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Enjoining Liquidation in Antidumping and Countervailing Duty Cases: Issues and Pitfalls*

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I. Introduction

When challenging antidumping and countervailing duty determinations before the Court of International Trade ("CIT"), an important consideration is the need to preserve the suspension of liquidation of import entries subject to the agency determination being challenged in the appeal. In the absence of an injunction from the court, the import entries covered by the determination can be liquidated by U.S. Customs and Border Protection ("CBP"), or the entries may be "deemed liquidated" by operation of law. In either case, liquidation of the entries has the effect of finally fixing the amount of antidumping or countervailing duties to be assessed on those entries, thereby rendering moot any judicial review of the underlying determinations.[2] In most instances, the liquidation of the entries covered by the challenged agency determination therefore deprives the court of subject matter jurisdiction and will lead to dismissal of the appeal.[3]

Because of the importance of preserving the suspension of liquidation during the pendency of a court challenge, the CIT routinely issues preliminary injunctions enjoining the liquidation of entries during the pendency of the appeal. In actions brought pursuant to 19

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[2] *See Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983).

[3] *Shandong Huarong Mach. Co., Ltd. v. United States*, 2008 Ct. Intl. Trade LEXIS 129 (Dec. 10, 2008); *Sichuan Changhong Elec. Co. v. United States*, 460 F. Supp. 2d 1338 (Ct. Intl. Trade 2006).

U.S.C. § 1516a and 28 U.S.C. § 1581(c), which cover the vast majority of judicial challenges to antidumping and countervailing duty determinations, the issuance of preliminary injunctions against liquidation is rarely contested, and the United States routinely consents to the issuance of an injunction provided certain standard terms are included.[4] In actions brought under the court's residual jurisdiction pursuant to 28 U.S.C. § 1581(i), the CIT also frequently issues preliminary injunctions against liquidation, but the issuance of a preliminary injunction against liquidation in these cases is frequently opposed by the government.[5]

This article will trace the state of the CIT's jurisprudence concerning the issuance of preliminary inunctions against liquidations, including the distinct statutory underpinning of such injunctions in actions brought under 28 U.S.C. § 1581(c), the application of the traditional four-factor test for preliminary injunctions in the unique context of such actions, and significant distinctions in the court's jurisprudence on preliminary injunctions in cases under 28 U.S.C. § 1581(c) versus cases under 28 U.S.C. § 1581(i).

II. The Need To Enjoin Liquidation: Retrospective Assessment

The United States uses a "retrospective" assessment system in imposing antidumping and countervailing duties. The importer of merchandise subject to an antidumping or countervailing duty order makes a cash deposit of the amount of estimated antidumping or countervailing duties

[4] The most significant of these are that the injunction will not take effect until five business days after Plaintiff has served the injunction order on certain designated officials at Commerce and CBP. The United States insists on this language in order protect against potential liability for contempt of court in the event of any inadvertent liquidations by agency staff unaware of the existence of the injunction. *Clearon Corp. v. United States,* 2010 Ct. Intl. Trade LEXIS 89 *13 (Aug. 9 2010).

[5] In many instances, opposition to the issuance of a preliminary injunction against liquidation in cases brought under 28 U.S.C. § 1581(i) stems from the government's challenge to the CIT's jurisdiction, rather than from an objection to an injunction *per se*. The government often contends that the plaintiff cannot demonstrate a likelihood of success on the merits because the court lacks jurisdiction over the claim. *See Nippon Steel Corporation v. United States*, 219 F.3d 1348, 1351-52 (Fed. Cir. 2000); *Parkdale Int'l Ltd. v. United States*, 491 F. Supp 2d 1262 (Ct. Int'l Trade 2007). More recently, the government and/or defendant intervenors have also opposed the issuance of preliminary injunctions in cases under 28 U.S.C. § 1581(i) on the grounds that the plaintiff cannot show irreparable harm from the liquidation of the entries because the plaintiff has an alternative remedy of reliquidation pursuant to *Shinyei Corp. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004). *See* discussion at Part IV, *infra*.

