THE BAN ON INTERVENTION IN 28 U.S.C. § 1581(A) CASES: TIME FOR A REAPPRAISAL?[1]

I. Introduction

The Federal Rules of Civil Procedure recognize that in many cases, litigation may affect the interests of persons other than the original parties who bring a dispute to court. In this regard, FRCP 24 provides for both "intervention of right" and "permissive intervention" in Federal lawsuits.[2] Rule 24 of the Rules of the United States Court of International Trade (USCIT R.) also provides for "intervention of right" in specific circumstances, and "permissive intervention" which is always subject to the court's discretion.[3]

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[2] FRCP 24 provides:

Rule 24. Intervention.

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
    (1) is given an unconditional right to intervene by a federal statute; or
    (2) 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.

(b) Permissive Intervention.
    (1) In General. On timely motion, the court may permit anyone to intervene who:
        (A) is given a conditional right to intervene by a federal statute; or
        (B) has a claim or defense that shares with the main action a common question of law or fact.
    (2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
        (A) a statute or executive order administered by the officer or agency; or
        (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

[3] USCIT R. 24 provides in relevant part:

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
    (1) is given an unconditional right to intervene by a federal statute; or
    (2) in an action described in section 517(g) of the Tariff Act of 1930, 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.

For its part, the Customs Courts Act of 1980,[4] is unique in that while it provides for both intervention of right and permissive intervention, it affirmatively prohibits intervention in certain types of cases—namely, those challenges brought under the U.S. Court of International Trade's (CIT) protest jurisdiction, 28 U.S.C. § 1581(a) and domestic interested party petition jurisdiction, 28 U.S.C. § 1581(b). Thus, Section 301 of the Customs Courts Act provides:

> 28 U.S. Code § 2631 - Persons entitled to commence a civil action.
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> (j)
> (1) Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that—
> (A) **no person may intervene in a civil action under section 515 or 516 of the Tariff Act of 1930**;
> (B) in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right; and
> (C) in a civil action under section 777(c)(2) of the Tariff Act of 1930, only a person who was a party to the investigation may intervene, and such person may intervene as a matter of right.
> (2) In those civil actions in which intervention is by leave of court, the Court of International Trade shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(Emphasis added). The intervention ban in 28 U.S.C. § 2631(j)(1)(A) relates to protest denial challenges under Section 515 of the Tariff Act,[5] and "Domestic Interested Party" challenges to Customs

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> (3) In an action described in 28 U.S.C. § 1581(c) …. [and satisfying certain statutory conditions]
> (b) Permissive Intervention.
> (1) In General. On timely motion, the court may permit anyone to intervene who:
> (A) is given a conditional right to intervene by a federal statute; or
> (B) has a claim or defense that shares with the main action a common question of law or fact.
> (2) By a Government Officer or Agency. On timely motion, the court may permit a federal governmental officer or agency to intervene if a party's claim or defense is based on:
> (A) a statute or executive order administered by the officer or agency; or
> (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.
> (3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

[4] Customs Courts Act of 1980, Pub. L. 96-417, October 10, 1980, 94 Stat. 1727.

[5] 19 U.S.C. § 1515. The statute deals with administrative review of importers' protests, and provides in pertinent part that (emphasis added):

determinations under Section 516 of that Act.[6] Interestingly, these types of cases accounted for virtually the entire docket of the United States Customs Court, which was the Article I predecessor to the CIT. It does not affect other cases which the 1980 Act placed within the CIT's expanded jurisdiction, which remain subject to traditional concepts of intervention of right, and permissive intervention.[7]

Historically, the bar on intervention was grounded in the fact that cases arising under Section 515 and 516 almost uniformly related to taxation disputes between the taxpayer and the taxing authority. Indeed, the "Domestic Interested Party Petition" procedure set out in Section 516 has always been controversial because it is an exception to that common adversarial relationship, and Congress has narrowly tailored the relief available thereunder by requiring extensive administrative proceedings before suit may be brought in the CIT, limiting litigation of Section 516 actions to a single identified

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> Notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary. Such notice shall include a statement of the reasons for the denial, as well as a statement **informing the protesting party of his right to file a civil action contesting the denial of a protest under section 1514 of this title.**

