLP (*Timothy C. Brightbill*) for Plaintiff Ames True Temper.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Antonia R. Soares* and *Courtney E. Sheehan*); and *Edward N. Maurer*, Deputy Assistant Chief Counsel, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, Of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I
Introduction

This action involves the liquidation of entries of heavy forged hand tools from the People's Republic of China ("PRC") that were subject to an administrative review of an antidumping duty order conducted by the U.S. Department of Commerce ("Commerce"). Because this court lacks jurisdiction over the claim asserted by Plaintiff Ames True Temper ("Ames"), the Motion to Dismiss filed by Defendant United States ("Defendant") is GRANTED and this action is dismissed in its entirety.

II
Background

In September 2006, Commerce concluded the fourteenth administrative review of heavy forged hand tools from PRC that covered merchandise entering the United States between February 1, 2004, and January 31, 2005. *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews and Final Rescission and Partial Rescission of Antidumping Administrative Reviews*, 71 Fed. Reg. 54,269, 54,269 (September 14, 2006) ("*Final Results*").[1] The *Final Results* assigned dumping margins to foreign producers/exporters including Shandong Huarong Machinery Co., Ltd., Tianjin Machinery Import & Export Corp., and Shandong Machinery Imports & Export Co. (collectively, the "Shandong plaintiffs").[2] *Id.* at 54,269, 54,271.

The Shandong plaintiffs challenged the *Final Results* in *Shandong Huarong Machinery Co., Ltd. v. United States*, No. 06–00345 (CIT filed October 26, 2006) (the "Shandong case"). Ames participated in the Shandong case as Defendant-Intervenor. *Shandong Huarong Mach. Co., Ltd. v. United States*, Slip Op. 08–135, 2008 WL 5159774, *1 (CIT December 10, 2008). On November 13, 2006, the Shandong plaintiffs filed a consent motion for preliminary injunction to enjoin

[1] Ames was the petitioner in the fourteenth administrative review of heavy forged hand tools from PRC. *Final Results*, 71 Fed. Reg. at 54,269 n.3.

[2] The fourth producer/exporter covered by the fourteenth administrative review of heavy forged hand tools from PRC, Iron Bull Industrial Co., Ltd., *Final Results*, 71 Fed. Reg. at 54,269, did not participate in the litigation challenging the *Final Results*. *See Shandong Huarong Mach. Co., Ltd. v. United States*, Slip Op. 08–135, 2008 WL 5159774 (CIT December 10, 2008).

the liquidation of certain entries while the action was pending. *Id.* at 3. On November 17, 2006, the court granted a preliminary injunction which enjoined the liquidation of entries of merchandise that "remain unliquidated as of 5:00 p.m. on the fifth business day after which copies of this Order are personally served on" specified government officials or their delegates. *Id.* at *1–*2 (citing *Shandong Huarong*, Court No. 06–00345 (Order dated November 17, 2006) ("PI order")). This language was prepared by the Shandong plaintiffs in their consent motion for preliminary injunction, *id.* at *1, and obligated them to file a certificate of service "immediately after service." USCIT R. 5(d)(1).

The Shandong plaintiffs did not serve the officials specified in the PI order until May 2007. Defendant's Motion to Dismiss ("Defendant's Motion") Att. B: Declaration of Ann M. Sebastian ¶¶ 2, 5. On October 31, 2007, Defendant moved to dismiss the Shandong case, alleging that the entries at issue were "deemed liquidated" under 19 U.S.C. § 1504(d) as of March 14, 2007—six months after publication of the *Final Results*. *See Shandong Huarong*, 2008 WL 5159774 at *2 (citation omitted). Pursuant to this statute, entries not liquidated by U.S. Customs and Border Protection ("Customs") within six months of notice from Commerce "shall be treated as having been liquidated at the rate" initially asserted by the importer. 19 U.S.C. § 1504(d). The rate asserted by the Shandong plaintiffs upon entry was based on prior administrative reviews of the antidumping order. *Shandong Huarong*, 2008 WL 5159774 at *5.