at the time that subject merchandise enters the United States,[6] but the actual amount of duties is not determined until after entry, and is not finally "paid" until the entries have been liquidated by CBP.[7] If no party requests an administrative review, Commerce instructs CBP to liquidate the entries at the estimated antidumping or countervailing duties deposited at the time of entry.[8] If a review is requested, the final results of that review determine the amount of antidumping or countervailing duties to be assessed on the entry.[9]

Liquidation is defined as the "the final computation or ascertainment of the duties . . . or drawback accruing on an entry."[10] Once CBP liquidates an entry, the duties owed on that entry, including any antidumping or countervailing duties, are final and conclusive on all parties unless a protest is filed[11] or one of several limited statutory exceptions applies.[12] When merchandise subject to an antidumping or countervailing duty order is entered, liquidation of the entry is suspended by operation of law.[13] If Commerce conducts an administrative review, the

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[6] Liability for antidumping or countervailing duties first attaches to entries made on and after the publication of a preliminary affirmative determination by Commerce. 19 U.S.C. § 1671b(d). During the period prior to the publication of the antidumping or countervailing duty order Commerce may permit importers to post bonds, rather than deposit cash, to secure the payment of antidumping duties. 19 U.S.C. § 1671b(d)(1)(B); 19 U.S.C. § 1673b(d)(1)(B).

[7] Upon liquidation of the entry, CBP compares the amount of antidumping or countervailing duty assessed on each entry with the amount deposited at the time of entry. If the deposit amount is greater than the assessed duty, the importer receives a refund of the difference with interest. If the deposit amount is less than assessed duty, the importer must pay the additional duties. 19 U.S.C. § 1671f(b); 19 U.S.C. § 1673f(b).

[8] 19 C.F.R. § 351.212(c)(i).

[9] 19 U.S.C. § 1675(a)(2).

[10] 19 C.F.R. § 159.1.

[11] *See* 19 U.S.C. § 1514(b). Because antidumping and countervailing duties are determined by Commerce, rather than CBP, the amount of such duties assessed on an entry is not protestable unless CBP's assessment deviates from the instructions it receives from Commerce. *Ugine & Alz Belgium v. United States*, 452 F.3d 1289 (Fed. Cir. 2006); *Mitsubishi Elecs. Am., Inc. v. United States*, 848 F. Supp. 193 (Ct. Int'l Trade 1994), *aff'd* 44 F.3d 973, 977 (Fed. Cir. 1994).

[12] 19 U.S.C. § 1501 (voluntary reliquidation by CBP within 90 days).

[13] During an investigation, liquidation is suspended at the time of the affirmative preliminary determination by Commerce. 19 U.S.C. § 1671b(d)(2); 19 U.S.C. § 1673b(d)(2). If the Commerce preliminary determination is negative, then liquidation is first suspended at the time of the final affirmative determination. 19 U.S.C. § 1671d(c)(1)(C); 19 U.S.C. § 1673d(c)(1)(C).

suspension of liquidation by operation of law remains in place during the course of the administrative review.[14] Once a review is concluded, Commerce issues instructions to CBP to liquidate the entries covered by the review at the amount of antidumping or countervailing duties determined in that review.[15] Consequently, parties who wish to appeal the final results of an antidumping or countervailing duty determination must normally seek an injunction from the CIT against liquidation of entries during the pendency of the appeal. In the absence of such an injunction, CBP would be free to liquidate the entries pursuant to 19 U.S.C. § 1500(c)-(d).[16]

III. Injunctions Against Liquidation In Cases Under Section 1581(c)

The primary statutory basis for appealing antidumping and countervailing duty determinations is 28 U.S.C. § 1581(c), which grants the CIT exclusive jurisdiction over any civil action commenced under section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a. Section 516A, in turn, authorizes interested parties who are parties to the proceeding to challenge final antidumping and countervailing duty determinations and administrative reviews by filing a summons within 30 days of the publication of the antidumping duty order or administrative review results, followed by a complaint within 30 days thereafter.[17] Section 516A provides express authority for the CIT to enjoin liquidation of entries covered by the challenged determination during the pendency of the appeal:

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[14] 19 C.F.R. § 351.212(c)(2). *See Am. Permac, Inc. v. United States*, 642 F. Supp. 1187, 1191 (Ct. Int'l Trade 1986) ("Because 19 U.S.C. § 1675(a)(2) expressly calls for the retrospective application of antidumping review determinations . . . suspension of liquidation during the pendency of a periodic antidumping review is unquestionably 'required by statute[].'")

[15] 19 U.S.C. § 1675(a)(2)(C).

[16] In addition, in the absence of injunction, entries not liquidated by CBP within six months of publication of final review results are deemed liquidated at the amount of duties deposited at the time of entry. 19 U.S.C. § 1504(d); *Shandong Huarong Mach. Co.*, 2008 Ct. Intl. Trade LEXIS 129; *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (Fed. Cir. 2002).

[17] 19 U.S.C. § 1516a(a)(2). Appeals of certain types of determinations (including determinations by Commerce not to initiate an antidumping or countervailing duty investigation and negative preliminary injury determinations by the ITC) must be initiated by filing a summons and complaint simultaneously. *See* 19 U.S.C. § 1516a(a)(1).

> In the case of a determination described in paragraph (2) of subsection (a) of this section by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.[18]

A. Irreparable Harm and Mootness

Given the statutory scheme, an injunction against liquidation of the entries covered by an antidumping or countervailing duty determination is normally necessary to permit meaningful judicial review of the determination. This principle was first established in *Zenith Radio Corp. v. United States*.[19] The plaintiffs in that case were domestic television manufacturers who wanted to challenge the antidumping duty rates determined by Commerce in an administrative review of an antidumping duty order on color televisions from Japan. The plaintiffs sought an injunction against liquidation of the entries covered by the review during the pendency of the litigation. The plaintiffs had argued that liquidation of the entries would irreparably harm them because it would preclude judicial review of the amount of antidumping duties to be assessed on the entries covered by the review. The CIT disagreed that this assertion was sufficient to establish irreparable harm, reasoning that such a theory would justify the issuance of a preliminary injunction in every such appeal:

> Under plaintiff's argument, any liquidation prior to a final decision of this court would constitute irreparable harm *per se* and would therefore qualify every litigant contesting an antidumping determination for a preliminary injunction provided the other factors necessary for an injunction were met.[20]

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[18] 19 U.S.C. § 1516a(c)(2). The CIT also has authority to issue preliminary injunctions pursuant to the All Writs Act, 28 U.S.C. § 1651. *See Fuyao Glass Indus. Group v. United States*, 27 CIT 1321 (2003); *OKI Elec. Indus. Co. v. United States*, 669 F. Supp. 480, 486 (Ct. Int'l Trade 1987).

[19] 710 F.2d 806 (Fed. Cir. 1983).

[20] *Zenith Radio Corp. v. United States*, 553 F. Supp. 1052, 1054 (Ct. Int'l Trade 1982). The CIT concluded that such a virtual *per se* rule in favor of preliminary injunctions conflicted with the well-established federal law

The Court of Appeals for the Federal Circuit reversed, finding that in the absence of a preliminary injunction, the plaintiffs would be deprived of any meaningful remedy even if they prevailed on appeal: "[W]e conclude that liquidation would indeed eliminate the only remedy available to Zenith for an incorrect review determination by depriving the trial court of the ability to assess dumping duties on Zenith's competitors in accordance with a correct margin on entries in the '79-'80 review period."[21]