[6] 19 U.S.C. § 1516 is known as the "Domestic Interested Party Petitioners" statute (formerly known as the American Manufacturer's Protest), and it allows certain domestic parties—domestic manufacturers, producers or wholesalers, certified or recognized unions or groups of workers, and trade or business associations, all the foregoing engaged in the domestic manufacture, production or wholesaling of a "class or kind" of merchandise—to file a written request with the Secretary of the Treasury for information concerning the "classification and rate of duty" applied to such class or kind of merchandise. *See also* 19 C.F.R. Part 175. The procedure is also available to domestic producers of raw agricultural produce concerned with the Customs treatment of a processed agricultural article. If dissatisfied with the Secretary's response, the interested party may file a petition with the Secretary indicating the classification or rate of duty it feels is correct. The Secretary will then publish a notice in the Customs Bulletin of its decision on the petition. If the Secretary agrees with the domestic petitioners, imported merchandise will, commencing 30 days after the Secretary's decision is published, be classified or assessed with duty in accordance with that decision. If the Secretary disagrees with the domestic petitioner's position, it will notify Customs to identify a single entry of covered product whose classification or appraisement the domestic party may challenge before the CIT. Despite the seemingly unconditional 28 U.S.C. § 2631(j)(1)(A) ban on intervention in such cases, 19 U.S.C. § 1516(e) provides:

> (e) Consignee or his agent as party in interest before the Court of International Trade
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> The consignee or his agent shall have the right to appear and to be heard as a party in interest before the United States Court of International Trade.

(Emphasis added). The CIT exercises jurisdiction over these challenges pursuant to 28 U.S.C. § 1581(b). Because the domestic interested party procedure is time-consuming and limited in impact, it has fallen into disuse in recent years. The most recent reported decision in a case arising under § 1581(b) is more than two decades old, *see Rubie's Costume Co. v. United States,* 26 C.I.T. 209 (2002), and no new § 1581(b) complaints have been filed since 1999.

[7] *See e.g.,* USCIT R. 24, which provides rules for intervention as of right in subsection (a), and permissive intervention in subsection (b), but curiously does not mention the 28 U.S.C. § 2631(j)(1)(A) statutory ban on intervention in cases arising under Sections 515 and 516 of the Tariff Act.

protest, and providing prospective relief only if the domestic petitioner is successful.[8] Indeed, the opening which Congress has created for parties other than importers to be heard on Customs taxation matters is so narrow that the CIT has ruled that parties wishing to be heard in Section 515 protest denial cases ordinarily should not be permitted to participate in importers' protest lawsuits even as *amici curiae*.[9]

In recent years, however, the CIT has seen a notable increase in 28 U.S.C. § 1581(a) actions commenced by the filing of protests which do not involve taxation. Often, these cases involve protests against Customs' exclusion of merchandise from entry for various reasons.[10] These reasons may include claimed infringement of patents incorporated in limited or general exclusion orders issued by the United States International Trade Commission (USITC), under Section 337 of the Tariff Act of 1930;[11] infringements of trademarks recorded with Customs for import protection in accordance with the provisions of the Lanham Act,[12] and associated Customs regulations;[13] importation of suspected piratical copies of copyrighted works under the Copyright Act;[14] exclusion of goods suspected of being made

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[8] The courts have rejected the notion that, because Section 516 proceedings are time-consuming, burdensome and only provide prospective relief, the remedy is inadequate, and parties may invoke the CIT's 28 U.S.C. § 1581(i) "residual" jurisdiction instead. *See e.g., Norcal/Crosetti Foods, Inc*., 963 F. 356 (Fed. Cir. 1992); *but see also e.g., Luggage and Leather Goods Mfrs. Inc. v. United States,* 7 C.I.T. 258 (1984) (finding the Domestic Interested Party procedure of Section 516 inadequate because the petitioners sought to challenge a Presidential Proclamation relating to the Generalized System of Preferences (GSP), a matter as to which the Customs authorities had no authority to provide the petitioners with administrative relief).

[9] *See e.g., Jedwards Int'l v. United States,* 161 F. Supp. 3d 1350 (Ct. Int'l Tr. 2016). By way of comparison, the United States Tax Court, which operates according to its own procedural rules, traditionally did not provide for intervention in its rules. Like the CIT and the Customs Court before it, the Tax Court looked to the FRCP for guidance in situations not covered by its own rules. *See* Cole Barnett and Christopher Weeg, *Intervention in the Tax Court and the Appellate Review of Tax Court Procedural Decisions*, 67 Fla. L. Rev. 1483 (2015). After a series of lawsuits involving attempts by the government of the U.S. Virgin Islands to intervene in certain Tax Court matters produced a circuit split, the Tax Court proposed, and later adopted, its own rule on intervention of right and permissive intervention. *See e.g.,* U.S. Tax Court R. 64.

