ANTIDUMPING AND COUNTERVAILING DUTY LAW

AND DEEMED LIQUIDATION - DEVELOPMENTS

by

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Written for the 14th Judicial Conference of the Court of International Trade
November 6, 2006
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1) Introduction

This memorandum highlights deemed liquidation under 19 U.S.C. §1504(d), a legal concept causing problems in the enforcement of U.S. antidumping and countervailing duty laws. Familiarity with this area of law is assumed. The memorandum summarizes fundamental concepts associated therewith, points out areas of uncertainty and describes developments occurring since the author published a law review article on the topic. See Deemed Liquidation: A case for Statutory Amendments of U.S. Customs Law Governing the Collection of Antidumping and Countervailing Duties, 83 Denv. U. L. Rev. 471 (2005). The most significant development in this area of law is undoubtedly the U.S. Court of International Trade's ("CIT") decision in Koyo Corp. of U.S.A. v. United States, 403 F. Supp. 2d 1305 (Ct. Int'l Trade 2005) which is currently on appeal (in the briefing stage) before the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). In Koyo, the fundamental issue is whether deemed liquidation operates equally in situations where importers have over-paid or under-paid antidumping or countervailing duties.

2) Fundamentals of Deemed Liquidation

a) The Statute

19 U.S.C. §1504(d) is entitled "Removal of suspension" and provides in its current version that "Except as provided in section 1675(a)(3) of this title, when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b) of this section, within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry (other than an entry with respect to which liquidation has been extended under subsection (b) of this section) not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record."

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b) The Test

Deemed liquidation occurs if (1) the suspension of liquidation has been removed, (2) Customs has received notice of the removal of suspension of liquidation, and (3) Customs has not liquidated within six month of receiving notice. See, e.g., Koyo, 403 F. Supp. 2d at 1308.

i) Removal of Suspension of Liquidation

The suspension of liquidation during an administrative review is removed upon publication in the Federal Register of the final results. See, e.g., Int'l Trading Co. v. United States, 281 F.3d 1268, 1271 (Fed. Cir. 2002). A court-ordered suspension of liquidation is removed the day after the time for appeal has expired. See, e.g., Am. Int'l Chem., Inc. v. United States, 387 F. Supp. 1258, 1264 (Ct. Int'l Trade 2005). It appears fairly well-established that it is not the removal of suspension itself but Customs' receiving notice of it which triggers the six-month period in §1504(d). See id. at 1265.

ii) Timing of Notice of Removal of Suspension of Liquidation

Courts have found that the six-month time period for deemed liquidation starts to run when Commerce publishes the final results of an administrative or judicial review in the Federal Register or when Commerce issues public and unambiguous liquidation instruction to Customs. See, e.g., Int'l Trading Co. v. United States, 412 F.3d 1303, 1313 (Fed. Cir. 2005) (results after administrative review, post-URAA statute), Fujitsu Gen. Am., Inc. v. United States, 283 F.3d 1364, 1381 (Fed. Cir. 2002) (results after judicial review), Int'l Trading, 281 F.3d at 1274-77 (results after administrative review, pre-URAA statute). There might be other ways in which the six-month time period might be triggered.

iii) Substance of Notice of Removal of the Suspension of Liquidation

The notice of removal of suspension of liquidation must be unambiguous but does not need to use specific language, such as including specific liquidation instruction or the final duty rate. See, e.g., NEC Solutions (America), Inc. v. United States, 411 F.3d 1340, 1344-45 (Fed. Cir. 2005); Am. Int'l Chem., Inc., 387 F. Supp. at 1267. Whether or not Commerce intended email instructions to Customs to constitute notice of removal of suspension is irrelevant. NEC Solutions, 411 F. 3d. at 1346. The author notes that this conclusion also follows from the fact that Customs acts in a ministerial capacity when liquidating and, therefore, should not inquire into Commerce's intent. Instead, a notice is considered unambiguous if a reasonable Customs official would have understood from the message that the suspension of liquidation has been removed. NEC Solutions, 411 F.3d. at 1346; Am. Int'l Chem., Inc., 387 F. Supp. at 1267 (citation omitted). An example of an unambiguous notice found in email instructions from Commerce to Customs stated: "Records at the Department of Commerce indicate that there should be no unliquidated entries of [goods] from [country]." See Am. Int'l Chem., Inc., 387 F. Supp. at 1268; see also NEC Solutions, 411 F. 3d. at 1345 (involving email instructions from Commerce to Customs stating that there should be no unliquidated entries except for certain entries for which suspension of liquidation had not been lifted).

