

UNITED STATES COURT OF INTERNATIONAL TRADE

YC RUBBER CO. (NORTH AMERICA)
LLC AND SUTONG TIRE RESOURCES,
INC. (FORMERLY KNOWN AS SUTONG
CHINA TIRE RESOURCES),

Plaintiffs,

KENDA RUBBER (CHINA) CO., LTD.,

Plaintiff-Intervenor,

and

MAYRUN TYRE (HONG KONG)
LIMITED AND ITG VOMA
CORPORATION,

Consolidated-Plaintiffs,

v.

UNITED STATES,

Defendant.

Before: Mark A. Barnett, Judge
Consol. Court No. 19-00069

OPINION AND ORDER

[Denying Plaintiff-Intervenor Kenda Rubber (China) Co., Ltd.'s motion to modify the statutory injunction.]

Dated: November 8, 2019

Lizbeth R. Levinson, Ronald M. Wisla, and Brittney R. Powell, Fox Rothschild LLP of Washington, D.C., for Plaintiff-Intervenor Kenda Rubber (China) Co., Ltd.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were Joseph H. Hunt, Assistant Attorney General, Jeanne E. Davidson, Director, and Patricia M. McCarthy, Assistant Director.

Barnett, Judge: Before the court is Plaintiff-Intervenor Kenda Rubber (China) Co., Ltd.'s ("Kenda") motion to modify the statutory injunction entered on July 2, 2019, to cover more than 250 entries of Kenda's subject merchandise during the period of review that were liquidated on June 14 and 21, 2019. See Confidential Pl.-Int.'s Mot. to Modify the Statutory Inj., ECF No. 31; Confidential Mem. of P&A in Supp. of Pl.-Int.'s Mot. to Modify the Statutory Inj. ("Kenda's Mem."), ECF. No. 31-1. Defendant United States ("the Government") opposes Kenda's motion. See Def.'s Resp. in Opp'n to Int.'s Mot. to Modify the Statutory Inj. ("Def.'s Resp."), ECF No. 33. For the following reasons, Kenda's motion is denied.

BACKGROUND

On April 26, 2019, Commerce published the final results of the second administrative review of the antidumping duty order covering certain passenger vehicle and light truck tires from the People's Republic of China for the period of review of August 1, 2016, through July 31, 2017.¹ See *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 84 Fed. Reg. 17,781 (Dep't Commerce Apr. 26, 2019) (final results of antidumping duty admin. review and final determination of no shipments; 2016–2017) ("*Final Results*"), ECF No. 24-4, and accompanying Issues and Decision Mem., A-570-016 (Apr. 19, 2019), ECF No. 24-5. Of relevance to this motion, Commerce assigned a weighted-average dumping margin to Kenda in the amount of 64.57 percent. *Final Results*, 84 Fed. Reg. at 17,782.

¹ Commerce signed the *Final Results* on April 19, 2019, see Def.'s Resp. at 1, and publication occurred a week later.

Commerce informed interested parties that it “intend[ed] to issue appropriate assessment instructions directly to [U.S. Customs and Border Protection (“Customs”)] 15 days after publication of the final results of this administrative review.” *Id.* at 17,783.

On May 14, 2019, 18 days after Commerce published the *Final Results*, Commerce sent liquidation instructions to Customs covering relevant entries of subject merchandise from Kenda, among others. Def.’s Resp. at 2 (citing Message No. 9134302, Liquidation Instructions for Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China Exported by Various Companies for the Period 08/01/2016 through 07/31/2017, A-570-016, (May 14, 2019) (“Liquidation Instructions”)); *see also* Kenda’s Mem. at 1–2.

On May 23, 2019, Plaintiffs YC Rubber Co. (North America) LLC and Sutong Tire Resources, Inc. (formerly known as Sutong China Tire Resources) filed a summons and complaint in this case. *See* Summons, ECF No. 1; Compl., ECF No. 2. On May 24, 2019, Plaintiffs filed Form 24 proposed orders for statutory injunctions and said orders were entered the same day.² *See* Orders for Statutory Inj. Upon Consent (May 24, 2019), ECF Nos. 11–12. These injunctions did not cover Kenda’s entries of subject merchandise. *See id.*

² Form 24 is a streamlined form a party may use to propose a statutory junction, pursuant to which the party indicates the consent of the other parties and agreement that they have made “a proper showing . . . that the requested injunctive relief should be granted under the circumstances.” *See* U.S. Court of International Trade (“USCIT”), Form 24 Order for Statutory Inj. Upon Consent (July 1, 2019) <https://www.cit.uscourts.gov/sites/cit/files/Form%2024.pdf>.