[10] Section 514(a)(4) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514(a)(4), allows importers to protest:

> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title …

[11] 19 U.S.C. § 1337.

[12] 15 U.S.C. § 1125(b).

[13] 19 C.F.R. Part 133.

[14] 17 U.S.C. § 602.

with forced labor;[15] and exclusion of goods suspected of being "drug paraphernalia" under the Mail Order Drug Paraphernalia Control Act of 1986,[16] and Controlled Substances Act.[17] In such cases, there may be parties other than the importer and Customs who have a significant stake in the outcome of Section 515 protest actions—for instance, owners of intellectual property whose scope or validity is being litigated before the CIT; other government agencies whose official orders are being construed by the Trade Court; industry actors or government officials in jurisdictions where prior controlled substances prohibitions have been repealed; and many others. Most of these stakeholders would at least be permitted to make a case for permissive intervention in most Federal courts but find themselves confronted by an absolute statutory bar in the CIT, 28 U.S.C. § 2631(j), which reduces them to at best *amici curiae,* or at worst mere bystanders.

The absence of these interested parties can make 28 U.S.C. § 1581(a) litigation in the CIT something of a charade as it prevents the court's decision, when issued, from having collateral estoppel or *res judicata* effect (if, indeed, *res judicata* is even possible in protest cases). Often, litigants exit the CIT with their decisions and are made to resume or relive the battle in another forum.

Under these circumstances, it may be time to consider whether the absolute bar on intervention in 28 U.S.C. § 2631(j)(1)(A) should be relaxed or reconsidered.

II. The CIT's Interpretation of the 28 U.S.C. § 1581(a) Intervention Ban.

In recent years, the CIT has seen numerous cases where parties other than the protestant and the government have sought to intervene in actions arising under Section 515 of the Tariff Act. The presence

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[15] 19 U.S.C. § 1307.

[16] Mail Order Drug Paraphernalia Control Act of 1986 ("Paraphernalia Control Act"), Pub. L. 99-570, 100 Stat. 3207-51, 21 U.S.C. § 863.

[17] Controlled Substances Act ("CSA"), Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 21 U.S.C. §§ 801-972.

of the statutory intervention bar[18] has generally (but not always) blocked intervention, and in many cases, has prompted the court to deny the would-be intervenor the right to participate as *amicus curiae*.

In *Jazz Photo Corp. v. United States*,[19] an importer filed suit to challenge Customs' exclusion from entry of certain disposable cameras alleged to infringe certain patent claims incorporated in a 19 U.S.C. § 1337 General Exclusion Order (GEO) issued by the USITC against Certain Lens-Fitted Film Packages. The action did not require the CIT to construe any of the patent claims incorporated in the GEO, or to determine their validity, but merely to evaluate the importer's affirmative defenses that the patent holder's rights had been exhausted pursuant to a prior authorized "first sale" of the merchandise by the patent owner, and that the importer had engaged in "permissible repair" of the used "camera shells" it had collected and imported. The owner of the underlying patents—*i.e.,* Fuji Photo Film Corp.—was advised it could not intervene due to the statutory ban in 28 U.S.C. § 2631(j)(1)(A); and instead, Fuji was granted leave to participate in the case as *amicus curiae*, and even to appear at pretrial oral argument.[20]

However, Fuji did not comport itself as a traditional *amicus curiae* during the course of litigation. It did not file one brief, but multiple briefs, each accompanied by motions for leave to do so. After trial, the Court decided the case largely in the plaintiff's favor, and Fuji peppered the Court with a flurry of motions, including an emergency motion to reopen the record of a trial it had not been a party to,[21] motions to obtain access to trial record materials, to require publication of a public trial record, and for reconsideration of the Court's decision and judgment.[22] Perhaps most outrageously, Fuji, although not a party to the action—docketed an appeal from the Court's decision with the United States Court of

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[18] 28 U.S.C. § 2631(j)(1)(A).

[19] *Jazz Photo Corp. v. United States*, 28 C.I.T. 1954, 353 F. Supp.2d 1327 (Ct. Int'l Tr. 2004), aff'd, 439 F.3 1344 (Fed. Cir. 2006).

