

UNITED STATES COURT OF INTERNATIONAL TRADE

GLOBAL ALUMINUM DISTRIBUTOR LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Before: Richard K. Eaton, Judge
	:	
UNITED STATES,	:	Consol. Court No. 21-00198
	:	
Defendant,	:	
	:	
and	:	
	:	
TA CHEN INTERNATIONAL, INC.,	:	
	:	
Defendant-Intervenor.	:	

MEMORANDUM AND ORDER

[Proposed Plaintiff-Intervenor’s motion to reconsider the court’s denial of its motion to intervene is granted.]

Dated: October 7, 2021

David J. Craven, Craven Trade Law LLC, of Chicago, IL, for Plaintiff Global Aluminum Distributor LLC.

Alexander Vanderweide, Senior Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-in-Charge, and *Aimee Lee*, Assistant Director. Of counsel on the brief were *Tamari J. Lagvilava* and *Chelsea Reyes*, Office of the Chief Counsel, U.S. Customs and Border Protection, of New York, N.Y.

Jeremy W. Dutra, Squire Patton Boggs (US) LLP, of Washington, D.C., for Defendant-Intervenor Ta Chen International, Inc.

Brady W. Mills, Morris Manning & Martin LLP, of Washington, D.C., for Proposed Plaintiff-Intervenor Kingtom Aluminio S.R.L. With him on the brief were *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas, III*, and *Jordan L. Fleischer*.

Eaton, Judge: Before the court is Kingtom Aluminio S.R.L.'s ("Kingtom") motion for reconsideration of the denial of its motion to intervene, ECF No. 44, together with the responses of Defendant-Intervenor Ta Chen International, Inc., ECF No. 45; Plaintiff Global Aluminum Distributor LLC, ECF No. 46; and Consolidated Plaintiff Hialeah Aluminum Supply, Inc., ECF No. 49. Defendant the United States did not file a response to the motion to reconsider. In reaching its decision, the court has considered Kingtom's supplemental briefing and its confidential declaration in further support of its motion to intervene, ECF No. 57 ("Brief") & 57-1 ("Declaration"). Both were filed in response to the court's August 5, 2021 order, ECF No. 50.

BACKGROUND

Here, Plaintiff Global Aluminum Distributor LLC ("Plaintiff"), a U.S. importer, seeks judicial review of a determination by U.S. Customs and Border Protection ("Customs"), issued pursuant to its authority under the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517 (2018), that Plaintiff entered, through evasion, certain "covered merchandise," *i.e.*, Chinese aluminum extrusions that are subject to antidumping and countervailing duty orders, to avoid paying those duties. *See* 19 U.S.C. § 1517(a)(3), (g); *see also* Notice of Final Determination as to Evasion, EAPA Case No. 7348 (Nov. 2, 2020); and Decision on Request for Admin. Review, EAPA Case No. 7348 (Mar. 18, 2021).

Kingtom is the producer and exporter that sold this merchandise to Plaintiff. *See* Brief 3-4. Kingtom moved to intervene on the side of Plaintiff as a matter of right, or in the alternative with the court's permission.¹ *See* USCIT R. 24(a), (b).

¹ It is undisputed that Kingtom's motion to intervene was timely filed.

DISCUSSION

Intervention is governed by this Court's Rule 24. Subsection (a) sets out the requirements for intervention "of right," which was revised in 2018 to account for certain aspects of the EAPA (the evasion statute):

On timely motion, the court must permit anyone to intervene who . . . in an action described in [the evasion statute, 19 U.S.C. § 1517(g)], is a person determined to have entered merchandise through evasion or is the interested party that filed the allegation; or claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

USCIT R. 24(a)(2)²; *see generally* 19 U.S.C. § 1517. The revised Rule takes into account persons "determined to have entered merchandise through evasion," *i.e.*, those in Plaintiff's position. None of the changes to the Rule, however, address intervention by an interested party in Kingtom's position as a producer and exporter.³ Thus, if Kingtom has a right to intervene, the basis for

² Rule 24(b) provides for permissive intervention. *See* USCIT R. 24(b). The court will not address permissive intervention because it finds Kingtom may intervene of right.