The notice must also be public. See, e.g., Am. Int'l Chem., Inc., 387 F. Supp. at 1269. Publication of notice of final results after administrative or judicial review in the Federal Register as well as email instructions from Commerce to Customs made public by posting on Customs Electronic Bulletin Board ("CEBB") satisfies this requirement. See, e.g., Int'l Trading Co., 281 F.3d at 1275; Am. Int'l Chem., Inc., 387 F. Supp. at 1269. The author notes that Customs has retired the CEBB and migrated the materials posted thereon to areas of its website at CBP.gov. It is likely, but not yet settled, that Customs' posting liquidation instructions on CBP.gov will satisfy the requirement that notice be public.

iv) To Whom Notice May Effectively Be Provided

§1504(d) provides that Customs must receive notice of the removal of the suspension of liquidation from Commerce, another agency, or a court with jurisdiction over the entries in question. The courts have rejected arguments that Customs received notice by service of process on attorneys from the U.S. Department of Justice ("Justice"). See, e.g., Fujitsu, 283 F.3d at 1379. Recently, the Federal Circuit rejected a variant of that argument in NEC Solutions. 411 F. 3d at 1346. The importer in NEC Solutions tried to distinguish Fujitsu by arguing that in Fujitsu, Justice was notified about a final dumping margin, while in NEC Solutions, Justice was notified that suspension of liquidation had been lifted. Id. Furthermore, the Federal Circuit rejected the importer's argument that notice was served on Customs via Justice because Customs is an agency of the United States and Justice in an interrogatory response stated that Justice represented "the United States." Id. at 1346. There is no indication whether this is an absolute rule or if further distinguishing can be made.

c) Finality and Protestability of Deemed Liquidation

It is unclear whether deemed liquidation by operation of law can be protested or undone. The current rule appears to be that deemed liquidation by operation of law cannot be protested in the absence of an active liquidation. See, e.g., Wolff Shoe Co. v. United States, 141 F.3d 1116, 1122-23 (Fed. Cir. 1998) (holding that deemed liquidation cannot be protested before it has occurred and cannot be undone thereafter). However, dicta by the CIT could be interpreted as alluding to the possibility that deemed liquidation by operation of law could be protested (and even undone). See, e.g., Koyo, 403 F. Supp. 2d at 1307 n.3.; Norsk Hydro Canada, Inc. v. United States, 350 F. Supp. 2d 1172, 1178-79 (Ct. Int'l Trade 2004); Cemex, S.A. v. United States, 279 F. Supp. 2d 1357, 1362 (Ct. Int'l Trade 2003); Detroit Zoological Soc. v. United States, 630 F. Supp. 1350, 1355 (Ct. Int'l Trade 1986). The CIT noted the issue in the recent Koyo case but did not provide any deeper analytical guidance. See Koyo, 403 F. Supp. 2d at 1307 n.3. There, the CIT compared United States v. Cherry Hill Textiles, Inc., 112 F.3d 1550, 1560 (Fed. Cir. 1997) to Koyo and noted that while there were active liquidations following deemed liquidations by operation of law in both cases, the government's active liquidation in Koyo did not purport to alter the deemed liquidation by operation of law, unlike in Cherry Hill. Id. The author notes that another way of saying this is to point out that the importer in Cherry Hill had under-paid duties while the importer in Koyo had over-paid duties. That is, in Cherry Hill, the government tried to recover from the importer duties owed while in Koyo the importer was asking for a refund of duties not owed. The CIT appears to state that an importer may protest an active liquidation following deemed liquidation by operation of law. See, e.g., id. (citing Fujitsu, 283 F.3d at 1375-76). Furthermore, "[p]resumably, if protest is not available an