[20] *Jazz Photo Corp. v. United States*, CIT Case No. 04-00494, at ECF 14.

[21] *Id*. at ECF 64.

[22] *Id*. at ECF 112.

Appeals for the Federal Circuit.[23] In the end, all of Fuji's machinations did it no good, and the Federal Circuit affirmed the CIT's decision in all respects. Even so, Fuji's antics greatly increased the plaintiff's cost of litigation, consumed significant resources of the Court and its staff,[24] and complicated both trial and appellate proceedings.

This inappropriate behavior did not go unnoticed by the CIT. In *Corning Gilbert Inc., v. United States,*[25] an action involving an importer's protest against the exclusion of its merchandise from entry pursuant to a USITC 19 U.S.C. § 1337 exclusion order, in which the CIT would perform a construction of patent claims[26], the owner of the patents at issue—*i.e.,* PPC—moved for leave of court to appear and participate fulsomely as *amicus curiae*. The CIT denied the motion, noting the court's prior experience dealing with Fuji's antics in the *Jazz Photo* case:

> With that said, amicus briefs are not altogether unheard of in section 1581(a) actions. *See, e.g*., *Amoco Oil Co. v. United States,* 7 CIT 13, 583 F. Supp. 581 (1984) (allowing amicus brief on legal issue of meaning of tariff provision). PPC points out that the court has previously granted an *amicus* motion in a similar case, *Jazz Photo Corp. v. United States*, Court No. 04-00494. In *Jazz Photo*, a domestic patent holder, like PPC, sought to participate as amicus curiae in a section 1581(a) action challenging the exclusion of merchandise covered by an ITC general exclusion order. Although the court granted the motion, it did so without explanation. *See* Order on Fuji's Mot. to Appear as *Amicus Curiae*, Oct. 13, 2004, ECF No. 14. More important, in its quite lengthy disposition on the merits involving complex factual findings and conclusions of law related to the underlying patents, the court also resolved in one paragraph a bevy of outstanding motions relating to the amicus curiae (at least six, perhaps more), granting some and denying others. *Jazz Photo Corp. v. United States*, 28 CIT 1954, 1996, 353 F. Supp. 2d 1327, 1363 (2004), aff'd 439 F.3d 1344 (Fed. Cir. 2006). Reading between the lines, one wonders whether the amicus submissions (and attendant motions) aided the court, or proved more of a burden and distraction.[27]

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[23] *Id*. at ECF 83.

[24] USCIT R. 1 (Rules of the CIT "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.")

[25] *Corning Gilbert Inc., v. United States*, 36 C.I.T. 680 (2012),

[26] *Corning Gilbert Inc. v. United States*, 37 C.I.T. 155 (2013).

[27] 36 C.I.T at 682.

The *Corning Gilbert* court acknowledged that the patent owner "has a direct and immediate interest in this litigation,"[28] but the court nevertheless stated that it:

> … does not believe that PPC's participation at this point in the litigation will assist with the 'just, speedy, and inexpensive determination' of this action. USCIT R. 1. Instead, the court believes that PPC may prove more of a hindrance than help, as the court will have to repeatedly weigh whether PPC's participation runs afoul of the prohibition on intervention."[29]

The court also noted the unique nature of USCIT R. 76, which concerns participation of parties in litigation before the court as *amicus curiae*:

> USCIT Rule 76, which governs amicus curiae motions, is unique to the U.S. Court of International Trade as a trial-level federal court. It has no counterpart in the Federal Rules of Civil Procedure, but instead finds a parallel in Rule 29 of the Federal Rules of Appellate Procedure. Rule 76 is a consequence of the hybrid nature of the subject matter jurisdiction of the U.S. Court of International Trade. In some actions, *e.g.*, those brought under section 1581(a), the court functions as a federal district court hearing cases *de novo*; in others, such as those commenced under 28 U.S.C. § 1581(c), the court functions as a federal circuit court of appeals, reviewing determinations based on the record made before an administrative agency. Rule 76, therefore, should typically find application in those actions in which the court functions as an appellate court.
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> The specific contours of Rule 76 make this clear. The rule provides that an applicant may, with the court's permission, file "a brief," and, for extraordinary reasons, participate in "the oral argument." USCIT R. 76. These are predominantly (though not exclusively) appellate concepts. The rule certainly does not contemplate general participation at the trial level, with everything that entails (*e.g.*, procedural motions, discovery motions, or settlement discussions). The broad scope of PPC's requested involvement—the filing of briefs on all pending motions and the ultimate disposition of this case—is problematic. PPC, in effect, is seeking the same rights as those afforded an intervenor. In the court's view, granting PPC's motion would be akin to granting a motion to intervene, which is statutorily barred by section 2631(j)(1)(A).[30]

