IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE JANE A. RESTANI, CHIEF JUDGE
THE HONORABLE DONALD C. POGUE, JUDGE
THE HONORABLE JUDITH M. BARZILAY, JUDGE

TOTES-ISOTONER CORPORATION, Plaintiff, v. UNITED STATES, Defendant.	Court No. 07-00001

ORDER

Upon consideration of defendant's motion to dismiss and all other papers and proceedings in this matter; and upon due deliberation, it is hereby

ORDERED that defendant's motion be, and hereby is, granted, and it is further

ORDERED that the action is dismissed.

JANE A. RESTANI, CHIEF JUDGE

DONALD C. POGUE, JUDGE

JUDITH M. BARZILAY, JUDGE

Dated: _____
New York, New York

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TOTES-ISOTONER CORPORATION, Plaintiff, v. UNITED STATES, Defendant.	)	Court No. 07-00001

DEFENDANT'S MOTION TO DISMISS

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Dated: September 19, 2007

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

THE CONSTITUTION OF THE UNITED STATES

STATUTES

TABLE OF AUTHORITIES (cont'd)

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TOTES-ISOTONER CORPORATION, Plaintiff, v. UNITED STATES, Defendant,	Court No. 07-00001

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(5) of the Rules of this Court, we respectfully request the Court to dismiss the complaint. In support of this request, we rely upon the allegations of the complaint and the following memorandum of law.[1]

QUESTIONS PRESENTED

1. Whether the political question doctrine bars review of plaintiff's claim.

2. Whether plaintiff has standing to bring an equal protection claim relative to import tariffs when plaintiff does not possess a due process right to import any product.

3. Whether plaintiff has failed to satisfy the constitutional and prudential requirements for standing to bring an equal protection claim.

[1] For purposes of this motion only, we treat the allegations of the complaint as true. If the Court denies this motion, we respectfully reserve our right to respond to the complaint and to deny the allegations contained in the complaint.

4. Whether the complaint, which claims a violation of equal protection guarantees but does not allege that plaintiff has not received equal protection, states a claim upon which relief can be granted.

NATURE OF THE CASE

Totes-Isotoner Corporation ("Totes-Isotoner") asserts that the provisions of the Harmonized Tariff Schedule of the United States "unlawfully and unconstitutionally discriminate on the basis of gender or age." Compl. ¶ 1. Totes-Isotoner seeks to recover duties that have been assessed against it in accordance with the provisions of the Harmonized Tariff Schedule. Compl. ¶ 1. Totes-Isotoner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1581(i)(1), Compl. ¶ 2.

STATEMENT OF THE CASE

I. Trade Policy Is Reserved To Congress And The President

The Harmonized Tariff Schedule of the United States incorporates, among other things, tariffs established through decades of multilateral negotiations with and among those countries to whom the United States grants "normal trade relations" (previously known as "most favored nation") status. Currently, this includes the approximately 150 countries that are members of the World Trade Organization.

The Constitution provides authority in the area of foreign affairs and foreign commerce to the political branches of government – Congress and the President. The Constitution states that Congress may "regulate Commerce with foreign Nations" and vests Congress with the express authority to establish tariff

rates. U.S. Const. art. I, § 8, cl. 3. The President is also vested with foreign affairs powers and the authority to make treaties. U.S. Const. art. II, § 1, § 2, cls. 1 & 2, and § 3. Equipped with these powers, the President negotiates duty rates with other countries. In some circumstances, Congress, then, enacts implementing legislation in order for the rates to become effective. See, e.g., 19 U.S.C. § 2903(a)(1)(C).

The President, through the United States Trade Representative ("USTR"), has responsibility for developing and coordinating United States trade policy. 19 U.S.C. § 2171(c)(1)(A). In matters of international trade, the USTR is the chief representative of the United States responsible for negotiations. 19 U.S.C. § 2171. Among other functions, the USTR issues and coordinates policy guidance to departments and agencies on issues of policy and interpretation of international trade functions. 19 U.S.C. § 2171(c)(1)(D).

Under the Trade Expansion Act of 1962, Congress established an interagency trade policy mechanism to assist with developing and coordinating United States policies. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 242, 76 Stat. 872 (1962). Through the interagency process, USTR requests input and analysis from government agencies to formulate strategies in tariff and other trade negotiations. The agencies participating in this process include, among others, the Departments of Agriculture, Commerce, Defense, Labor, State, Treasury, and Interior. 19 U.S.C. § 2152. Through the Trade Act of 1974, Congress established an advisory system to ensure that United States trade policy and trade

negotiating objectives adequately reflected United States public and private sector interests. Trade Act of 1974, Pub. L. No. 93-618, § 135, 88 Stat. 1978 (1975); 19 U.S.C. § 2155. In this way, government agencies, the public, and the private sectors influence the formulation of United States negotiating positions. Consequently, broadly speaking, that policy takes into account, and balances, the often competing objectives of diverse constituencies with interests in the outcome of trade negotiations.