importer could file an action under the court's residual jurisdiction, 28 U.S.C. §1581(i) to challenge a non-qualifying "deemed liquidation." Id. Of course, the CIT did not explicitly state that deemed liquidation could be undone once occurred and the current rule appears to be that deemed liquidation by operation of law cannot be undone, at least not by a subsequent active liquidation if the importer under-paid duties (a government enforcement action). See, e.g., Cherry Hill, 112 F.3d at 1560; Koyo, 403 F. Supp. 2d at 1307 n.3. The Federal Circuit in Koyo is currently grappling with the issue of whether deemed liquidation by operation of law can be undone in a situation where an importer has overpaid duties and protested an active liquidation by Customs. These issues are undecided.

3) Whether the Negative Consequences of Deemed Liquidation Should Apply only Against the Government - The Koyo Litigation

The biggest problem with the current liquidation scheme is that the government may inadvertently, and arguendo deliberately, control whether or not deemed liquidation occurs. One way in which this could happen is by Customs' not liquidating in a timely manner after receiving notice of the removal of the suspension of liquidation. The government may also prevent the six-month time period to start to run e.g. by Commerce's failing to provide notice to Customs. The fundamental question from a equitable viewpoint is whether Congress could have intended the government to have this ability in light of legislative history indicating that §1504(d) was created and amended to create certainty, achieve finality and prevent the government from delaying liquidation indefinitely. Litigants have increasingly focused on this issue in recent years but it was not until in Koyo that a court explicitly expressed a view on the real-world, equitable impact resulting from Commerce and Customs' operating under the current statutory scheme. Representing a new direction in this area of law, it is worthwhile to spend some time reviewing the Koyo litigation.

a) Facts

Koyo imported roller and ball bearings subject to an antidumping order and paid cash deposits on its entries of between 48 and 74 percent ad valorem. Koyo, 403 F. Supp. 2d at 1307. After an administrative review and litigation, the antidumping rates were finalized, in most cases, at under 10 percent. Id. Suspension of liquidation was lifted and Commerce published notice of the results in the Federal Register and issued liquidation instructions to Customs. Id. Customs did not liquidate and approximately one year later, Koyo contacted Customs about some of its unliquidated entries. Id. Customs then found that those entries had been deemed liquidated by operation of law at the higher cash deposit rates and posted active liquidations to that effect. Id. Koyo protested the liquidations, Customs denied the protests and Koyo filed suit. Id.

b) The CIT's Decision

In Koyo, the CIT defined the issue as whether the deemed liquidation by operation of law at the higher cash deposit rates were "proper liquidations" under §1504(d), in which case the later consistent active liquidations would stand, or, if not, then Koyo's protests of the active liquidations should have resulted in reliquidation at the lowered final rates resulting from the administrative review and litigation. Id. at 1307.

The CIT first stated that the purpose behind §1504(d), as amended, was to increase certainty in the customs process for importers and to remove the government's unilateral ability to extend indefinitely the time for liquidation. Id. at 1308 (citing Int'l Trading, 412 F.3d at 1310. According to the CIT, while past cases interpreting §1504 had almost always involved importers' attempts to obtain the benefit of the statute by securing the finality of lower entry rates, in light of the purpose behind §1504(d), "the issue here is whether the statute may also be used to deprive an importer of later determined lowered rates." Id. at 1308.