On June 14 and 21, 2019, pursuant to the Liquidation Instructions, Customs liquidated over 250 (but not all) of Kenda's entries of subject merchandise at the rate determined in the *Final Results*. See Kenda's Mem. at Ex. 1 (Decl. of Robin Pickard, Vice President of Finance and Accounting at Kenda (undated) ("Pickard Decl.")), ¶ 4. By June 25, 2019, Kenda became aware that Customs had liquidated these entries. *Id.* Upon learning of these liquidations, Kenda contacted counsel about intervening in this litigation. *Id.* ¶ 5.

On June 27, 2019, Kenda filed a consent motion to intervene in this litigation. See Proposed Pl.-Int.'s Consent Mot. to Intervene as a Matter of Right, ECF No. 18. The following day, the court granted Kenda's motion to intervene. Order (June 28, 2019), ECF No. 21.

On July 2, 2019,³ Kenda filed a Form 24 proposed order for a statutory injunction to enjoin Commerce or Customs from "issuing instructions to liquidate or making or permitting liquidation of any unliquidated entries of" subject merchandise exported by Kenda that were subject to the *Final Results*. Proposed Inj. at 1–2. Kenda's proposed order covered "any entries inadvertently liquidated after this order [was] signed but before this injunction [was] fully implemented by [Customs]" *Id.* at 3. The court entered the injunction later that same day. See Injunction.

³ Kenda initially filed a Form 24 proposed order for a statutory injunction on July 1, 2019. See [Proposed] Order for Statutory Inj. Upon Consent, ECF No. 22. The next day, Kenda filed a revised Form 24, see [Revised Proposed] Order for Statutory Inj. Upon Consent ("Proposed Inj."), ECF No. 25, which the court granted, see Order (July 2, 2019) ("Injunction"), ECF No. 26.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)⁴ and 28 U.S.C. § 1581(c) (2012). Alternatively, to the extent that it is properly before the court, *see infra* note 7, the court has jurisdiction pursuant to 28 U.S.C. § 1581(i) to review Kenda's challenge to Commerce's issuance of the Liquidation Instructions pursuant to its 15-Day Policy.⁵ *See Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 738–39, 491 F. Supp. 2d 1273, 1280 (2007) (stating that “this vexing jurisdictional question. . . is largely academic” because the court has jurisdiction pursuant to either 28 U.S.C. § 1581(c) or (i)). With respect to Kenda's motion, the facts are not in dispute; the only questions are whether Customs' liquidation of the relevant entries was inconsistent with the purpose of the injunction, meriting use of the court's equitable powers to reverse liquidation, and whether Commerce's issuance of the Liquidation Instructions was not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (providing that the court “shall hold unlawful” actions brought pursuant to 28 U.S.C. § 1581(c) that are “unsupported by substantial evidence on the record, or otherwise not in accordance with the law”); 28 U.S.C. § 2640(e) (specifying that “civil action[s] not specified in this section” are

⁴ Further citations to the Tariff Act of 1930, as amended are to the relevant portions of Title 19 of the U.S. Code, 2012 edition.

⁵ As used in this Opinion and Order, the term “15-Day Policy” refers to Commerce's policy of issuing instructions to Customs to liquidate entries subject to the final results of an administrative review 15 days after publishing the results of that review. *See generally* Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Admin. Reviews (Aug. 9, 2002), *available at* <http://ia.ita.doc.gov/download/liquidation-announcement.html> (updated Nov. 9, 2010) (last visited Nov. 8, 2019).

reviewed as provided in 5 U.S.C. § 706 (2012)); 5 U.S.C. § 706(2)(A) (“The reviewing court shall . . . hold unlawful and set aside agency action, . . . found to be [] arbitrary, capricious and abuse of discretion, or otherwise not in accordance with the law”).