Zenith Radio thus established what amounts to a virtual *per se* rule that liquidation of the entries covered by an antidumping or countervailing duty administrative review constitutes irreparable harm to a plaintiff seeking to challenge that review under 28 U.S.C. § 1581(c) and section 516A. Significantly, the irreparable harm recognized by the court in *Zenith Radio* is a legal one – the inability to obtain meaningful judicial review in the absence of the continued suspension of liquidation – and arises from the statutory scheme, and not from the facts of any particular agency determination or the specific circumstances of any particular plaintiff. Thus, plaintiffs seeking injunctions against liquidation in cases under 28 U.S.C. 1581(c) and section

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proposition that the issuance of a preliminary injunction constitutes an "extraordinary remedy", as well as with section 516A(c)(1) of the Tariff Act of 1930, which provides that

> Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination . . . contested under subsection (a) of this section shall be liquidated in accordance with the determination . . . if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.

19 U.S.C. § 1516a(c)(1). According to the court, the insertion of this language immediately before section 516A(c)(2), which grants the court authority to enjoin liquidation, indicated that Congress did not intend for the *per se* issuance of preliminary injunctions in appeals of antidumping reviews. *Zenith Radio*, 553 F. Supp. at 1053-54.

[21] *Zenith Radio*, 710 F.2d at 810.

516A generally are not required to make a showing of specific commercial injury stemming from the liquidation of the entries. [22] [23]

Although the court in *Zenith Radio* did not expressly discuss the issue in terms of mootness, subsequent decisions by the CIT and Federal Circuit have held that liquidation of the entries subject to a challenged administrative review would normally moot the appeal by depriving the court of the ability to order any meaningful relief.[24] This approach has been embraced by the government, which routinely moves to dismiss appeals of administrative reviews when the entries have been liquidated, even when the liquidation was due to the inadvertent actions of the government despite the issuance of a preliminary injunction by the CIT.[25]

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[22] *Id*. at 809. In *Qingdao Taifa Group Co., Ltd. v. United States*, 581 F.3d 1375, 1380-81 (Fed. Cir. 2009), the Federal Circuit recently reaffirmed the rule of *Zenith Radio*, holding that a foreign producer can make a showing of irreparable harm from liquidation of the subject entries even though the U.S. importer, not the foreign producer, is liable for paying antidumping duties assessed on import entries.

[23] As discussed in part III-C *infra*, the liquidation of entries does not moot an appeal by a domestic interested party challenging an original *negative* determination of Commerce or the ITC because the court can still grant meaningful relief in the form of the prospective imposition of an antidumping duty order. For this reason, the CIT has held that a domestic interested party challenging a negative determination cannot rely on the virtual *per se* rule of *Zenith Radio*, but rather must make a more particularized showing of actual irreparable economic harm in order to obtain an injunction against liquidation of entries during the pendency of the appeal. *Bomont Indus v. United States*, 638 F. Supp. 1334, 1338 (Ct. Int'l Trade 1986); *Am. Spring Wire Corp. v. United States*, 578 F. Supp. 1405, 1408 (Ct. Int'l Trade 1984).

[24] *See SKF USA Inc. v. United States*, 316 F. Supp. 2d 1322, 1327 (Ct. Int'l Trade 2004); *Chr. Bjelland Seafoods v. United States*, 29 CIT 35, 51-52 (1995). *But see Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1309 (Fed. Cir. 2004) (questioning whether the holding of *Zenith Radio* "is properly extended outside the preliminary injunction context to jurisdictional rulings.")