The CIT rejected as absurd the government's argument that the language of §1504(d) made it immaterial who benefited from deemed liquidation, whether the government or the importer, because the finality purpose of §1504(d) was served regardless. Id. According to the CIT, "the goal of [§1504(d)] was to achieve finality so that importers would not be hit with unexpected duties years later, not so that Customs would profit by international wrongdoing or even mere inattention to duty." Id. (relying on Cherry Hill, 112 F.3d at 1559) (explaining that the purpose of the statute was finality to prevent later harm to importers and their sureties, not finality as such) and Cemex, S.A. v. United States, 279 F. Supp. 2d 1357 (Ct. Int'l Trade 2003), aff'd 384 F.3d 1314 (Fed. Cir. 2004) (finding that §1504(d) was intended to benefit importers)).

The CIT also rejected the government's argument that importers have ways to protect themselves from the negative effects of deemed liquidation caused by the government's inaction. Id. at 1310. An importer has no available remedy after deemed liquidation by operation of law has occurred because deemed liquidation cannot be undone. Id. (citing Cherry Hill, 112 F.3d at 1559). Similarly, before deemed liquidation has occurred, an importer has no available remedy because a protest or law suit would not be ripe because deemed liquidation has not yet occurred and the government is expected to act in a regular manner and obey statute. Id. (citation omitted). Furthermore, a court could not issue a writ of mandamus before deemed liquidation has occurred because mandamus issues upon a clear violation of law and before the six month time period in §1504(d) has expired, Customs has not violated the law. Id.

Finally, the CIT pointed out that while the government blamed Koyo for not reminding the government to timely liquidate, the statute and regulations do not require that importers do that and there is no procedure to accomplish it. Id.

In light of congressional intent to encourage prompt liquidation and Customs' failure to follow clear instructions to liquidate, the CIT concluded that Customs must reliquidate the entries at the appropriate duty rates as instructed by Commerce. Id. at 1311.

c) The Parties' Arguments on Appeal to the Federal Circuit in Koyo Corp. of U.S.A. v. United States, Appeal No. 06-1226

The government argues that the entries in question were deemed liquidated by operation of law because Customs did not liquidate the entries within six months after receiving notice of removal of suspension of liquidation by way of Commerce's publishing notices of final court decisions in the Federal Register. Brief for Appellant at 8, 14-16, Koyo Corp. of U.S.A. v. United States, Appeal No. 06-1226 (Fed. Cir.) ("Government Brief"). Koyo argues that it is entitled to a refund

of over-paid duties because Customs failed to liquidate in accordance with statutory obligations and Commerce's liquidation instructions. Brief for Appellee at 3, Koyo Corp. of U.S.A. v. United States, Appeal No. 06-1226 (Fed. Cir.) ("Koyo Brief").

- Koyo argues that 19 U.S.C. §1675(a)(2) provides that Customs must liquidate in accordance with the final results of an administrative review. Id. at 10-11. Because Customs liquidated at a different rate, the cash deposit rate, Customs failed to liquidate in accordance with statutory obligations and Commerce's liquidation instructions. Id. at 9, 11.

- The government argues that the plain language of §1504(d) covers all entries regardless of who benefits from deemed liquidation. Government Brief at 9, 17, 22. Because the language of §1504(d) is clear, there is no need to look to congressional intent. Id. at 21, 22. The government notes that courts in the past have set aside active liquidations and treated deemed liquidation by operation of law as final, regardless of whether the final antidumping rate was lower or higher than the cash deposit rate. Id. at 9, 19. Congressional intent, to increase certainty and bring finality to the liquidation process, is served by the plain language of §1504(d) because deemed liquidation is final regardless of who benefits therefrom. Id. at 9, 23-25. Congress must have been aware that the final duty rate can be both higher and lower than the cash deposits paid at entry, and because Congress did not legislate an exception for either situation, Congress must have intended deemed liquidation to be final in both cases. Id. at 25. Furthermore, because Congress considered this aspect, the "absurdity exception" does not apply because it only applies when it is impossible that Congress could have intended the result. Id. The CIT's decision is contrary to congressional intent to bring finality to the liquidation process because if §1504(d) does not apply to final antidumping rates that are lower than the cash deposit rates, there is no deadline within which Customs must liquidate such entries. Id. at 30. Koyo replies that a literal application of §1504(d) to a situation in which Customs "benefits" from its own inaction and violation of statutory obligations leads to an absurd result. Koyo Brief at 9. Congress' intent in enacting §1504(d) was to limit the time for liquidation, create finality and prevent harm to importers. Id. at 15-16. "Congress obviously would not impose a deadline for action by Customs and in the same provision allow Customs to punish the importer for Customs' own failure to meet the deadline." Id. at 16.