Since 1974, Congress has repeatedly enacted expedited voting procedures, referred to as "trade promotion authority" or "fast track procedures," under which it considers certain trade agreements negotiated by the President. Under fast track procedures, Congress commits to vote "yes" or "no," without amendment and within a prescribed period, upon legislation implementing the final agreement reached by the President. 19 U.S.C. § 2191. The fast track procedures have served two crucial purposes: to ensure greater cooperation between the political branches on foreign trade matters and to bolster the credibility of the United States in trade negotiations. See H.R. Rep. No. 103-361(I), at 11 (1993), reprinted in 1993 U.S.C.C.A.N. 2561. Fast track procedures "preserve the constitutional role and fulfill the legislative responsibility of the Congress with respect to agreements which generally involve substantial changes in domestic law." S. Rep. No. 100-71, at 36 (June 12, 1987). "Congressional and private sector involvement throughout the course of trade negotiations, in conjunction with the assurance

of expedited consideration of the negotiated results, represent a careful balance between the President's authority to conduct foreign affairs and to negotiate agreements and the Congress' constitutional authority to regulate foreign commerce." Id.

As mentioned, under fast track procedures, Congress has limited itself to voting whether to accept or to reject proposed legislation implementing certain trade agreements. 19 U.S.C. § 2191(d). Fast track procedures are based upon the recognition that complex trade agreements reflect a carefully negotiated balance on concessions among nations. H.R. Doc. No. 102-51, The Extension of Fast Track Procedures: Message from the President of the United States (Mar. 4, 1991) at i-ii.

The tariff rates challenged by Totes-Isotoner in this action were established through the fast track procedures. These rates were considered during the Uruguay round of negotiations under the General Agreement on Tariffs and Trade ("GATT"). At the time of the Uruguay Round, approximately 128 countries were GATT participants.

During the Uruguay Round of negotiations, one factor, among many, considered by the United States in negotiating rates was whether the primary supplier of a product was a GATT participant. Of the eight categories of leather gloves covered by HTS subheading 4203.29, the tariffs upon four were reduced from 14 percent ad valorem to 12.6 percent ad valorem, and the tariffs upon the other four categories remained at 14 percent ad valorem. With respect to the four categories for which the tariffs were reduced, the primary supplier was a GATT participant. With

respect to the four categories for which the tariffs remained at 14 percent ad valorem, the primary supplier was China, who was not a GATT participant during the Uruguay Round of negotiations.

II. Totes-Isotoner's Claims

Totes-Isotoner imports into the United States certain men's seamed leather gloves. Compl. ¶ 4. These gloves are covered by the HTS subheading 4203.29.30: "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Other: Men's." Compl. ¶ 5. Pursuant to that subheading, the gloves are assessed a duty rate of 14 percent ad valorem. Compl. ¶ 5.

HTS subheading 4203.29.40 applies to "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Other: For other persons . . . Not lined." Compl. ¶ 9. HTS subheading 4203.29.50 applies to "Articles of apparel and clothing accessories, of leather or of composition leather: Gloves, mittens and mitts: Other: Other: Other: For other persons . . . Lined." Compl. ¶ 10. Gloves imported under either of these two subheadings are assessed a duty rate of 12.6 percent ad valorem. Compl. ¶¶ 9 and 10.

Pursuant to these subheadings, some men's gloves are assessed a duty rate of 14 percent ad valorem, and some gloves for other persons are assessed a duty rate of 12.6 percent ad valorem.[2] Compl. ¶ 11.

[2] Not all gloves are similarly categorized in the HTS.

SUMMARY OF ARGUMENT

The complaint should be dismissed because the claims asserted raise non-justiciable political questions beyond the authority of the Court to decide; Totes-Isotoner does not possess standing to bring the claims; and, the complaint fails to state a claim upon which relief can be granted.

Totes-Isotoner challenges the substance of the Harmonized Tariff Schedule of the United States, alleging that differences in duty rates for some "men's" gloves and some gloves "for other persons" violate equal protection guarantees inferred in the Due Process Clause of the Fifth Amendment of the Constitution. Because the Constitution commits matters of foreign trade to Congress and the President, and because establishment of the tariff rates at issue are political decisions reached through complex, multilateral negotiations and agreements with foreign governments, whether the United States should equalize the tariff rates on "men's" gloves and gloves "for other persons" is a non-justiciable political question beyond the authority of the Court to adjudicate. Judicial intervention could undermine policies, strategies, and negotiations of the United States in reaching international trade agreements, potentially causing embarrassment from multifarious pronouncements upon trade matters, expressing a lack of respect for Congress and the President and the need to adhere to the political decisions made. Further, judicially manageable standards for conducting such a review are absent. Under the political question doctrine, therefore, the Court should dismiss this action because it is without authority to

entertain the merits of the complaint.

Further, Totes-Isotoner does not possess standing to bring this claim. Totes-Isotoner's equal protection claims depend upon the Due Process Clause. As an importer, however, Totes-Isotoner does not have a due process right to import any product. Consequently, Totes-Isotoner does not possess standing to challenge either the substance or the constitutionality of the tariff schedule. Totes-Isotoner fails also to satisfy the requirements for either constitutional or prudential standing. The complaint fails to allege the elements necessary for injury-in-fact, causation, or redressibility. If the Court does not dismiss the complaint pursuant to the political question doctrine, the Court should dismiss the complaint because Totes-Isotoner does not possess standing to make this equal protection claim.

In any event, the complaint fails to state a claim upon which relief can be granted. Totes-Isotoner provides inadequate factual support to demonstrate that current tariff rates discriminate between groups of people or that Totes-Isotoner is receiving less favorable treatment than other similarly situated entities. The complaint does not assert that the tariff schedule creates a class of people of which Totes-Isotoner is a member or against whom the Government has discriminated. The allegations of the complaint do not demonstrate that Totes-Isotoner has been denied equal protection. Totes-Isotoner, therefore, fails to state an equal protection claim, and the Court should dismiss the complaint.