Thus, the statutory intervention bar of 28 U.S.C. § 2631(j)(1)(A) creates a tension with at least two rules of the CIT: *First*, it denies interested parties the ability to seek intervention in 19 U.S.C. § 1515 cases, which would be permissible under USCIT R. 24 but for the statutory intervention bar; and *Second*, it skews participation as *amicus curiae* under USCIT R. 76 away from 19 U.S.C. § 1515 cases. In a case

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[28] *Id.*

[29] *Id.* at 683.

[30] *Id.* at 681-82.

arising in the Federal District Courts, a person showing it would be significantly affected by the outcome of a case would, upon meeting requirements for permissive intervention, be allowed to participate in a trial-level proceeding (subject to such conditions and restraints as the court, in its discretion, might impose). However, in the CIT, even those with a significant stake in the outcome are forced to observe from the sidelines.

Similarly, litigants in intellectual property rights cases have found themselves reduced to observer status. In *Otter Products, LLC v. United States,*[31] a patent holder was denied participation in a case where the plaintiff-importer contested the exclusion of its goods pursuant to a 19 U.S.C. § 1337 exclusion order. Following *Corning Gilbert*, with a nod to the *Jazz Photo* case, the *Otter Products* court denied the patent holder even the right to file an *amicus brief*:

> Based upon the court's reading of Speck's motion, it is clear to the court that Speck desires a role greater than that of an *amicus curiae*. To that end, Speck effectively seeks to become a defendant-intervenor in the case and advocate for its own benefit. (ECF No. 26 at 2-3.) The court is statutorily prohibited from permitting parties to intervene in § 1581(a) cases. 28 U.S.C. § 2631(j)(1)(A); accord *Jazz Photo Corp. v. United States*, 439 F.3d 1344, 1357 (Fed. Cir. 2006); *Corning Gilbert*, No. 11-511 (CIT June 14, 2012) (order denying motion for leave to appear as amicus curiae). The court therefore denies the motion.

Obviously, the Court is required by 28 U.S.C. § 2631(j)(1)(A) to deny an *amicus* motion which is in fact an intervention motion in disguise. However, as noted in *Corning Gilbert,* a court could condition participation by *amicus curiae* to recognize its substantial interest in the litigation, and to avoid denying it a voice in the dispute altogether.

In at least one case, the CIT treated a patent owner's renewed motion to participate as *amicus curiae* as a motion to intervene, and denied it on the basis of the statutory intervention bar under 28 U.S.C. § 2631(j)(1)(A).[32] In another, the CIT denied an intervention motion of the USITC, even though it was the agency's own 19 U.S.C. § 1337 exclusion order which had been applied by CBP to imports

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[31] *Otter Products, LLC v. United States*, 38 C.I.T. 1931, 1944 (2014).

[32] *One World Techs. v. United States,* 357 F. Supp. 3d 1278, 1288 (Ct. Int'l Tr. 2018).

protested by the importer and brought to court under 28 U.S.C. § 1581(a), and with its exclusion order now being subject to review and construction in the CIT.[33]

At least one decision, however, was willing to look beyond the statutory ban on intervention in 19 U.S.C. § 1515 cases. In *Luxury Int'l Inc. v. United States*,[34] an importer protested Customs' exclusion of imported "Tetris" games, which Customs contended contained piratical software. The copyright holder issued a demand to Customs to hold the goods while *inter partes* proceedings regarding the authenticity of the copyrighted software were conducted administratively. The importer contended that the copyright owner had not timely posted the required penal bond, and it commenced suit in the CIT pursuant to 19 U.S.C. § 1515. The copyright owner moved to intervene in the importer's protest action. Seemingly disregarding the statutory intervention ban in 28 U.S.C. § 2631(j)(1)(A), the CIT looked to the permissive intervention rules of USCIT R. 24(b), to allow the copyright owner to intervene:

> The fact remains that barring ZAO's intervention may impair its ability to protect the reputation of its goods and the security it has posted with Customs.
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> Finally, the Court finds that ZAO's interest will not be adequately represented by the government in the original action. As stated above, ZAO's security is at stake as is the reputation of its products. This is quite different from the government's interest in seeing that its regulations are properly interpreted and applied. To illustrate this point, the Court notes that it is possible that a proper interpretation of the government regulations could yield a result contrary to ZAO's interest.
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> Because ZAO has satisfied the criteria for non-statutory intervention as of right under USCIT R. 24(a)(2), the Court grants its motion to intervene. 3 Accordingly, the Court concludes that it is not necessary to consider the issues pertaining to] statutory intervention as of right pursuant to USCIT R. 24(a)(1) nor permissive intervention pursuant to USCIT R. 24(b). See *Sumitomo Metal Indus., Ltd. v. Babcock & Wilcox Co*., 69 C.C.P.A. 75, 81, 669 F.2d 703, 707 (1982). The Court remands the matter to Customs to allow Customs to determine administratively whether there is an infringement of ZAO's copyright.[35]

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[33] *Wirtgen Am Inc. v. United States*, 437 F. Supp. 1302, 1306 (Ct. Int'l Tr. 2020).

[34] *Luxury Int'l Inc. v. United States*, 23 C.I.T. 694 (1999).

[35] *Id.* at 699-700.

The *Luxury Int'l* court made no attempt to distinguish the statutory intervention ban, or state why it should not be applied.

Where cases have involved more traditional matters of duty assessment, the CIT has been steadfast in denying intervention and has been generally unwilling to hear presentations of interested parties as *amicus curiae*.[36] The (proper) judicial reluctance not to allow external intrusion into such cases was explained in *Jewards Int'l Inc. v. United States,*[37] where a company styled as a producer and importer of krill oil, similar to that whose classification was at issue, asked to be heard. The Court denied the *amicus curiae* application, noting:

> The court notes at the outset that any contested motion to appear as *amicus curiae* in a Customs' classification action is viewed with a measure of skepticism because Congress long ago codified the practice of this Court's predecessor, the Customs Court, limiting participation of third parties in classification and valuation actions. 28 U.S.C. § 2631(j)(1)(A) ("Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that—(A) no person may intervene in a civil action under section 515 or 516 of the Tariff Act of 1930."); Customs Courts Act of 1980, S. REP. No. 96-466 at 14 (1979) (continuing existing law barring intervention in denied protest litigation); H.R. REP. No. 96-1235 at 52 (1980), 1980 U.S.C.C.A.N. 3729, 3764.

The court noted the derivation of USCIT R. 76 regarding intervention and concluded:

> DSM's motion and assertion of an alternative classification for the subject merchandise beyond that claimed by the parties implicates the statutory prohibition against intervention in classification actions, and raises an issue about the appropriateness of *amicus curiae* in *de novo* classification cases at the U.S. Court of International Trade. *See id*. at 837 F. Supp. 2d at 1305 (citing *Stewart-Warner Corp. v. United States*, 4 CIT 141, 142 (1982) ("The Court is also somewhat concerned that in this action participation as *amicus* should not become a substitute for intervention. Participation in this action by intervention is expressly forbidden by … 28 U.S.C. § 2631(j)(1)(A)")); *see also United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) ("*Amicus curiae* may not and, at least traditionally, has never been permitted to rise to the level of a named party/real party in interest nor has an *amicus curiae* been conferred with the authority of an intervening party … ").

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[36] *Koyo Corp. of USA v. United States*, 412 F. Supp. 2d 1340-1341 (Ct. Int'l Tr. 2015); *House of Lloyd Inc. v. United States*, 11 C.I.T. 278 (1987); *Stewart-Warner Corp. v. United States*, 4 C.I.T. 141, 142 (1982); *Matsushita Elec. Ind. Co. v. United States*, 2 C.I.T. 554, 555 (1981).

[37] *Jewards Int'l Inc. v. United States*, 161 F. Supp. 3d 1350, 1352-53 (Ct. Int'l Tr. 2016).