- Koyo also argues that the entries were not deemed liquidated by operation of law at the cash deposit rates because Koyo did not "assert" the cash deposit rates paid upon entry. Id. at 9, 18. Koyo notes that the Federal Circuit in Wolff Shoe, 141 F.3d at 1123-24 rejected a similar argument. Id. But, according to Koyo, Wolff Shoe is distinguishable: (i) the importer in Wolff Shoe did not participate in the administrative review setting the final duty rates but Koyo did and, therefore, "asserted" the final duty rates, not the cash deposit rates, and (ii) the cash deposit rates in Wolff Shoe were lower than the final duty rates so the importer was not punished for Customs' failing to comply with its statutory obligations, unlike Koyo. Id. at 19-20. In the alternative, Customs' active liquidations constitute protestable reliquidations. Id. at 9-10, 22. Because Koyo protested the reliquidations and Customs wrongfully denied the protests, the court should order

Customs to liquidate the entries at the rates established in the final results after administrative review and litigation. Id. at 22.

- The government argues that there is no evidence in the record of international wrongdoing by Customs and, because of the Byrd Amendment, the government cannot "profit" from deemed liquidation. Government Brief at 26-27. Koyo replies that the government's argument is misplaced because an inquiry into wrongdoing or inattention is unnecessary and would overwhelm the courts. Koyo Brief at 23. Also, the argument is incorrect because there was evidence of wrongdoing or inattention to duty. Id.

- According to the government, Koyo had additional remedies available to it, such as reminding Customs to liquidate, seeking a writ of mandamus, or filing a protest within 90 days after deemed liquidation by operation of law had occurred. Government Brief at 9, 10, 31-36. A request for mandamus would be mature if it is likely that Customs might not liquidate within the six-month period. Id. at 35-36. Koyo replies that Customs is the one not acting diligently because it is under a statutory obligation to liquidate while importers are not under a statutory obligation to remind Customs to liquidate. Koyo Brief at 25. A writ of mandamus would not be available to Koyo because it issues for a clear violation of law and before deemed liquidation has occurred, Customs has not violated its statutory duty. Id. at 25-26. Koyo could not have protested within 90 days of deemed liquidation by operation of law occurring because 19 C.F.R. §159.9(c)(iii) provides that a protest of deemed liquidation by operation of law shall be "filed 'within 90 days from the date the bulletin notice of liquidation ... is posted ....'" Id.

d) Brief Remarks Regarding the Koyo Litigation

The CIT started out its analysis by stating that an active liquidation purporting to memorialize a "proper" deemed liquidation by operation of law would be upheld, but that an active liquidation purporting to memorialize a not "proper" deemed liquidation by operation of law would not. In the latter situation Customs should reliquidate. Because the CIT in Koyo ordered Customs to reliquidate, it seems that the decision includes an implicit finding that the deemed liquidation by operation of law in this case was not proper. The CIT focused its discussion on congressional intent finding that Congress cannot have intended the result a literal interpretation of the statute would lead to in light of congressional intent in enacting §1504(d) to protect importers and promote finality and prompt liquidation. It is unclear what a "proper" liquidation by operation of law is.