ARGUMENT

I. Standard Of Review

When deciding a motion to dismiss based upon either lack of subject matter jurisdiction or failure to state a claim, the Court assumes that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the plaintiff's favor. Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995). "Upon a motion to dismiss, the Court must decide whether the complaint, with all factual allegations taken as true and considered in the light most favorable to the plaintiff, sets forth facts sufficient to state a legal claim." Degussa Canada Ltd. v. United States, 19 CIT 864, 864-65, 889 F. Supp. 1543, 1545 (1995).

"When the court's jurisdiction is challenged, the party asserting jurisdiction has the burden of establishing that jurisdiction exists." Wally Packaging, Inc. v. United States, 7 CIT 19, 20, 578 F. Supp. 1408, 1410 (1984). Further, as a Federal court, this Court is "presumed to be 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" DaimlerChrysler Corp. v. United States, 442 F.3d 1313, 1318 (Fed. Cir. 2006). Moreover, "[t]he party invoking federal jurisdiction bears the burden of establishing the elements required for Article III standing." Fuji Photo Film Co., Ltd. v. International Trade Com'n, 474 F.3d 1281, 1289 (Fed. Cir. 2007) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).

In Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1968-69 (2007), the Supreme Court abrogated Conley v. Gibson, 355 U.S. 41 (1957), and clarified that, in order to survive a motion to dismiss for failure to state a claim, it is not enough for a complaint simply to allege in conclusory fashion, as Conley had suggested, that relief could be granted under some conceivable set of facts. Instead, "to raise a right to relief above the speculative level," a complaint must allege "enough factual matter (taken as true)" by making allegations "plausibly suggesting (not merely consistent with)" a valid claim. Id. at 1965-66.

II. The Complaint Presents A Non-Justiciable Political Question, Which The Court Does Not Possess Jurisdiction To Entertain

Totes-Isotoner raises a non-justiciable political question. The Court, therefore, does not possess jurisdiction to entertain the merits of the complaint. Accordingly, the Court should dismiss the complaint.

A. The Political Question Doctrine

Based upon concerns regarding separation of powers and deference to the politically accountable branches of government, the political question doctrine encompasses subject matter deemed inappropriate for judicial review, despite otherwise meeting jurisdictional requirements. Baker v. Carr, 369 U.S. 186, 211 (1962); Erwin Chemerinsky, Federal Jurisdiction 143, 149-50 (4th ed. 2003). "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, . . . which gives rise to the 'political question.'" Baker, 369 U.S. at 210.

Courts determine the existence of a non-justiciable political question by evaluating the six factors identified in Baker:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217 (determining that a challenge to the Tennessee Apportionment Act was a justiciable cause of action); accord Tembec, Inc. v. United States, 441 F. Supp. 2d 1302, 1325-1326 (Ct. Int'l Trade 2006). Any one of these six factors may be sufficient to find the existence of a political question, but "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability . . ." Baker, 369 U.S. at 217.

The political question doctrine applies when there is a challenge to the law itself, as distinguished from the application or interpretation of a law, or procedures leading to the passage of a law, which would be within the realm of judicial determination. See Sneaker Circus, Inc. v. Carter, 566 F.2d 396, 402 (2d Cir. 1977). In Sneaker Circus, a case involving a

challenge to the procedures employed in concluding certain trade agreements, the court noted that appellant did not challenge the substance of the trade agreements. Sneaker Circus, 566 F.2d at 402. The court stated that "[w]ere it to do so, we would be unable to consider the case on its merits, for it would then be nonjusticiable" on political question doctrine grounds. Id.

B. Challenges To The Substance Of Trade Agreements Raise Non-Justiciable Political Questions

Conflicts involving foreign policy are often deemed to be political questions. E.g., Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."). This does not mean, however, that "every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker, 369 U.S. at 211; accord Canadian Lumber Trade Alliance v. United States, 425 F. Supp. 2d 1321, 1355 (Ct. Int'l Trade 2006) ("Not every matter touching on politics is a political question . . . ."). Determining the existence of a political question requires a "discriminating inquiry" into the facts and circumstances of the case at issue. Baker, 369 U.S. at 217.

This pattern of deference applies in the specific context of trade policy, as well. "Trade policy is an increasingly important aspect of foreign policy, an area in which the

executive branch is traditionally accorded considerable deference." Federal Mogul Corp. v. United States, 63 F.3d 1572, 1581, 1582 (Fed. Cir. 1995) ("For the Court of International Trade to read a GATT violation into the statute, over Commerce's objection, may commingle powers best kept separate.").

Trade matters that implicate the authority of another sovereign nation or create possible conflicts with international obligations of the United States, will be deemed non-justiciable political questions. E.g., Oetjen, 246 U.S. at 301-04 (holding that because the United States Government had recognized the new government of Mexico, claims for property seized in Mexico, during the Mexican civil war, were not justiciable in United States courts); Footwear Distribs. & Retailers of Am. v. United States, 18 CIT 391, 413-414 (1994) (declining to determine whether a countervailing duty order on non-rubber footwear complies with United States obligations under GATT as "courts traditionally refrain from disturbing 'the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of foreign [sic, international] relations.'" (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936))).