The Shandong plaintiffs consented to dismissal of the Shandong case. *Id.* at *2. Ames did not consent to the dismissal and instead sought reliquidation pursuant to the *Final Results*, *id.*, claiming that the rate asserted by the Shandong plaintiffs upon entry was inappropriately low. *Id.* at *5. The court in December 2008 held that the subject entries were deemed liquidated six months from publication of the *Final Results*. *Id.* at *2–*4 (citing *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (Fed. Cir. 2002)). The court explained that the PI "order was ineffective because it was not properly served" and therefore did not suspend liquidation. *Id.* at *4. Applying the rule that liquidation "renders moot an action . . . challenging the amount of dumping duties assessed on subject merchandise following a final determination," the court dismissed the Shandong case and along with it Ames' challenge. *Id.* at *5, *6.

The court found that "the only remedy Ames seeks — reliquidation — is one the court cannot order as a consequence of the mootness doctrine." *Id.* at *5. With respect to the deemed liquidation, the court explained that "the validity of the entered rate is not a subject of this

action." *Id.* at *6. The Shandong case concluded by observing Defendant's suggestion that Ames could "bring an action in its own right to protect whatever its own interest may be . . . . What defendant-intervenor may not do, however, is append a new cause of action, based on a record not before the court, to [the Shandong] plaintiffs' existing suit." *Id.* (quotation omitted).

Ames filed this case in March 2009 asserting jurisdiction under 28 U.S.C. § 1581(i). Complaint ¶¶ 2, 3. Ames alleges that Customs unlawfully "permitted the entries to liquidate at rates far below the rates calculated by Commerce" in the *Final Results*. *Id.* ¶ 6. Although Ames' Complaint references the Shandong case proceedings and outcome, *id.* ¶¶ 7–8, the only relief that Ames seeks is that previously denied—reliquidation in accordance with the *Final Results*. *Id.* at 4 ("Plaintiff respectfully requests that this Court issue an order directing [Customs] to reliquidate the improperly liquidated entries, in accordance with the rates finally determined by [Commerce] in the *Final Results*.") (emphasis added). Defendant moves to dismiss pursuant to U.S. Court of International Trade Rule 12(b)(1), contending that the court lacks jurisdiction. Defendant's Motion at 1, 4–10.

III
Standard Of Review

In deciding a motion to dismiss, "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 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). "Dismissal for failure to state a claim upon which relief can be granted is proper if the plaintiff's factual allegations are not 'enough to raise the right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Int'l Custom Prods., Inc. v. United States*, 549 F. Supp. 2d 1384, 1389 (CIT 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). When jurisdiction is challenged, "[t]he party seeking to invoke the Court's jurisdiction bears the burden of proving the requisite jurisdictional facts." *Former Employees of Sonoco Prods. Co. v. United States*, 27 CIT 812, 814, 273 F. Supp. 2d 1336 (2003) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)).

IV
Discussion

Ames' challenge to compel reliquidation pursuant to the *Final Results* is moot because the subject entries were deemed liquidated, as

previously recognized by the court. *Infra*, Part IV.A. To the extent that Ames seeks to challenge the rate applied to the subject entries resulting from the deemed liquidation,[3] Ames lacks statutory standing as a domestic producer and therefore jurisdiction under 28 U.S.C. § 1581(i) does not exist. *Infra*, Part IV.B.

A

Ames' Challenge Is Moot Because The Subject Entries Were Deemed Liquidated

Courts lack jurisdiction over moot claims; the United States Supreme Court explains that "[m]ootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions.'" *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971) (quoting *United States v. Alaska S. S. Co.*, 253 U.S. 113, 116, 40 S. Ct. 448, 64 L. Ed. 808 (1920)). The Federal Circuit first held that liquidation will moot a challenge to duties assessed on those entries in *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983) ("Once liquidation occurs, a subsequent decision by the trial court on the merits . . . can have no effect on the dumping duties assessed on entries"). This decision gave rise to "[t]he *Zenith* rule" that "renders a court action moot once liquidation occurs." *SKF USA, Inc. v. United States*, 512 F.3d 1326, 1329 (Fed. Cir. 2008). This applies to entries deemed liquidated by operation of 19 U.S.C. § 1504(d). *Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187, 1191 (Fed. Cir. 2009) (citing *SKF USA*, 512 F.3d at 1329) (*SKF USA* "held that under the Zenith rule the deemed liquidation rendered the importer's claims moot in the absence of an injunction.").