The government appears to correctly point out that the plain language of §1504(d) does not distinguish between the over- or under-payment situations – deemed liquidation applies to both. However, this result leaves something to be desired in light of discussion in legislative history indicating that Congress intended to limit the time period for liquidation and protect importers from delayed demands for payment of duties. Also, the government's interpretation would give Customs absolute control over whether deemed liquidation occurs. Of course, courts assume that the government acts in a diligent manner but that assumption is also part of the problem because it raises the evidentiary burden on a party trying to prove governmental inattention, negligence or wrongdoing. Furthermore, the government's argument makes little sense from a public policy and law and economics standpoint. Why spend governmental and private

resources on administrative reviews and litigation when the hard-fought-for results therefrom may be lost in the liquidation process? The author also notes that if deemed liquidation by operation of law can be protested, it appears to follow that the negative consequences from deemed liquidation should apply only against the government. Only importers may protest Customs' liquidation decisions and an economically rational importer would only protest deemed liquidation in the over-payment situation. If a court could not undo Customs' decision to recognize the deemed liquidation, there would be little point in allowing the protest. Hence, the outcome of the protest should be positive for the importer (and negative for the government). Conversely, in the under-payment situation, an importer would not protest deemed liquidation and could invoke deemed liquidation to prevent the government from collecting duties in an enforcement action.

Finally, another interesting argument in the Koyo case is the government's argument that one of Koyo's protests was untimely because it was filed before Customs' posting the bulletin notice of liquidation of that entry. See Government Brief at 36-38. While there might be some merit to this argument under 19 U.S.C. §1514(c)(3) (providing for filing of a protest "after" but not "before" notice of liquidation), it highlights the fact that there is no process in place for importers' monitoring of the liquidation process. Hence, the government's argument that importers are partly to blame if they suffer negative effects from deemed liquidation because they did not diligently monitor Customs' liquidating appears flawed. Furthermore, there is no statutory requirement that importers do that while Customs is obligated by statute to liquidate in a timely manner.

4) Miscellaneous Related Issues

a) Mandamus; Publication Requirement in 19 U.S.C. §1516a

One way in which an importer potentially could safeguard its rights is by seeking a writ of mandamus to force Customs to liquidate in a timely and accurate manner. A court may grant a writ of mandamus after a showing that: (i) the party seeking the writ has no other adequate means to attain the relief desired, (ii) the right to the writ is clear and indisputable, and (iii) issuing the writ is appropriate under the circumstances. See, e.g., Decca Hospitality Furnishings v. United States, 427 F. Supp. 2d 1249, 1256 (Ct. Int'l Trade 2006). The recent Decca case is informative as to the mechanics of issuing the writ even though it does not involve deemed liquidation. The case is further interesting because of its potential implication that there might be other circumstances in which a party may force Commerce to implement a CIT decision even if appealed to the Federal Circuit. In Decca, Commerce rejected as untimely information about independence from state control submitted by a Chinese manufacturer of furniture in an antidumping investigation. Id. at 1253. As a result, Commerce assigned the importer the country-wide rate of 198.08% as opposed to the lower rate for non-state-controlled importers. Id. After litigation, Commerce lowered the importer's rate to 6.65% but concluded that it was unable to amend the importer's cash deposit rate under 19 U.S.C. §1516a(e) until the CIT's decision had become final and conclusive, which it never did because a defendant-intervenor appealed the decision. Id. at 1253-54. In the mandamus proceedings, the importer produced evidence that it could no longer import the goods subject to the antidumping duty order because it could not secure credit to post the high cash deposit rate. Id. at 1255. The CIT concluded that the importer had no adequate alternative remedies available to it and rejected the government's

argument that a potential refund of cash deposits was an adequate remedy. Id. at 1257. According to the court, creditors may not understand the risks involved because of the complexity of U.S. trade laws and may therefore refuse to lend or charge high interest rates, both of which may have a chilling effect on imports. Id. at 1257. The CIT found that Commerce had a duty to implement the lower cash deposit rate under §1516a(c)(1) because Commerce's obligation to publish notice of an adverse court decision thereunder is absolute and administrative determinations govern only until the CIT has entered a final judgment, not until any appeals are concluded. Id. at 1261-63. Finally, the CIT concluded that it was appropriate to issue a writ in this case because there was a low probability that the importer's goods would be liquidated at the 198.08% rate. Id. at 1264.