[25] The government's efforts to dismiss actions as moot even where the plaintiff had obtained a preliminary injunction have generally been unsuccessful. Where the liquidations have been contrary to the express terms of a preliminary injunction, the CIT has held the liquidations to be void *ab initio* and ordered the entries to be restored to suspended status. *AK Steel Corporation v. United States*, 281 F. Supp. 2d 1318, 1322-23 (Ct. Int'l Trade 2003); *LG Electronics U.S.A., Inc. v. United States*, 991 F. Supp. 668, 675-76 (Ct. Int'l Trade 1997). Even in cases where the liquidations were not technically in violation of the terms of the injunction, the courts have refused to find that liquidation mooted the appeal where it was the clear intent of the court and the parties that the entries would remain suspended during the pendency of the appeal. *See Agro Dutch Indust. Ltd. v. United States*, 589 F.3d 1187, 1189 (Fed. Cir. 2009) (CIT properly exercised its equitable authority to retroactively amend the effective date of the preliminary injunction where CBP liquidated the entries after issuance of the injunction but on the fourth day of the five-day "grace period" before the injunction took effect.); *Clearon Corp.*, 2010 Ct. Intl. Trade LEXIS 89 at *16-20 (CIT retroactively modified the terms of the preliminary injunction to eliminate the personal service requirement where service was not made and the deemed liquidation period had expired). *But see SKF USA Inc. v. United*

B. Availability Of Injunctions Against Liquidation In Original Investigations

While *Zenith Radio* made clear that a preliminary injunction is necessary to preserve the CIT's jurisdiction over a section 1581(c) appeal of the final results of an administrative review, there was for some time uncertainty as to whether an injunction against liquidation is similarly available in an appeal of an original antidumping or countervailing duty determination. Prior to 1984, annual administrative review of all antidumping or countervailing duty orders was automatic. However, the law was modified by the Trade and Tariff Act of 1984[26] to provide for administrative reviews only upon request. Since that time, Commerce conducts administrative reviews only upon request of an interested party.[27] The antidumping or countervailing duty rate determined by Commerce in its original investigation sets the cash deposit rate on entries subject to the order, but does not directly determine the amount of duties to be imposed on any particular entries. Liquidation of entries on and after the date of the preliminary affirmative determination remains suspended by operation of law until the first anniversary month of the order, at which time Commerce publishes a notice of opportunity to request an administrative review of the entries. If no party requests a review, the entries are liquidated at the amount of the estimated duties collected at the time of entry, that is, at the rate determined in the original investigation.[28] Thus, a party seeking to challenge the antidumping or countervailing duty rate determined in the original investigation faces the prospect of having that appeal mooted where no review has been requested, because the entries would be liquidated at the rates established in the determination

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States, 512 F.3d 1326, 1328-29 (Fed. Cir. 2007) (where deemed liquidation period expired after plaintiff's motion for preliminary injunction but before the injunction was issued by the CIT, the entries were deemed liquidated by operation of law and the appeal was mooted even though the government had consented to the issuance of an injunction against liquidation).

[26] P.L. 98-573 (Oct. 30, 1984).

[27] 19 U.S.C. § 1675(a)(1).

[28] 19 C.F.R. § 351.212(c).

that is being challenged on appeal. Plaintiffs appealing the results of original antidumping and countervailing duty determinations therefore began moving for injunctions against liquidation of entries in order to ensure that the entries would remain suspended so they could be liquidated in accordance with the CIT's decision.

The CIT was initially split over the availability of injunctions in appeals of original antidumping and countervailing duty determinations. The government argued that under the statute, an administrative review was the exclusive means for a party that was dissatisfied with the amount of antidumping or countervailing duties paid at the time of entry on its import entries to obtain a different duty rate at liquidation, and that the CIT had no authority to review the amount of duties to be assessed on such entries in an action challenging an original antidumping or countervailing duty order.[29] In *Fundicao Tupy S.A. v. United States*,[30] the CIT appeared to agree with the government's position and denied a motion for preliminary injunction against liquidation, finding that plaintiffs would not be irreparably harmed by the liquidation of the entries at the cash deposit rate determined in the investigation because they could have availed themselves of the opportunity to request an administrative review. But the court took the opposite view in *OKI Electric Indus. Co. v. United States*,[31] *Ipsco, Inc. v. United States*,[32] and *Sonco Steel Tube Div., Ferrum, Inc. v. United States*,[33] concluding that granting an injunction against liquidation, so that entries for which no review had been requested could be liquidated at the final investigation rate as modified, if necessary, by judicial review, was consistent with the statutory scheme. The issue was ultimately resolved by the Federal Circuit in *Asociacion*

[29] *See Ipsco, Inc. v. United States*, 692 F. Supp. 1368, 1372, n.4 (Ct. Int'l Trade 1988).