In dismissing the Shandong case, the court determined that "the merchandise has been liquidated pursuant to the deemed liquidation

[3] Given "the liberal pleading requirements of the Federal Rules," *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1327 (Fed. Cir. 1998), Ames' Complaint is construed as both to compel liquidation under the *Final Results*, as initally contested by the Shandong plaintiffs, and a challenge to the deemed liquidation rate, as suggested by the court (albeit with the remedy sought by Ames as replacing the rate asserted upon entry by the Shandong plaintiffs with the rate from the *Final Results*). *See* USCIT R. 8(a), (e)(1), (f) (employing identical language as Fed. R. Civ. P. 8(a), (d)(1), (e)); Complaint ¶¶ 2, 7, 8; *Shandong Huarong*, 2008 WL 5159774 at *1–*2, *6.

statute." [4] *Shandong Huarong*, 2008 WL 5159774 at *4. Because the subject entries were not liquidated within six months of the Final Results, they were deeemed liquidated at the rate asserted upon entry by operation of 19 U.S.C. § 1504(d). *Id.* at *2–*4; *see Int'l Trading*, 281 F.3d at 1272. Ames unsuccessfully opposed dismissal by invoking precedent wherein deemed liquidation did not automatically render a claim moot. *See Shandong Huarong*, 2008 WL 5159774 at *4–*5. After surveying the applicable cases, *id.* at *5 n.8, the court concluded as follows:

> While the Court of Appeals for the Federal Circuit and this Court have recognized exceptions to the general rule, these exceptions are inapplicable here. That is, no Court has found that it has jurisdiction to order reliquidation, at an increased rate, because merchandise was deemed liquidated at an inappropriately low entered rate determined in a previous review. As defendant points out, those cases where reliquidation has been ordered all involve errors made by government agencies in contravention of a statute or in violation of a court ordered injunction. Those cases are far removed from deemed liquidation resulting from a law office failure.

Id. at *5 (citation omitted).

Ames now presents the same argument to avoid mootness, *see* Plaintiff's Response to Defendant's Motion to Dismiss ("Ames' Response") at 5–6, and it is no more persuasive. In particular, neither *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004) ("*Shinyei I*"), nor *Shinyei Corp. of Am. v. United States*, 524 F.23d 1274 (Fed. Cir. 2008) ("*Shinyei II*"), aid Ames. In *Shinyei I*, an importer challenged the liquidation instructions from Commerce to Customs and the Federal Circuit held that the *Zenith* rule did not apply in that particular situation. *See Shinyei I*, 355 F.3d at 1309. In *Shinyei II*, the Federal Circuit clarified that once "an entry is deemed liquidated, the duty rate is the deposit rate, and Customs may not recover additional duties from the importer thereafter." *Shinyei II*, 524 F.3d at 1283 (emphasis omitted) (citations omitted). Because Ames here seeks to impose additional duties on the importer and does not challenge liquidation instructions, *Shinyei I* and *Shinyei II* are

[4] Ames asserts that the subject liquidation resulted from purposeful action taken by Customs and was therefore "not a deemed liquidation pursuant to 19 U.S.C. § 1504(d)." Plaintiff's Response to Defendant's Motion to Dismiss at 6. However, Defendant is correct that both the record establishes the subject liquidation having occurred by operation of law, *see* Reply in Support of Defendant's Motion to Dismiss at 5 (citing *Shandong Huarong*, 2008 WL 5159774 at *4), and the distinction is irrelevant for determining mootness, *id.* at 4–5 (quoting *SKF USA*, 512 F.3d at 1329).

inapplicable and the *Zenith* rule renders Ames' challenge moot. *See Zenith Radio*, 710 F.2d at 810.

This outcome is not affected by the December 2009 Federal Circuit decision in *Agro Dutch Industries Ltd.*, 589 F.3d 1187 (Fed. Cir. 2009).[5] There, an importer obtained a preliminary injunction that became effective after service upon designated officials. *Id.* at 1189. The government consented to the injunction, but requested and received a five-day grace period between service and the effective date of the injunction as a means to avoid an indadvertant violation. *Id.* Customs affirmatively liquidated the subject entries on the day that the injunction was served—before the injunction went into effect by virtue of the grace period. *Id.* The court found that the liquidation did not render the challenge moot, declining to apply the Zenith rule and ordering the injunction effective as of its date of issuance. *Agro Dutch Indus. Ltd. v. United States*, Slip Op. 08–110, 2008 WL 4604397, *2 (CIT October 17, 2008). The Federal Circuit affirmed by holding that Zenith will not render a challenge moot where affirmative liquidation contradicts the purpose of a grace period contained in the injunction. *Agro Dutch*, 589 F.3d at 1193.