While a blanket ban on intervention may well be appropriate to 19 U.S.C. § 1515 cases involving traditional issues of duty assessment,[38] it is less suited to cases involving an exclusion of merchandise from U.S. entry, where persons other than the importer and the government may have substantial interests at stake. Excluding these parties from being heard reduces the importance and usefulness of CIT decisions in these cases by precluding the court's decisions from having *res judicata* effect. To this extent, the intervention ban in 28 U.S.C. § 2631(j)(1)(A) cuts against Congress' goal of establishing the CIT as a fully empowered Article III court with *all* the powers in law and equity of other federal district courts.

III. The *Res Judicata* Issue.

Jurisprudential considerations militate against repeated litigation of the same issues of law and fact. The doctrine of *res judicata*, also known as "claim preclusion," makes a final judgment on the merits binding upon all parties to the action or any party in privity with the parties to the action, and precludes them from brining a second suit based on the same cause of action.[39] A party is considered to be in privity to a prior party when the party to the prior litigation represented the same legal right, as applied to the same subject matter.[40] In this respect, *res judicata* prevents the parties, or their privies, from relitigating both the issues that were raised and the issues that could have been raised in the prior litigation.[41]

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[38] By definition, cases arising under 19 U.S.C. § 1516 almost always deal with traditional taxation issues. However, in at least one case, the court has indicated that § 1516 petitions may be used to raise issues regarding country of origin marking, which it styled a "rate of duty" issue because of the potential for improperly marked goods to be assessed with a penalty duty under 19 U.S.C. § 1304. *See Norcal/Crosetti Foods Inc. v. United States*, 963 F.2d 356 (Fed. Cir. 1992) (reversing and vacating a CIT decision which had allowed the domestic packers to present their position in a case brought pursuant to the court's 28 U.S.C. § 1581(i) residual jurisdiction, noting that the matter was best presented under 19 U.S.C. § 1516 and 28 U.S.C. § 1581(b). The domestic petitioners subsequently filed a 19 U.S.C. § 1516 petition, which Customs approved, publishing a rule requiring particular marking of all packages of frozen vegetables. *Treasury Decision 94-5.* This, in turn, ignited further litigation which set aside Customs' marking requirement as having been adopted without following Administrative Procedure Act (APA) notice-and-comment rulemaking requirements. *American Frozen Food Inst. v. United States*, 18 C.I.T. 565 (1994).

[39] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979).

[40] *Jefferson School v. Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963).

[41] *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

The application of *res judicata* requires identity of parties. A person that a court deems neither a party nor a privy[42] is considered a "stranger" to the litigation, and is therefore not bound by a judgment in that suit.[43] A non-party is not bound by another party's judgment, even if a prior judgment decided an identical issue against their position, because this preclusion would prevent the non-party from having an opportunity to be heard.[44]

Thus, the ban on intervention will at times result in adjudications by the CIT which (unlike district court judgments) will lack *res judicata* effect, and not bind litigants from relitigating the same issue. The claim construction which the CIT performed in *Corning Gilbert Inc. v. United States,*[45] and which reflected considerable work by the court, would not preclude re-litigation of the issue in another forum, simply because the patent holder--who had sought to participate in the case-- was prevented from doing so by the statutory intervention bar of 28 U.S.C. § 2631(j)(1)(A). In these cases, the intervention bar prevents the CIT from assuming full equivalency to the Federal District Courts.

It is sometimes said that decisions in 19 U.S.C. § 1515 cases do not have *res judicata* effect because of the Supreme Court's decision in *United States v. Stone & Downer Co*.[46] But such a claim applies the *Stone & Downer* decision far beyond its intended boundaries, and is a gross over-simplification. The question presented in *Stone & Downer* was whether decisions on tariff classification matters by the Board of General Appraisers (the forerunner to the U.S. Customs Court) had *res judicata* effect. The Board of General Appraisers, having been created by the Tariff Act of 1890,[47] had been required to create its own jurisprudence. It had concluded that its decision in a given tariff classification

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[42] "Privies" refers to individuals or entities that are not actual parties to a lawsuit but have a legally recognized interest in the outcome of the litigation due to their relationship with one of the parties.

[43] *Richards v. Jefferson County*, 571 U.S. 793, 798 (1996). The Due Process Clause of the United States Constitution protects this principle by incorporating the right to be heard in judicial proceedings. Id. at 797.

[44] *Parklane, supra note 39,* 439 U.S. at 322, 327 n. 7.

[45] *Corning Gilbert Inc. v. United States*, 37 C.I.T. 155 (2013).