[30] 669 F. Supp. 437, 429 (Ct. Int'l Trade 1987).

[31] 669 F. Supp. 480, 486 (Ct. Int'l Trade 1987).

[32] 692 F. Supp. 1368, 1375-76 (Ct. Int'l Trade 2008).

[33] 698 F. Supp. 927, 928 (Ct. Int'l Trade 1988).

Colombiana de Exportadores de Flores v. United States,[34] in which the Federal Circuit confirmed that where a party seeks only to challenge Commerce's calculations in the original investigations, it is not obliged to request an administrative review of the entries subjected to that cash deposit rate and thus would be irreparably harmed if the entries were liquidated before the conclusion of the appeal.

C. Applicability Of The *Zenith Radio* Rule In Negative Determinations

The *Zenith Radio* virtual *per se* rule of irreparable harm from liquidation does not apply to cases in which a domestic interested party challenges a negative final determination of Commerce or the ITC. Unlike a plaintiff challenging final review results, or a plaintiff challenging an affirmative original determination of Commerce or the ITC, liquidation of import entries sought to be covered by an antidumping or countervailing duty order does not make the appeal moot or leave the plaintiff without a remedy. Rather, if the plaintiff prevails on the merits of the appeal, the court can provide the plaintiff with prospective relief by directing Commerce to issue an antidumping duty order upon completion of the appeal.

This distinction was first recognized by the CIT in *American Spring Wire Corp. v. United States*.[35] Domestic interested parties challenged negative ITC injury determinations concerning imports of steel wire strand from several countries, and sought a preliminary injunction against liquidation of import entries from the affected countries during the pendency of the appeal. The court found that the *Zenith Radio* rule did not apply and denied the preliminary injunction. The court concluded that, unlike the plaintiff in *Zenith Radio*,

> [S]hould this court ultimately reverse the Commission's negative injury determinations, antidumping and countervailing duties can still be assessed at that time on all unliquidated as well as future entries pursuant to an affirmative injury

[34] 916 F.2d 1571, 1575 (Fed. Cir. 1990).

[35] 578 F. Supp. 1405, 1408 (Ct. Int'l Trade 1984).

> determination. Thus, unlike in the section 751 review context, plaintiffs will unquestionably have meaningful judicial review regardless of whether an injunction now issues.[36]

Consequently, the court concluded that in cases challenging negative original determinations, "the party seeking injunctive relief must make some showing of immediate and irreparable injury beyond the mere invocation of *Zenith*."[37]

The CIT reached a similar result in *Bomont Indus v. United States*.[38] There, domestic interested parties challenged a negative final fair value determination of Commerce. Following *American Spring Wire*, the CIT again concluded that even without an injunction against liquidation, the court retained the ability to award meaningful relief if the plaintiffs prevailed. The court thus concluded that the *Zenith* virtual *per se* rule did not apply and "an applicant for an injunction suspending liquidations during judicial review of a negative administrative dumping determination must prove irreparable injury along with the other requirements for such extraordinary relief."[39] Thus, while a plaintiff challenging a negative determination is not precluded from obtaining a preliminary injunction, it must make a full-blown showing of irreparable harm, similar to that required for preliminary injunctions seeking relief other than the mere continuation of the suspension of liquidation.[40] The plaintiffs in *Bomont* attempted to make this showing by means of affidavits attesting to the significant competitive injury they were suffering from having to compete with the allegedly dumping imports, but the court found this showing to have been insufficient to establish the requisite irreparable harm.[41]

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[36] *Id.* at 1407.

[37] *Id.* at 1408.

[38] 638 F. Supp. 1334 (Ct. Int'l Trade 1986).

[39] *Id*. at 1338.

[40] *See* footnote 47, *infra*.

[41] *See Bomont*, 638 F. Supp. at 1339.