DISCUSSION

A. The Liquidation of Kenda’s Entries Was Not Inconsistent with the Injunction and the Court Will Not Exercise Its Equitable Powers

The court entered the Injunction pursuant to 19 U.S.C. § 1516a(c)(2), which provides that the court “may enjoin the liquidation of some or all entries of merchandise covered by a determination of [Commerce].” Here, while Kenda moves to modify the Injunction, Kenda does not seek to have the court enjoin the liquidation of additional unliquidated entries. To the contrary, while only ever addressing the issue in terms of modifying the Injunction, in substance, Kenda would have the court order the reversal of liquidation of Kenda’s entries that were liquidated in accordance with the *Final Results* at a time when no injunction was in place.

Kenda does not allege that the liquidation of these entries occurred contrary to the terms of the Injunction. In fact, Kenda could not make such an argument. It is clear from the Pickard Declaration that Kenda knew these entries had been liquidated and only then considered intervening in this litigation. See Pickard Decl. ¶¶ 3–6.

Kenda nevertheless suggests that the liquidation of these entries must be reversed in accordance with the “purpose” of the Injunction. Kenda’s Mem. at 3–5. Kenda’s claim is at least disingenuous, if not outright false. Kenda had actual knowledge that the entries in question had already been liquidated when it filed its proposed injunction, Pickard Decl. ¶¶ 3–6; therefore, when it sought the Injunction,

which, on its face, applies only to unliquidated entries, it could not have been Kenda's purpose (much less the purpose of any other party consenting to the proposed injunction) that the Injunction cover previously liquidated entries. See Proposed Inj. at 1 (enjoining the liquidation "of any unliquidated entries"); Injunction at 1 (same). Thus, the liquidation of Kenda's entries did not violate the terms or purpose of the Injunction.

Kenda also requests the court to grant relief as an exercise of the court's equitable powers. Kenda's Mem. at 2–5 (citing *Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187 (Fed. Cir. 2009); *Clearon Corp. v. United States*, 34 CIT 970, 717 F. Supp. 2d 1366 (2010)). That being said, Kenda's argument for relief in equity merely restates its arguments regarding the purpose of the Injunction.

While the court has equitable powers to modify an injunction to achieve its intended purpose, see, e.g., *Clearon*, 34 CIT at 979, 717 F. Supp. 2d at 1373, here, the purpose of the Injunction was to maintain the status quo as of the time the Injunction was entered. The particular entries in question were liquidated prior to the entry of the Injunction, and Kenda only sought to intervene after learning of the liquidation. See Pickard Decl. ¶¶ 4–5. Consequently, Kenda's arguments based on equity and the purpose of the Injunction must fail.⁶ See, e.g., *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 41 CIT ___, ___, 211 F. Supp. 3d 1346, 1351 n.6 (2017)

⁶ Denial of Kenda's motion does not moot Kenda's ability to challenge Commerce's *Final Results* because, while Kenda's cause of action as to the liquidated entries may be lost, see *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983), the liquidated entries in question constitute a subset of the universe of Kenda's entries during the period of review. Other entries remain unliquidated and the liquidation of those entries is enjoined pursuant to the Injunction.

(finding that the court's equitable powers do not extend to "reliquidat[ing] entries that liquidated prior to the entry of the statutory injunction and that were not covered by the terms of that injunction").

B. Commerce's Issuance of Liquidation Instructions Was Not Unlawful

The only legal basis that Kenda asserts for possibly reversing the liquidation of the entries in question is that Commerce's issuance of the Liquidation Instructions was unlawful.⁷ The court is unpersuaded.

In the *Final Results*, Commerce provided notice that it would issue liquidation instructions 15 days after the publication of the *Final Results*. Such notice was consistent with Commerce's 15-Day Policy. Citing *Jinan Farmlady Trading Co., Ltd. v. United States*, 41 CIT ____, 228 F. Supp. 3d 1351 (2017), and *SKF USA Inc. v. United States*, 33 CIT 370, 611 F. Supp. 2d 1351 (2009), Kenda contends that Commerce's issuance of the Liquidation Instructions less than 30 days after publication of the *Final Results* is unlawful. Kenda's Mem. at 5–7. In both *Jinan* and *SKF*, the court found the issuance of liquidation instructions pursuant to the 15-Day Policy unlawful because it abbreviated the 30-day period parties have following the publication of the final results