Agro Dutch Industries Ltd. is readily distinguishable from Ames' challenge, despite both involving preliminary injunction orders with five-day grace periods. *See Shandong Huarong*, 2008 WL 5159774 at *1–*2; *Agro Dutch*, 589 F.3d at 1189. In *Agro Dutch Industries Ltd.*, Customs affirmatively liquidated the subject entries during this grace period notwithstanding proper service of the injunction. *Agro Dutch*, 589 F.3d at 1189. By contrast, Ames' challenge involves the deemed liquidation of entries pursant to 19 U.S.C. § 1504(d) months after the issuance of an injunction that never went into effect because of improper service. *See Shandong Huarong*, 2008 WL 5159774 at *1–*2. *Agro Dutch Industries Ltd.* cannot be construed as broadly as Ames seeks, for its "reasoning . . . focuses upon the effect of Customs' act of liquidating the entries during the five-day period between the injunction's issuance and its effective date." *Agro Dutch*, 589 F.3d at 1193 n.2. Moreover, the Federal Circuit's survey of the narrow exceptions to the *Zenith* rule confines *Agro Dutch Industries Ltd.* to its facts. *See id.* at 1191–92 & n.1. Because the instant case does not involve affirmative liquidation during an injunction grace period,

[5] Both parties claim support from this decision that was rendered subsequent to the briefing on Defendant's Motion. *See* Plaintiff's Notice of Supplemental Authority (January 7, 2010); Defendant's Motion for Leave to Respond to Plaintiff's Notice of Supplemental Authority (January 26, 2010), at 3.

Agro Dutch Industries Ltd. does not alter the mootness of Ames' challenge.[6]

The core of Ames' argument to avoid mootness is the arguably unfair result if it cannot obtain reliquidation. According to Ames, the Shandong plaintiffs knowingly did not serve the PI order to "produce a windfall if the entries were deemed to have liquidated at the fraudulent rates claimed at the time of entry, rather than at the higher rates calculated by Commerce." Ames' Response at 4. Ames maintains that its challenge is necessary to prevent "perversely reward[ing]" the Shandong plaintiffs, *id.* at 4, 18, "permit[ting] fraud against the U.S. government to go unaddressed," id., and nullifying both the administrative process leading to the *Final Results* and the judicial process in the Shandong case. *Id.* Defendant acknowledges that the outcome it seeks is "unfortunate, in that the Shandong plaintiffs are being rewarded with low rates based upon their own, possibly purposeful, failure to serve" the PI order. Reply in Support of Defendant's Motion to Dismiss ("Defendant's Reply") at 8.

Application of the *Zenith* rule renders a case moot without consideration of the underlying circumstances. *SKF USA*, 512 F.3d at 1329 ("*Zenith* focused on the fact of liquidation; it did not turn on the nature of the action giving rise to liquidation."). Therefore, the Shandong case was properly dismissed as moot during the threshold jurisdictional inquiry. *Shandong Huarong*, 2008 WL 5159774 at *4–*5. In language directly relevant here, the court explained: "Ames apparently believes that the claimed illegitimacy of the entered duty rates provides a basis for jurisdiction. Ames' arguments are unpersuasive." *Id.* (citation omitted).

This court reaches the same conclusion that any challenge predicated on the *Final Results* was rendered moot by operation of the deemed liquidation statute. *See id.* at *4–*5. Ames argues that its assertion that Customs acted contrary to statute prevents dismissal. Ames' Response at 7; *see* Complaint ¶¶ 6, 10, 8 [sic] (11), 9 [sic] (12). Courts, however, "are not bound to accept as true a legal conclusion

[6] Ames' position is also not aided by the March 2010 Federal Circuit decision in *American Signature, Inc. v. United States*, No. 2010–1023, 2010 WL 786568 (Fed. Cir. 2010). In that case, "Commerce transmitted liquidation instructions to Customs, which reflected the error in the assessment rate" for plaintiff's subject entries attributable "to a computer programming error in Commerce's antidumping margin calculation computer programs." *Id.* at *2, *3. The plaintiff was denied a preliminary injunction to prevent Customs or Commerce from taking any action to liquidate or reliquidate the subject entries, and the Federal Circuit reversed by finding that consideration of each factor weighed in favor of granting the preliminary injunction. *Id.* at *6, *8–*11. *American Signature, Inc.* does not impact Ames' challenge because the instant dispute involves a preliminary injunction that was granted, as opposed to being denied, and does not involve liquidation instructions.

couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). This court lacks jurisdiction because it "is not empowered to decide moot questions or abstract propositions." *Rice*, 404 U.S. at 246 (quotations omitted).