The author notes that the CIT's decision was appealed by a defendant-intervenor, not by Commerce. Because Commerce's position not to amend the cash deposit rate was publicly known, the appeal is an example of a situation where, in this case, the domestic industry has an incentive to appeal, regardless of the merits of the claim, because the appeal will prolong the period during which the importer is shut out of the market.[2]

b) Government Inaction and the Collection of Antidumping Duties on Rescinded Antidumping Orders

The government is in absolute control of whether or not entries are properly liquidated. The government may cause deemed liquidation to occur by communicating inaccurate information or taking erroneous action but also may prevent deemed liquidation from occurring by preventing the six-month time period from starting to run. Most importantly, as a result, without implying any malfeasance on behalf of the government, the government may collect duties not owed. The CIT and Federal Circuit have been increasingly vocal in recent years in expressing concern with the inequities caused by the government's actions in the liquidation context. American Nat'l Fire Ins. Co. v. United States is an interesting case involving some of these issues. 2006 Ct. Int'l Trade LEXIS 105 (July 18, 2006). There, an importer imported ferrosilicon from China, subject to a cash deposit rate of 137.73%. Id. at 3. However, Customs did not collect the cash deposit at entry. Id. at 4. Commerce sent liquidation instructions to Customs and Customs made a demand for the unpaid duties on the importer's surety. Id. at 6-7. The surety protested the demand, Customs denied the protest and the surety filed suit. Id. at 7. To complicate matters, meanwhile, the U.S. International Trade Commission reopened its original injury determination in light of evidence of a price-fixing conspiracy maintained by some U.S. ferrosilicon producers. Id. at 8. Commerce subsequently rescinded the antidumping order "ab initio" as a result. Id. at 9. The CIT concluded that it lacked jurisdiction under 28 U.S.C. §1581(a) to hear the case because the surety's complaint was vague and could be read as either challenging the calculation of duties or collection of duties, neither of which was protestable under 19 U.S.C. §1514(a). Id. at 16-17. The court's discussion is interesting for purposes of analyzing what constitutes a protestable decision but the author would like to focus on the issue of equity in the liquidation process. The CIT rejected the surety's argument that Customs should not have liquidated because of the ongoing price-fixing investigation because Customs acts merely in a ministerial nature on Commerce's order during liquidation. Id. at 28-29. This appears to be well-settled law.

[2] The author has no knowledge of the motivations behind this particular appeal and does not intend to imply any motives on behalf of any parties to the case.

However, the CIT also noted quite pointedly that "[f]or Commerce to order the liquidation of entries while at the same time investigating an enormous price-fixing conspiracy concerning these entries leaves businesses such as the Plaintiff to conclude the Government unjustly enriches itself to the detriment of its citizens." Id. at 41 n.24. The CIT also did not understand Commerce's attempt to rescind the antidumping order "ab initio" as the rescission was prospective only. Id. Finally, the CIT stated that it was "troubled by Customs' behavior" during the administrative phase because its poorly written responses to the surety's requests for guidance had added to the surety's confusion as opposed to alleviated it. Id. at 40.