Courts often find non-justiciable political questions when consideration of trade issues would require the court to second guess decisions made by the President or Congress that appear to be rooted in policy. Gilda Indus. v. United States, 446 F.3d 1271, 1283 (Fed. Cir. 2006) (refusing to hold that toasted breads should have been removed from a list of products subject to

higher retaliatory tariffs out of "deference accorded by the court to the Executive Branch's exercise of discretion in the area of trade negotiations"); Huaiyin Foreign Trade Corp. v. United States, 26 CIT 494, 509-510 (2002) (refusing to review antidumping statute's provision that allowed duties to be distributed to parties affected by the dumping as this is an issue of policy and "not a matter of inquiry" for the Court); see also Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 318 (1933) ("Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed.").

C. Under The Baker Criteria, Totes-Isotoner Raises A Non-Justiciable Political Question

Totes-Isotoner's claim does not involve issues of procedure, application, or interpretation under the Harmonized Tariff Schedule, but raises broader issues that go to the substance of the trade agreement. Further, because the tariff rates at issue are established through negotiation and agreements with foreign governments, forcing the United States to equalize the tariff rates on "men's" gloves and gloves "for other persons" could undermine policies, strategies, and negotiations of the United States in reaching international trade agreements. Whether the rates provided in the Harmonized Tariff Schedule should be equalized with regard to products classified based upon gender or age related characteristics is a political question that the Court should decline to adjudicate.

1. The Constitution Commits Trade Policies To Congress And The President

In evaluating this case, it is clear that a number of Baker criteria are satisfied. First, the Constitution commits international trade matters to Congress and the President. For the judiciary to attempt to resolve the issues presented would demonstrate a lack of respect to the coordinate branches of the Government. The Constitution specifically grants powers of foreign commerce, foreign affairs, and the authority to set tariff rates to the Congress and the President. U.S. Const. art. I, § 8, cl. 3, 8; art. II, § 1, cl. 1, § 2, cls. 1 & 2,§ 3.

In the area of foreign policy, particularly foreign commerce, the political branches possess exclusive authority. Made in the USA Foundation v. United States, 242 F.3d 1300,1313 (11th Cir. 2001).

In this regard, the Supreme Court has stated:

> The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – "the political" – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

Oetjen, 246 U.S. at 302. See also Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 386 (2000) ("'nuances' of 'foreign policy of the United States . . . are much more in the province of the Executive Branch and Congress than of this Court'") (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 196 (1983)); Antolok v. United States, 873 F.2d 369, 381 (D.C. Cir. 1989) ("nowhere does the Constitution contemplate the

participation by the third, non-political branch, that is the Judiciary, in any fashion in the making of international agreements").

Thus, the Constitution clearly commits foreign policy and foreign affairs, including trade policy, to Congress and the President. The utilization of those powers is accorded wide discretion. Totes-Isotoner is improperly requesting the Court to review and to set aside trade policy decisions properly made by the political branches of the Government. Totes-Isotoner is essentially asking the Court to make foreign trade policy. Under the political question doctrine, these are non-justiciable matters.

2. Judicially Manageable Standards Are Absent

Further, judicial examination of the tariff rates established by the political branches of Government, resulting from a series of complex multilateral negotiations, would require the Court to move beyond areas of judicial expertise, satisfying another Baker criterion. There is an absence of judicially manageable standards for reviewing the negotiations and the results that lead to the creation of tariff rates. In the ever-changing realm of foreign affairs, formulating durable standards that would be consistently applicable to the setting of tariffs for all goods would be extremely challenging, and to ask the Court to set such standards would be imprudent and would improperly interfere with the control exercised by the political branches of government.

The challenged rates reflected in the Harmonized Tariff Schedule are the result of a complex series of multilateral negotiations with the GATT participants. In preparing for the negotiations, the President, through the USTR, developed the United States negotiating positions through input from a wide variety of governmental, public, and private sources, including through the statutory advisory system, numbering nearly 40 committees with nearly a thousand advisers. United States Government Accountability Office Report, GGD-94-83B, July 29, 1994, at 10-11. The results of these multi-year negotiations reflected not only this input, but the give-and-take with trading partners across the full range of product sectors as well as the many other subjects under negotiation.

Because United States most favored nation tariffs typically are the product of agreements reflecting multifaceted economic, public and private domestic interests, international concerns, and complex, multi-year, global trade negotiations, it would be virtually impossible to establish appropriate judicial standards to examine the specific tariff rates established through those negotiations. The tariffs form part of a larger package of concessions that the United States developed as a result of detailed interagency and international consultations. The elements contributing to the United States negotiating position and the considerations that led to the eventual outcome of the Uruguay round negotiations with 128 contracting parties cannot properly be reviewed by the Court.

3. Potential For Embarrassment From Multifarious Pronouncements And Need For Adherence To Political Decision

Moreover, this case satisfies another Baker criterion because Totes-Isotoner invites competing policies and statements on United States trade policy from the Judicial branch, potentially causing embarrassment in the conduct of United States foreign relations. Disruption of joint decisions by the President and Congress establishing United States tariffs based upon carefully balanced results achieved in multilateral trade negotiations could have international, as well as domestic, repercussions.

As noted above, Congressional "fast track" procedures, see 19 U.S.C. § 2903(b), pursuant to which the challenged rates were established, recognized the delicate balance of the competing interests reflected in complex trade agreements by providing that legislation implementing these sorts of agreements would not be subjected to amendments. Congress was cognizant that the alteration of a single term could be fatal to an entire agreement, because to achieve the end result required considerable give-and-take and concessions from all the trading partners. Fast track procedures recognized that the President negotiated a "package deal." The challenged tariff rates, negotiated in the Uruguay Round and implemented under fast track procedures, cannot be considered in isolation but must be viewed as part of a delicately balanced collection of reciprocal concessions.