[46] *United States v. Stone & Downer Co.,* 274 U.S. 225 (1927).

[47] The Tariff Act of 1890, ch. 1244, 26 Stat. 567 (1890), also known as the "McKinley Tariff," significantly raised import duties on foreign goods to protect US industries and was a precursor to later protectionist tariff laws.

case was not binding in a subsequent case between the same parties, or between different parties, involving identical or substantially identical merchandise. The Supreme Court, while acknowledging the application of *res judicata* to taxation matters generally, noted that the Board of General Appraisers, in the exercise of its jurisdiction:

> … established the practice that the finding of fact and the construction of the statute and classification thereunder, as against an importer, was not res judicata in respect of a subsequent importation involving the same issue of fact and the same question of law. 48

> The Supreme Court, like the Board of General Appraisers and the subsequently-formed Court of Customs Appeals (CCPA), recognized that the adjudication of a classification issue for one shipment of merchandise, should not bar litigation of the classification issue as it concerns a subsequent shipment of identical or similar merchandise, noting:The fact that objection to the practice has never been made before, in the history of this Court or in the history of the Court of Customs Appeals in eighteen years of its life, is strong evidence not only of the wisdom of the practice but of general acquiescence in its validity. The plea of *res judicata* can not be sustained in this case. [49]

That the Supreme Court's limitation on the application of *res judicata* to Customs protest cases was specific to a certain class of taxation cases is clear. Lower courts have significantly limited application of *Stone & Downer* over the years.[50] While an appellate court would likely not apply the rule

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[48] *United States v. Stone & Downer Co.,* 274 U.S. at 233-34.

[49] *Id.* at 236-37.

[50] Thus, as noted in *Shah Bros. Inc. v. United States*, 38 C.I.T. 1314, 1318 n.9 (2014):

> While it is true that, due to "the unique and continually shifting facts of merchandise classifications, 'a determination of fact or law with respect to one importation is not res judicata as to another importation of the same merchandise by the same parties,'" *Gulfstream Aerospace Corp. v. United States*, 21 CIT 1083, 1093, 981 F. Supp. 654, 664 (1997) (footnote omitted) (quoting *Schott Optical Glass, Inc. v. United States*,750 F.2d 62, 64 (Fed. Cir. 1984) (relying on *United States v.Stone & Downer Co.*, 274 U.S. 225 (1927))), the rationale behind this jurisprudence does not apply where, as here, Custom sseemingly arbitrarily treats identical merchandise, imported by the same importer and during substantially the same time period, without any intervening change in law or fact, differently. See,e.g., *Heartland By-Products, Inc. v. United States*, 26 CIT 268, 277, 223 F. Supp. 2d 1317, 1328 (2002) (discussing the "significant subsequent narrowing of the [Stone & Downer] principle by statute and caselaw," and noting that the rationale behind the *Stone & Downer* decision and its progeny was a narrow concern "that a [classification] decision would create binding law between one [importer] and Customs that would be applied to another [importer], without giving the second [importer] a chance to litigate any distinguishing elements"); *Gulfstream Aerospace,* 21 CIT at 1094, 981 F. Supp. at 665 (distinguishing *Stone & Downer* and holding that the outcome of prior litigation regarding a challenge to Customs' specific procedure for classifying the type of merchandise at issue in that case was preclusive against Customs in a later litigation challenging Customs' use of the same procedure to classify subsequent entries of the same merchandise).

to a 19 U.S.C. § 1515 decision by the CIT involving matters of exclusion of goods from entry, the rule might well be rendered inapplicable by the lack of identity of parties in a CIT litigation to a subsequent litigation involving the same transactions and the same issues.

IV. Conclusion.

Given the increasing complexity and diversity of actions brought before the United States Court of International Trade in actions pursuant to 19 U.S.C. § 1515, and heard under the Court's 28 U.S.C. § 1581(a) jurisdiction, the blanket ban on intervention imposed by 28 U.S.C. § 2631(j)(1)(A) is at this point both unnecessary and unwise. Intervention may well be appropriate and useful in some of these cases, and the Court of International Trade should be given the power to consider applications for permissive intervention in such cases. This will bring the CIT's Article III power in line with that of other federal district courts, and eliminate the present disharmony between the statutory intervention ban of 28 U.S.C. § 2631(j)(1)(A), 19 U.S.C. § 1516(e), and the Rules of the U.S. Court of International Trade.