⁷ Defendant did not object that Kenda, as a Plaintiff-Intervenor, impermissibly enlarged the Plaintiff's case with this claim. Plaintiff-Intervenors do not enlarge a case by seeking an injunction to cover their own entries. See, e.g., *N.M. Garlic Growers Coal. v. United States*, 41 CIT ____, ____, 256 F. Supp. 3d 1373, 1376 (2017). However, by requesting the court to declare Commerce's 15-Day Policy unlawful and order the reversal of liquidation, it appears that Kenda's motion is improper to the extent that it would enlarge the issues in the case. See *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944). In the absence of argument on this issue by the Parties, the court will note this as an alternative basis for its denial of Kenda's motion.

to decide whether to file suit. See *Jinan*, 228 F. Supp. 3d at 1358; *SKF*, 33 CIT at 389, 611 F. Supp. 2d at 1367; see generally 19 U.S.C. § 1516a(c).

In this case, the Liquidation Instructions were issued 18 days after publication of the *Final Results*. See Def.'s Resp. at 2. Obviously, that is less than the statutory 30-day period afforded by 19 U.S.C. § 1516a(c)(2) to file suit following the publication of a determination as identified in 19 U.S.C. § 1516a(a)(1). However, liquidation itself did not occur until 49 to 56 days after publication. Pickard Decl. ¶ 4. Thus, Kenda, in fact, had more than 30 days to decide whether to file suit or intervene.⁸

Kenda argues, however, that the reasoning of *Jinan* and *SKF* should be extended to hold unlawful the issuance of liquidation instructions until Kenda's full time period for determining whether to intervene and obtain a statutory injunction has run its course. See Kenda's Mem. at 5–7. Such a period could be as long as 120 days. See 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (a civil action to challenge the final results of an administrative review must be commenced within 30 days of publication of the results in the Federal Register); USCIT Rule 3(a)(2) (a complaint must be filed within 30 days of filing the summons that commenced the action); USCIT Rule 24(a) (providing for intervention no later than 30 days after service of the complaint); USCIT Rule 56.2(a)

⁸ Given that Kenda filed its motion to intervene 62 days after Commerce published the *Final Results* and 44 days after Commerce issued the Liquidation Instructions, Kenda has failed to make a case that the 15-Day Policy forced Kenda to file its motion to intervene or seek an injunction "in a rushed manner." *Juancheng Kangtai Chem. Co., Ltd v. United States*, 41 CIT ___, ___, 322 F. Supp. 3d 1351, 1358–59 (2018), *aff'd*, 932 F.3d 1321 (Fed. Cir. 2019); see also *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 738–39 (2007) (stating that the 15-Day Policy may cause a "lack of certainty of when liquidation will occur," causing interested parties to "almost immediately" file with this court a complaint, summons, and motion to enjoin liquidation).

("[A]n intervenor must file a motion for statutory injunction . . . no later than 30 days after the date of service of the order granting intervention . . ."). In other words, Kenda suggests that because an intervenor is permitted to wait as long as 30 days after service of a complaint (which, pursuant to 19 U.S.C. § 1516a, might not be filed until as late as 60 days from the publication of the final results) to intervene in an action, see USCIT Rule 24(a)(3), and to wait another 30 days after its motion to intervene is granted to request a statutory injunction, see USCIT Rule 56.2(a), that any issuance of liquidation instructions and actual liquidation prior to such deadline is unlawful.

The court declines to extend the logic of *Jinan* and *SKF* as requested by Kenda. The statute is clear that liquidation of entries of merchandise subject to a preliminary or final determination in an antidumping investigation is suspended by operation of law. *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (Fed. Cir. 2002); *Am. Power Pull Corp. v. United States*, 39 CIT ___, ___, 121 F. Supp. 3d 1296, 1301 (2015). Publication of the final results of an administrative review provides notice to Customs of the lifting of the suspension of liquidation of entries covered by that administrative review. *Int'l Trading*, 281 F.3d at 1275. That notice marks the start date for measuring the six-month period by the end of which Customs must have liquidated the covered entries, otherwise they are deemed liquidated at the entered rate. 19 U.S.C. § 1504(d). Thus, in the absence of a judicial challenge to the final results of an administrative review, the liquidation of the covered entries is either suspended by law, or it is not.