Areas of foreign affairs "uniquely demand [a] single-voiced statement of the Government's views." Baker, 369 U.S. at 211. See also United States v. Martinez, 904 F.2d 601, 602 (11th Cir. 1990). In foreign commerce, "federal uniformity is essential." Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979). See also Michelin Tire Corp. v. Commissioner, 423 U.S. 276, 285 (1976) ("the Federal Government must speak with one voice when regulating commercial relations with foreign governments"). Foreign affairs powers rest with Congress and the President. Courts are ill-equipped to review those controversies that revolve around policy choices and value determinations and to make highly technical, complex, and on-going decisions regarding how to maintain market conditions, negotiate trade agreements, and control currency.

If the courts were to decide matters contrary to what has been negotiated and agreed to by the United States and other countries, there could be grave repercussions for our national interest, national economy, and credibility with foreign nations. Accordingly, it is not for the judiciary to insert itself into this highly political process of negotiating and establishing tariff rates that are the result of a multitude of economic, international, and domestic policies. If the Court were to rule on this matter, it would be, in effect, making trade policy by dictating the parameters of United States negotiating authority.

The Court, therefore, should find that this action presents a non-justiciable political question and dismiss the complaint. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230

(1986); Schroder v. Bush, 263 F.3d 1169, 1174-75 (10th Cir. 2001) (citing Chicago & S. Air. Lines, v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

III. Totes-Isotoner Does Not Possess Standing To Bring This Equal Protection Claim Because It Has No Due Process Right To Import Any Product

Because Congress's power to regulate commerce is broad and comprehensive, "[n]o one can be said to have a vested right to carry on foreign commerce with the United States." Ganadera Industrial, S.A. v. John R. Block, 234 U.S. App. D.C.57, 727 F.2d 1156, 1160 (1984). "No one has a protectable interest to engage in international trade." American Assoc. of Exporters and Importers v. United States, 751 F.2d 1239, 1250 (Fed. Cir. 1985). "[N]o one has a Congressionally untouchable right to the continued importation of any product." Arjay Associates, Inc. v. Bush, 891 F.2d 894 (Fed. Cir. 1989). The court in Arjay explained:

> When the people granted Congress the power `To regulate Commerce with foreign Nations,' U S. Const. art. I, § 8, cl. 3, they thereupon relinquished at least whatever right they, as individuals, may have had to insist upon the importation of any product Congress has excluded. To say otherwise would be to render the grant of power to the Congress a nullity.

891 F.2d at 898.

Moreover, as part of regulating foreign commerce, Congress imposes duties on importations "[a]nd the Congress may, and undoubtedly does, in its tariff legislation consider the conditions of foreign trade in all its aspects and effects." Board of Trustees of the University of Illinois v. United States,

289 U.S. 48, 58 (1933). The importer, arguably the most affected by tariff legislation, is recognized to have "no vested right to a particular classification or rate of duty or preference right to a specific duty rate." See, e.g., Norwegian Nitrogen, 288 U.S. at 318; North American Foreign Trading Corp. v. United States, 783 F.2d 1031, 1032 (Fed. Cir. 1986).

Equal protection applies to the Federal Government through the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The framework for analyzing an equal protection claim is identical whether it is brought against a state government, under the Fourteenth Amendment, or against the Federal Government, under the Fifth Amendment. Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under Fourteenth Amendment."); Briggs v. MSPB, 331 F.3d 1307, 1317 (Fed. Cir. 2003) (citing Buckley v. Valeo). Thus, the Due Process Clause implies the right of similarly situated persons to be treated similarly by the Federal Government. See SKF USA, Inc. v. United States, 451 F. Supp. 2d 1355, 1360 (Ct. Int'l Trade 2006) (noting that similarly situated entities that are treated differently "do not stand equal before the law"). This is the right, pursuant to the Due Process Clause, that Totes-Isotoner relies upon to bring its equal protection claims.

It is, however, a well-settled principle that there is no due process right to a particular classification, rate of tariff or duty, or preference. Norwegian Nitrogen, 288 U.S. at 318 ("No one has a legal right to the maintenance of an existing rate or

duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed."); Parkdale Int'l v. United States, 475 F.3d 1375, 1379 (Fed. Cir. 2007) (citing N. Am. Foreign Trading Corp. v. United States, 783 F.2d 1031, 1032 (Fed. Cir. 1986), for the principle that "[n]o vested right to a particular classification or rate of duty or preference is acquired at the time of importation").

The loss of such classification or tariff rate due to Government action, then, cannot amount to an impermissible taking of property in violation of the Due Process Clause. Gilda Industries, 446 F.3d at 1284 ("It has long been settled that executive actions involving foreign trade, such as the imposition of tariffs, do not constitute the taking of property without due process of law . . . .").

Similarly, because Totes-Isotoner has no due process right to a particular tariff rate, it has no Fifth Amendment claim to equal protection, as inferred through the Due Process Clause, with regard to the tariff rates. Arjay, 891 F.2d at 898 ((holding that appellants lacked standing to challenge either the substance or the constitutionality of the law "because the injury they assert is to a non-existent right to continued importation of a Congressionally excluded product and is thus nonredressable"); see also Buttfield v. Stranahan, 192 U.S. 470, 493 (1904) (". . . a statute that restrains the introduction of particular goods into the United States from considerations of

public policy does not violate the due process clause of the Constitution.").