³ Under the evasion statute, an "interested party" is defined as follows:

(i) a foreign manufacturer, producer, or exporter, or the United States importer, of covered merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise;

(ii) a manufacturer, producer, or wholesaler in the United States of a domestic like product;

(iii) a certified union or recognized union or group of workers that is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product;

(iv) a trade or business association a majority of the members of which manufacture, produce, or wholesale a domestic like product in the United States;

intervention must be found in the older remaining language of the Rule providing for intervention by a person who “claims an interest relating to the property or transaction that is the subject of the action.”

In order to intervene of right under the older provisions, the moving party “must claim an interest in the property or transaction at issue that is ‘legally protectable—merely economic interests will not suffice.’” *N. Am. Interpipe, Inc. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1313, 1323 (2021), *appeal docketed*, No. 2021-2180 (Fed. Cir. July 30, 2021) (quoting *Wolfsen Land & Cattle Co. v. Pac. Coast Fed’n of Fishermen’s Ass’ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012)). In addition, “that interest’s relationship to the litigation must be ‘of such a *direct* and *immediate* character that the intervenor will either gain or lose by the *direct* legal operation and effect of the judgment.” *Id.* at __, 519 F. Supp. 3d at 1323. Finally, “the movant must demonstrate that said interest is not adequately addressed by the [existing parties’] participation.” *Id.* at __, 519 F. Supp. 3d at 1323 (citing *Wolfsen*, 695 F.3d at 1315).

(v) an association a majority of the members of which is composed of interested parties described in clause (ii), (iii), or (iv) with respect to a domestic like product; and

(vi) if the covered merchandise is a processed agricultural product, as defined in section 1677(4)(E), a coalition or trade association that is representative of either—

(I) processors;

(II) processors and producers; or

(III) processors and growers.

19 U.S.C. § 1517(a)(6)(A).

Kingtom has demonstrated that it satisfies these requirements.⁴

I. Kingtom’s Contractual Arrangements Provide an Interest in the Transaction at Issue That Has a Direct and Immediate Relationship to the Litigation

The court first finds that Kingtom has demonstrated that it has a legally protected interest in the transaction that is the subject of the action. *See* USCIT R. 24(a)(2). The word “transaction,” as traditionally used in customs law, means only the act of entering a product into the United States.⁵ Since the word as used in Rule 24(a)(2) was borrowed⁶ from Federal Rule of Civil Procedure 24, however, it can be presumed that a broader meaning is intended. Thus, for these purposes, the court finds that transaction means the whole transaction by which the merchandise was sold, transported, entered, and paid for.

As Kingtom attests, the transaction at issue here is governed by a contract to, *inter alia*, sell and arrange for shipment of Dominican-origin aluminum extrusions, *that were not subject to antidumping or countervailing duties*, to its customers. *See* Brief 3 (citing Declaration ¶¶ 3-4, 15). According to Kingtom, Customs made a “factual finding . . . that Kingtom did not tender the merchandise agreed upon under contract (*i.e.*, Dominican produced [aluminum extrusions]) and

⁴ Because the court finds that Kingtom may intervene of right, and seeks the same relief as Plaintiff, *i.e.*, remand of this matter to Customs with instructions to terminate its investigation and order the liquidation of entries without the addition of antidumping and countervailing duties, the requirement of constitutional standing is satisfied here. *See Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017).

⁵ *See, e.g., Nat’l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 30 CIT 1838, 1839, 465 F. Supp. 2d 1300, 1302 (2006) (emphasis added) (describing a single “transaction” bond as one that covers the obligation to pay duties, taxes, and charges obligations “arising from one *entry*”).