B

Ames Lacks Statutory Standing To Challenge The Deemed Liquidation

In dismissing the Shandong case, the court indicated that Ames could initiate litigation to challenge the "validity of the entered rate" applicable as a result of the deemed liquidation. *See Shandong Huarong*, 2008 WL 5159774 at *6. However, Defendant is correct that such recourse is available "only to the extent that Ames could meet its burden of establishing this Court's jurisdiction." Defendant's Reply at 4. Ames cannot carry this burden because domestic producers lack statutory standing to challenge deemed liquidation.[7]

The Federal Circuit first recognized that deemed liquidation may be challenged only by importers through filing a protest under 19 U.S.C. § 1514 in *Cemex, S.A. v. United States*, 384 F.3d 1314 (Fed. Cir. 2004). "By contrast, domestic parties have no specific avenue of relief for improper liquidation. Unlike importers, domestic parties are limited to prospective challenges to the rate and classification of antidumping duty decision, as provided in 19 U.S.C. § 1516." *Id.* at 1322 (emphasis removed). *Cemex* rejected the ability of the court to "exercise judicial review over a domestic industry's challenge to . . . liquidation" because "section 1516 contemplates remedies solely prospective in nature, and cannot after-the-fact cure Customs' decisions with respect to liquidation, legal or illegal." *Id.* at 1322–23.

Cemex drew its distinction between relief available to importers and domestic producers based upon legislative history. *Id.* at 1323 (quoting *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1551 (Fed. Cir. 1988)) ("After much debate, Congress determined that any relief" for American manufacturers "could only be prospective in nature."). The Federal Circuit decisions since Cemex invariably recognize that deemed liquidation may only be challenged by the affected importer. *See Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1243 (Fed. Cir. 2007); *SKF USA*, 512 F.3d at 1331 n.1; *Shinyei I*, 355 F.3d at 1302

[7] Ames' argument that it has constitutional standing, Ames' Response at 7–11, need not be addressed because Defendant "did not raise a jurisdictional challenge based on constitutional standing—only mootness and statutory standing." Defendant's Reply at 6 n.2 (citations omitted). Furthermore, the unpublished order that Ames relies upon to establish constitutional standing is limited to the context of challenging premature liquidation. *See* Ames' Response at 9, 10 (citing *SSAB N. Am. Div. v. United States*, Court No. 07–00057 (Order dated November 20, 2007, at 6)); Defendant's Reply at 5.

n.2; *Shinyei II*, 524 F.3d at 1284. *Cemex* acknowledged the potentially harsh result "where Congress declined to give domestic producers protest rights . . . . Unfair as that may seem, the proper forum for remedying the harshness of the statute is Congress, not this court." *Cemex*, 384 F.3d at 1325.

As a domestic producer, Ames here lacks statutory standing to challenge the deemed liquidation.[8] Jurisdiction under 28 U.S.C. § 1581(i) cannot be used to permit a cause of action disallowed by Congress. *See Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (describing 28 U.S.C. § 1581(i) as a "'catch-all' provision" that "preserves the congressionally mandated procedures and safeguards.") (citations omitted). Ames' reference to the Administrative Procedure Act, 5 U.S.C. §§ 702 *et seq.* ("APA"), Complaint ¶¶ 3, 9 [sic] (12), is unavailing because the APA "does not give an independent basis for finding jurisdiction in the Court of International Trade." Am. *Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1552 (Fed. Cir. 1983). Ames' assertion that it has standing, Complaint ¶ 3, is simply another legal conclusion. *See Papasan*, 478 U.S. at 286. Ames has no statutory standing, and this court lacks jurisdiction over Ames' challenge to the deemed liquidation.

V
Conclusion

For the reasons stated above, Defendant's Motion to Dismiss is GRANTED and this action is dismissed in its entirety.

Dated: March 30, 2010
New York, New York

__/s/ Evan J. Wallach__
EVAN J. WALLACH, JUDGE

[8] Given this conclusion, the dispute as to whether Ames timely initiated litigation need not be resolved. *See* Defendant's Motion at 9–10; Ames' Response at 14–17.