The Court, therefore, should dismiss the complaint because Totes-Isotoner does not possess standing to bring this claim.

IV. Totes-Isotoner Does Not Satisfy The Constitutional And Prudential Requirements For Standing

Totes-Isotoner has failed to allege facts that support the requirements of constitutional and prudential standing. Based upon the allegations in its complaint, Totes-Isotoner did not suffer any personal, cognizable injury as a result of the Government's actions. Totes-Isotoner, therefore, lacks standing to raise this equal protection claim, and the Court should dismiss the complaint.

As part of the "case or controversy" requirement of Article III, a jurisdictional prerequisite to any suit brought before this Court is whether the plaintiff has standing to raise its claims. To demonstrate "standing" to sue, a litigant must show that it has suffered an actual injury traceable to defendant's unlawful conduct that may be redressed by a favorable judicial decision. Massachusetts v. EPA, 127 S. Ct. 1438, 1453 (2007). See also Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976).

In Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982), the Supreme Court stated:

> [A]t an irreducible minimum, Art. III [and its standing mandate] requires the party who invokes the court's authority to "show that he personally has suffered some actual or

> threatened injury as a result of the putatively illegal conduct of the defendant."

Id. at 472 (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). In Lujan, 504 U.S. at 560-61, the Supreme Court explained that to satisfy the constitutional requirements of standing, a litigant must show that: (1) it has suffered an "injury in fact," an intrusion upon a legally protected interest, that is (a) concrete and particularized and (b) actual or imminent and not merely conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the Government and not the result of independent action of a third party not before the court; and (3) it is likely and not mere speculation that the injury will be redressed by a favorable decision. See also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81 (2000).

As the Supreme Court has explained, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975); see also 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3531, at 338-39 (1984) ("Standing doctrines are employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct, the litigant advancing it is not properly situated to be entitled to its judicial determination.") Thus, the question of injury must relate to the particular plaintiff bringing the suit.

A. The Injury-In-Fact Requirement

To satisfy the injury-in-fact requirement, the plaintiff must allege an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal citations omitted). This test is "very generous," requiring only that plaintiffs allege "an identifiable trifle of injury." United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973). Injuries in equal protection claims are often articulated as the denial of equal treatment based upon a classification or barrier, rather than the inability to obtain a benefit because of the classification or barrier. Gratz v. Bollinger, 539 U.S. 244, 261-62 (2003); Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.").

While economic loss can be sufficient to demonstrate an injury-in-fact, see Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 506 (9th Cir. 1988) (finding injury based upon a tax that reduced competitive advantage); Alliant Energy Corp. v. Bie, 277 F.3d

916, 920 (7th Cir. 2002) (increased competitiveness and higher costs of capital conferred injury on plaintiff), the loss must be related to the violation of a legal right. See Hardin v. Kentucky Utilities Co., 390 U.S. 1, 5-6 (1968) (noting that "competitive injury provided no basis for standing in the above [i.e., earlier] cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury"); Railroad Co. v. Ellerman, 105 U.S. 166 (1882) (dismissing case because the specific injury complained of, loss based upon increased competition, was not sufficiently related to the violation of the corporate charter).

In connection with standing, Totes-Isotoner has alleged only that it paid customs duties for men's gloves at the rate of 14 percent ad valorem. Compl. ¶ 4. Later in its complaint, Totes-Isotoner alleges that the tariff rate assessed on men's gloves is higher than the tariff rate on other types of gloves and, therefore, constitutes a violation of equal protection. Compl. ¶¶ 11, 15-16, 18-19. While Totes-Isotoner points to a distinction between the tariff treatment afforded some "men's" gloves and some gloves "for other persons," nowhere in the complaint does Totes-Isotoner allege that it has been subjected to unequal treatment because of this classification. Like any other importer of gloves, Totes-Isotoner must pay rates of 14 percent ad valorem upon the men's gloves that it imports and 12.6 percent ad valorem upon gloves for other persons that it imports. Totes-Isotoner has failed to allege an injury-in-fact based upon

unequal treatment.

Further, the economic loss that Totes-Isotoner articulates is not sufficiently related to the equal protection claim to constitute an injury-in-fact. As demonstrated in part V, below, the equal protection doctrine inferred in the Fifth Amendment Due Process Clause is concerned with distinctions among people, not with distinctions among products. The Harmonized Tariff Schedule does not distinguish between Totes-Isotoner and other persons in establishing and applying tariff rates. It distinguishes between classes of products, not classes of people. Therefore, the fact that Totes-Isotoner pays a higher duty rate for one group of products than for another group of products does not constitute an economic injury-in-fact arising from a violation of equal protection.

Because Totes-Isotoner has failed to allege an injury-in-fact, one of the essential elements of standing, the Court should dismiss the complaint.

B. Causation And Redressibility

Even if Totes-Isotoner could demonstrate that by paying a duty rate of 14 percent ad valorem on some men's gloves it suffers an injury-in-fact, it fails to allege both sufficient causation and redressibility. Standing requires "a causal relationship between the injury and the challenged conduct." Northeastern Florida, 508 U.S. at 663. That is, the injury "fairly can be traced to the challenged action of the defendant." Simon v. Eastern Kentucky Welfare, 426 U.S. at 41-42. Further, the plaintiff must allege that the injury will likely be

redressed by a favorable decision. That is, "the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative.'" Northeastern Florida, 508 U.S. at 663-64 (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).