Following the issuance of the final results of an administrative review, a party may challenge those results at the U.S. Court of International Trade. See 19 U.S.C.

§ 1516a. Again, the statute is clear regarding the consequences associated with such a court challenge: If liquidation of the covered entries is enjoined by the court, such entries must be liquidated in accordance with the final court decision in the action, 19 U.S.C. § 1516a(e); otherwise, the entries must be liquidated in accordance with Commerce's determination, 19 U.S.C. § 1516a(c)(1). Thus, following the publication of the final results and the lifting of the suspension of liquidation, the liquidation is either enjoined by the court, or it is not.⁹

This is a detailed scheme created by Congress and defined by statute that addresses the status of entries covered by an administrative review by which their liquidation is either suspended or not and, if not suspended, either enjoined or not. What Kenda would do is ask this court to create an additional status whereby entries that are neither suspended by law nor enjoined by the court, nevertheless, may not be liquidated. Moreover, Kenda would ask that this period of inaction cover four of the six months within which Customs must act to liquidate the entries. Kenda's request is both unwarranted and unreasonable.

Just as it is clear that Congress knew how to provide for the status of entries subject to an administrative proceeding by Commerce—that is, the suspension of liquidation and the lifting of that suspension with the publication of the final results of the administrative review—so too did Congress know how to provide for a period for parties to file a summons and then a complaint challenging those final results. Congress,

⁹ Special procedures exist in the case of a bi-national panel review pursuant to the NAFTA, which are not relevant here. *See, e.g.*, 19 U.S.C. § 1516a(g)(5).

however, chose not to extend the period of suspension of liquidation to encompass the period in which a party may elect to challenge Commerce's final results.¹⁰ Similarly, 19 U.S.C. § 1504(d) makes it plain that Congress intended to provide Customs with a six-month period—which begins to run on the date the final results are published—during which the suspension is lifted and Customs may liquidate entries in accordance with the agency's final results. *Cf. Int'l Trading*, 281 F.3d at 1273 (“[T]here is nothing untoward about having the six-month period for liquidation run during the period between the time Commerce publishes the final results and the time Commerce directs Customs to liquidate the entries that are covered by those results.”). To suggest that there exists some extended waiting period after the notice lifting suspension of liquidation is published but before the agencies may begin the process of liquidating an entry (absent an injunction) is inconsistent with Congress's statutory framework.¹¹

¹⁰ In that vein, the court in *SKF* specifically rejected the argument “that 19 U.S.C. § 1516a(a)(2) requires Commerce to wait sixty days (or alternatively, according to USCIT Rule 56.2(a), ninety days) from the date of publication before issuing liquidation instructions.” 33 CIT at 382, 611 F. Supp. 2d at 1362.

¹¹ The court has suggested in previous opinions that Congress left a statutory gap by not prescribing a schedule or methodology for Commerce's issuance of liquidation instructions, and that Commerce may not fill that gap by use of an earlier version of the 15-Day Policy. *See, e.g., Jinan*, 228 F. Supp. 3d at 1358. However, the court “must . . . defer to Commerce's reasonable construction of its governing statute where Congress ‘leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by ‘the agency's generally conferred authority and other statutory circumstances.’” *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir. 2010) (citation omitted). And while the court looks for reasoned analysis or explanation to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion, *id.*, here, Commerce has *supra* provided that explanation by public announcement (i.e., the 15-Day Policy, *see supra* note 5), in which it explained its reasoning in light of the six-month deemed liquidation deadline and other challenges. Notwithstanding Commerce's

For these reasons, the court declines to extend the logic of *Jinan* or *SKF* in this case.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Kenda's motion to modify the statutory injunction (ECF Nos. 31, 32) is denied.

/s/ Mark A. Barnett
Mark A. Barnett, Judge

Dated: November 8, 2019
New York, New York

reasoning, the agency might consider whether its 15-Day Policy could be amended so that regardless of when Commerce issues the liquidation instructions to Customs, the instructions specify some time period before which Customs may not act on those instructions in order to provide greater clarity to all parties and to better address some of the concerns raised in the numerous court cases addressing the 15-Day Policy. See, e.g., *Mukand Int'l Ltd. v. United States*, 30 CIT 1309, 1314–15, 452 F. Supp. 2d 1329, 1334–35 (2006).