⁶ Indeed, prior to the 2018 amendments to Rule 24(a) nearly all of the wording was taken from Federal Rule of Civil Procedure 24(a), and this Court has held that opinions construing that rule are at least persuasive authority for construing the Court of International Trade Rule. *Interpipe*, 45 CIT at ___, 519 F. Supp. 3d at 1323 (citing *Wolfsen*, 695 F.3d at 1315).

knowingly subjected its customers to additional potential liabilities,” by tendering Chinese-origin aluminum extrusions subject to antidumping and countervailing orders. *See* Brief 3.

As the seller and exporter of the merchandise, Kingtom has a clear interest in disputing Customs’ claim that it did not fulfill the terms of its contract. Although demonstrating that it did indeed perform in accordance with the terms of its contract would, no doubt, have some effect on Kingtom’s future business, its interest in demonstrating that it fulfilled its obligations gives it an interest in the contract itself, that is not merely economic. That is, Customs’ determination necessarily lays Kingtom open to a claim that it breached its contract by failing to tender and deliver aluminum extrusions *not* subject to the antidumping and countervailing duty orders. While it is not known what effect this finding might ultimately have on the contractual arrangements themselves, Kingtom surely has a protectable legal interest in demonstrating it did not breach its contract.

It is also the case that, were Kingtom excluded from this action, as a practical matter its ability to protect that interest would be impaired or impeded. *See* USCIT R. 24(a)(2). Kingtom’s situation is not dissimilar to a person joining in a lawsuit to protect “an interest relating to the subject of the action” where “disposing of the action in the person’s absence may . . . *as a practical matter impair or impede the person’s ability to protect the interest.*” USCIT R. 19(a)(1)(B)(i) (emphasis added); *see also* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1604, at 33 (4th ed. 2019) (observing that “protecting the absent persons from the possible prejudicial effect of deciding the case without them” is among the policies guiding joinder under Federal Rule of Civil Procedure 19(a)). This same policy guides the court in reaching its finding here. Kingtom’s interest in defending itself against claims that it breached its contract is, “as a practical matter,” an interest that directs its intervention in this case.

Finally, the protection of Kingtom's interest in the contract is of a direct and immediate character such that the company will either gain or lose by the effect of the judgment in the case. Customs' finding that Kingtom did not tender the aluminum extrusions as provided for in its contract could be used to support a finding that it breached a contract that has been fully performed. Were the court to sustain this finding, its possible use in other negotiations or proceedings would follow immediately.

II. The Existing Parties' Representation of Kingtom's Interest Is Inadequate

"The burden of showing inadequacy of representation is 'minimal,' requiring only a showing that an existing party's representation of [the proposed intervenor's] interests 'may be' inadequate as to some aspect of the case at bar." *Wolfsen*, 695 F.3d at 1315 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Here, Kingtom points out that "[w]hile the importers in this case are on the hook for the payment of the duties for the transactions during the period of investigation, the factual findings themselves are not against them, but against Kingtom." Brief 8. In addition, Kingtom maintains that its "interests are more expansive than those of the named importers before the Court" in that it has an interest not only in the transaction at issue before the court, but also in transactions with importers not party to this action, who are under investigation by Customs. *See* Brief 7.

As noted in the court's discussion above, Kingtom has an interest in demonstrating that it fulfilled its contractual obligations. This is quite a different matter from an importer contesting an obligation to pay additional duties, which may rely on different legal theories and different facts taken from the record. The court thus finds Kingtom's interest is not adequately protected by those parties interested primarily in avoiding payment of duties, and this favors Kingtom's intervention as a matter of right.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion for reconsideration is granted; and it is further

ORDERED that Kingtom shall have the status of Plaintiff-Intervenor in this action, pursuant to Rule 24(a)(2).

/s/ Richard K. Eaton
Richard K. Eaton, Judge

Dated: October 7, 2021
New York, New York