Totes-Isotoner alleges that the United States imposes a 14 percent ad valorem duty upon some men's gloves, Compl. ¶ 11, and that it has paid these duties. Compl. ¶ 4. Assuming, for purposes of this motion, that to be true and that payment of those duties somehow does not accord Totes-Isotoner equal protection, Totes-Isotoner cannot demonstrate that a decision by this Court would necessarily remedy any injury that payment of the duty has caused.

First, the Court should not determine what the duty rate should be. As demonstrated above, the Constitution reserves to Congress and the President the exclusive authority to establish tariffs. Second, if the Court were to order the United States to eliminate the current disparity in the rates, the United States could decide to leave the rate for "men's" gloves at the current rate of 14 percent ad valorem and raise the rate for gloves "for other persons" from the current 12.6 percent ad valorem to 14 percent ad valorem. Totes-Isotoner would realize no economic relief. Totes-Isotoner has not demonstrated how any relief that this Court might provide would necessarily remedy any supposed injury-in-fact that the 14 percent ad valorem duty rate may impose, and there is no assurance that any such relief would redress the alleged injury.

More importantly, as demonstrated above, this Court does not have authority to redress the alleged injury. "The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States." Board of Trustees of Univ. of Illinois, 289 U.S. at 57. Totes-Isotoner improperly asserts that it has a right to import under terms different than those established by Congress. No such right exists, and therefore, any alleged injury is not redressable by this Court. Arjay, 891 F.2d at 898 (holding that appellants lacked standing to challenge either the substance or the constitutionality of the law "because the injury they assert is to a non-existent right to continued importation of a Congressionally excluded product and is thus nonredressable").

C. Prudential Standing Requirements

In addition to constitutional standing requirements, prudential standing requirements further limit cases brought under the Administrative Procedure Act, which include civil cases before this Court brought pursuant to 28 U.S.C. § 2631(i). "[T]he plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provisions whose violation forms the legal basis for his complaint." Nat'l Wildlife Fed'n, 497 U.S. at 883; accord Bennett v. Spear, 520 U.S. 154, 175-76 (1997). This involves a two-part inquiry that first considers the interests to be protected by the statutory or constitutional provisions at issue and, then, considers whether the plaintiff's injury is

among these interests. Canadian Lumber Trade Alliance, 425 F. Supp. 2d at 1352. The "zone of interest" requirement "denies a right of review if the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in the statute . . . ." Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987).

Totes-Isotoner brings this claim alleging violations of equal protection guarantees inferred in the Due Process Clause of the Fifth Amendment. Compl. ¶¶ 15–16, 18–19. Totes-Isotoner, however, has not articulated an injury resulting from an action that denied it equal treatment. Instead, Totes-Isotoner complains of a tariff rate based upon a distinction among products, not people. The equal protection doctrine, however, protects people from discrimination or unequal treatment without a sufficient government purpose. The fact that the Harmonized Tariff Schedule treats one category of gloves differently than another category of gloves, and that Totes-Isotoner must pay duty rates based upon that distinction, does not bring Totes-Isotoner within the "zone of interests" addressed by the equal protection doctrine.

Because Totes-Isotoner does not adequately allege that differences in the tariff rates for some men's gloves and some other gloves has caused it to suffer a redressible injury-in-fact that falls within the "zone of interests" of the equal protection doctrine, it lacks standing to bring this equal protection action. The Court, therefore, should dismiss the complaint.

V. The Complaint Fails To State A Claim

Totes-Isotoner fails to allege a sufficient factual basis to demonstrate that it has been discriminated against or treated unequally without a sufficient government purpose.

In declaring that no state shall deny to any person the "equal protection of the laws," the Equal Protection Clause of the Fourteenth Amendment prohibits state governments from discriminating among people without a sufficient purpose. U.S. Const. amend. XIV, § 1; Bolling v. Sharpe, 347 U.S. at 499 (applying equal protection to the Federal Government through the Due Process Clause of the Fifth Amendment); Erwin Chemerinsky, Constitutional Law: Principles and Policies 763 (2d ed. 2002). Essentially, equal protection analysis consists of determining how the Government is distinguishing among people, whether this classification is "suspect" and requires heightened scrutiny, and whether the Government has a sufficient purpose for its actions. Chemerinsky, Constitutional Law at 644–48.

Totes-Isotoner's complaint focuses upon the different tariff rates on certain kinds of gloves. The complaint, however, does not explain how the tariff rates draw a distinction among different groups of people or how this distinction discriminates against Totes-Isotoner.

The complaint states that "the rate of duty imposed on seamed leather gloves imported for men is higher than the rate of duty imposed on seamed leather gloves imported for women, and there is no exceedingly persuasive justification for this discrimination." Compl. ¶ 16 (mirroring ¶ 19, which uses the

exact language except it refers to children and rational basis).[3] The complaint, thus, asserts a distinction that the Government has drawn in the tariff schedule based upon products: "men's" gloves and gloves "for other persons." To the extent that Totes-Isotoner bases its equal protection claim upon this distinction, its claim is foreclosed by its failure to satisfy the requirement that equal protection claims be founded upon distinctions among classes of people, see Part V.A below, and to demonstrate that it is a member of a class against which the Harmonized Tariff Schedule discriminates, see Part V.B below.