c) Injunctions

i) Timing of Injunctions

Upon appeal of an administrative decision, the CIT routinely issues a preliminary injunction suspending liquidation of the entries involved upon a motion from a party. The purpose of the injunction is to prevent liquidation during judicial review to allow proper liquidation in accordance with the final court decision after exhaustion of all appeals. A preliminary injunction remains in effect through the entire appeals process and expires when suspension of liquidation is removed at the time all appeals have been exhausted. See, e.g., Fujitsu, 283 F.3d at 1379. In SKF USA Inc. v. United States, the government argued that the CIT lacked jurisdiction to hear a challenge to results after administrative review because the entries at issue were deemed liquidated by operation of law before the court had issued an injunction suspending liquidation. 435 F. Supp. 2d 1247 (Ct. Int'l Trade 2006), 2006 Ct. Intl. Trade Lexis 91, *3-4, 6. The CIT found that the entries were not deemed liquidated at the time the importer filed its motion for preliminary injunction. Id. at *6, 10. While the CIT's rules provide a time limit within which a party must file a motion, there is no rule or statute providing any time limit within which the CIT must issue an injunction. Id. at *10. Furthermore, preliminary injunctions are crucial to preserving the parties rights in trade litigation, and the government consented to the injunction and the CIT's jurisdiction at the time of filing of the motion. Id. at *9, 10. The CIT cited Koyo, and stated that "here Defendant argues that it should benefit from its own unfounded opposition and delay in preventing Plaintiff from obtaining a preliminary injunction within the six-month period." Id. at *13. The purpose of §1504(d) is to ensure proper liquidation and not merely to achieve finality. Id. at *13 (citing Cherry Hill, 112 F.3d at 1560). The government's interpretation of §1504(d) is contrary to congressional intent because it would restricts the CIT's power to grant injunctive relief. Id. at *13 (citing S. Rep. No. 96-249, at 2352 (1979)). "Because deemed liquidation is a legal proposition requiring further action to effect actual liquidation, SKF's entries remain within this court's jurisdiction." Id. at *14 (citations omitted). The author notes that it is possible to interpret the latter statement to lend support for an argument that deemed liquidation by operation of law can be reviewed and undone by a court after an active liquidation by Customs.

ii) Liquidation in Violation of Injunction; Contempt

It appears well-established that Custom's active liquidation in violation of a preliminary injunction is void. See, e.g., Allegheny Bradford Corp. United States, 342 F. Supp. 2d 1162, 1169 (Ct. Int'l Trade 2004). In Nippon Steel Corp. v. United States, the CIT reiterated this rule.

No. 99-08-00466, slip op. 2006-97, 2006 Ct. Intl. Trade Lexis 93 (June 27, 2006). In Nippon Steel, Commerce had issued liquidation instructions and Customs had liquidated entries at the cash deposit rate of 18.37% despite an injunction suspending liquidation. Id. at *2. The final duty rates after litigation was between 19.95% and 21.12% and Commerce issued a correction of its previous liquidation instructions. Id. at *3. The CIT found that the liquidations were void and rejected the importer's argument that the liquidation should be upheld because the government should not benefit from its own wrongdoing. Id. *4.

Under certain circumstances, a court may hold the government in contempt for violating an injunction suspending liquidation. In Yancheng Baolong Biochemical Products Co. v. United States, the government appealed the CIT's decision holding the government in contempt. 406 F.3d 1377 (Fed. Cir. 2005). There, the importer had challenged the results after administrative review and moved for a preliminary injunction. Id. at 1379. The CIT upheld the review results and the importer appealed, without moving for a new, second injunction. Id. While the appeal was pending, Commerce instructed Customs to liquidate and Customs started to liquidate the entries. Id. The importer sought a clarification from the CIT about the duration of the preliminary injunction and the CIT informed the parties that the injunction remained effective until all appeals were exhausted. Id. Commerce sent instructions to Customs to cease liquidation but Customs liquidated the last of the entries on the same day it received the revised instructions. Id. at 1380. "To establish civil contempt, it must be shown, by clear and convincing evidence, that there was a valid order in place, the defendant had knowledge of the order, and the order was disobeyed." Id. at 1381 (citation omitted). The Federal Circuit rejected the government's argument that it should not be held in contempt because there was "fair grounds for doubt as to whether the injunction continued in to the appeal stage of the litigation." Id. According to the court, it is well-established that a court-ordered suspension of liquidation remains in effect until there is a final court decision. Id. at 1381-82. A court decision is "final" or conclusive when it can no longer be appealed. Id. at 1382. Hence, the Federal Circuit found that the CIT correctly held the government in contempt. Id. at 1383.