In any event, if the Court were to find that Totes-Isotoner has properly stated a claim, the appropriate standard of review would be rational basis. See Part V.C below.

A. Equal Protection Claims Must Allege A Government-Created Distinction Among People, Not A Distinction Between Products

Equal protection claims must be based upon "distinctions among people." Chemerinsky, Constitutional Law at 763; accord Truax v. Raich, 239 U.S. 33 (1915) (noting that the category of "any person within its jurisdiction" includes aliens); see also Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (statement of Waite, C.J.) (1886) (allowing corporations to be treated as "persons" within the Fourteenth Amendment).

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[3] Plaintiff's characterization of gloves as being "imported for men" or "imported for women" is misleading. Although one subheading refers to "men's" gloves and the other refers to "for other persons," one cannot say that the gloves are "imported for men" or "imported for women." The gloves are presumably imported into the United States for resale to anyone willing to purchase them, male or female.

Nowhere in its complaint does Totes-Isotoner assert that the tariff schedule creates a class of people of which it is a member or against whom the Government has discriminated. The only explicit distinction alleged in the complaint is between the tariff rates for certain "men's" gloves and the tariff rates for certain gloves "for other persons." That distinction is based upon product type and does not establish a class of differently treated people. Totes-Isotoner, therefore, has not asserted any basis for its equal protection claim. The Court should dismiss the complaint for failure to state a claim.

B. Equal Protection Claims Must Allege That A Person Or Group Is Being Treated Differently Than Those Who Are Similarly Situated

Courts have allowed equal protection claims, not based upon product distinctions, but based upon distinctions drawn between groups of people or entities within the same industry that are otherwise similarly situated. See Fitzgerald v. Racing Association of Central Iowa, 539 U.S. 103, 105 (2003. In Fitzgerald, the Court permitted an equal protection claim based upon a distinction in Iowa tax law that taxed revenues from riverboat slot machines at 20 percent and revenues from racetrack slot machines at 36 percent. Fitzgerald, 539 U.S. at 105.

In its complaint, Totes-Isotoner does not allege that the tariff schedule distinguishes it from any similarly situated entities. In fact, the complaint makes no mention of any distinction that the United States draws between importers for purposes of applying duties upon glove imports. Because Totes-Isotoner fails to allege that it is being treated differently

than other similarly situated entities, it fails to state a claim that it has been denied equal protection. The Court should dismiss the complaint for failure to state a claim.

C. Equal Protection Claims That Adequately Show A Distinction Between Similarly Situated Entities Generally Require Only Rational Basis Review

Even if Totes-Isotoner could demonstrate that the duty rates about which it complains result in its receiving less favorable treatment than similarly situated entities, it would be entitled to only rational basis review.

The general rule in areas of social and economic policy is that a "'statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld' against an Equal Protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." SKF, 451 F.Supp.2d at 1360 (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)). Tax schemes provide a close analogy to the Harmonized Tariff Schedule in terms of the level of detail, sheer number of classifications, and amount of negotiation and compromise they require. In equal protection cases involving distinctions in the tax scheme, it has long been understood that equal protection "imposes no iron rule of equality." Allied Stores v. Bowers, 358 U.S. 522, 526 (1959) (citing, among numerous other cases, Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232, 237 (1890)). In taxing, a state "may impose different specific taxes upon different trades and professions and may vary

the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." Id. at 527.

Further, the "task of classifying . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (quoting Matthews v. Diaz, 426 U.S. 67, 83-84 (1976)). All that is required to avoid an equal protection violation is that the classification not be "palpably arbitrary." Allied Stores, 358 U.S. at 527. It is also unnecessary to probe the actual reasons for the government action, see id. at 528–29, because any reasonably conceivable set of facts that could support a rational basis for the classification is sufficient to uphold the classification.

In evaluating for equal protection purposes specific rates of duty imposed by the Harmonized Tariff Schedule, then, it is not necessary to consider the specific reasons why Congress has established those rates at particular levels. The simple fact that men's gloves and gloves for other persons constitute readily distinguishable product categories is a sufficient rational basis for treating them differently for tariff purposes. The exact reason why these different types of gloves are treated differently is irrelevant to the equal protection analysis. As long as there is any conceivable rational basis for the different tariff rates, that ends the inquiry.

Totes-Isotoner may argue that heightened scrutiny is required, rather than the general requirement of rational basis review. While distinctions between "suspect" classes, like "women" or "men", require that courts give a higher level of scrutiny to the government action, Craig v. Boren, 429 U.S. 190, 197 (1976), Totes-Isotoner has not alleged that it is a member of any class, let alone a suspect class.

In sum, Totes-Isotoner provides inadequate factual support to demonstrate that current tariff rates discriminate between groups of people or that Totes-Isotoner is receiving less favorable treatment than other similarly situated entities. Totes-Isotoner, therefore, fails to state an equal protection claim, and the Court should dismiss the complaint for failure to state a claim. Were the Court to find, however, that Totes-Isotoner had adequately stated an equal protection claim, rational basis review would apply, and the demonstrated rationality of the distinctions supports dismissal of the complaint.

CONCLUSION

For these reasons, we respectfully request the Court to dismiss the complaint.

Respectfully submitted,

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Dated: September 19, 2007

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 19th day of September, 2007, I caused to be placed in the United States mail (first-class mail, postage prepaid) copies of "DEFENDANT'S MOTION TO DISMISS" addressed as follows:

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