D. The Four-Factor Test

The issuance of preliminary injunctions against liquidation has become routine in appeals of antidumping and countervailing duty orders under 28 U.S.C. § 1581(c) and section 516A. Recognizing the prevalence of motions for preliminary injunction against liquidation in actions under 28 U.S.C. § 1581(c), when the CIT in 1993 promulgated Rule 56.2, which governs appeals under section 1581(c), it required parties to file any motion for preliminary injunction no later than 30 days after the service of the complaint, thus recognizing that a motion for preliminary injunction against liquidation is a routine procedural step in an appeal under section 1581(c).[42] [43] As noted *supra* at I, the government normally consents to the issuance of a preliminary injunction provided certain conditions are included.[44] Nevertheless, the case law is clear that the issuance of a preliminary injunction against liquidation pursuant to section 516A(c)(2) remains subject to the traditional four-factor test for injunctive relief applicable in all federal courts. Thus, a plaintiff must show that (i) it will be immediately and irreparably injured; (ii) there is a likelihood of success on the merits; (iii) the public interest would be better served by the relief requested; and (iv) the balance of hardship on all the parties favors the plaintiff.[45]

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[42] USCIT R. 56.2(a).

[43] As a practical matter, however, plaintiffs frequently need to move for preliminary injunction considerably earlier. Following the decision of the Federal Circuit in *Int'l Trading Co. v. United States*, 412 F.3d 1303, 1310-12 (Fed. Cir. 2005) Commerce adopted a policy of issuing liquidation instructions to CBP 15 days after publication of the final review results. The CIT appears split on whether Commerce's policy is lawful. *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264 (Ct. Int'l Trade 2009); *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 353 F. Supp. 2d 1294 (Ct. Int'l Trade 2004); *but see Mittal Steel Galati S.A. v. United States*, 491 F. Supp. 2d 1273 (Ct. Int'l Trade 2007).

[44] However, in two recent appeals the government opposed issuance of a preliminary injunction on the ground that the plaintiffs had no likelihood of success on their single claim challenging Commerce's practice of "zeroing" dumping margins in antidumping administrative reviews. *See NSK Bearings Europe Ltd. v. United States*, Slip Op. 10-118 (Ct. Int'l Trade Oct. 15, 2010); *NSK Ltd. v United States*, Slip Op. 10–117 (Ct. Int'l Trade Oct. 15, 2010).

[45] *Qingdao Taifa Group Co., Ltd. v. United States*, 581 F.3d 1375 (Fed. Cir. 2009); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983); *SKF USA Inc v. United States*, 316 F. Supp. 2d 1322 (Ct. Int'l Trade 2004); *NMB Singapore Ltd. v. United States*, 120 F. Supp. 2d 1135, 1139 (Ct. Int'l Trade 2000).

As evident from the foregoing discussion, since *Zenith Radio*, the CIT's decisions on injunctions against liquidation have focused primarily on the first factor – whether liquidation of the entries would cause irreparable harm to the plaintiff. As discussed, the *Zenith Radio* rule establishes a virtual *per se* rule that liquidation of the entries that are the subject of an appeal under 28 U.S.C. § 1581(c) would constitute irreparable harm by mooting the action and thereby depriving plaintiff of judicial review of its challenge to the agency determination. Thus a plaintiff seeking a preliminary injunction against liquidation normally can make the requisite showing of irreparable harm simply by invoking the *Zenith Radio* rule and averring that in the absence of the requested injunction, the entries of the subject merchandise that are the subject of the appeal would be liquidated at the rate established in the challenged agency determination.[46] [47]

Where a plaintiff has satisfied the irreparable harm element based on the *Zenith Radio* rule, the CIT and the Federal Circuit typically have invoked the "sliding scale" approach to analyzing the remaining factors. *See Ugine & Alz Belg. v. United States*;[48] *Corus Group PLC v.*

[46] *SKF USA Inc.*, 316 F. Supp. 2d at 1327-28; *Chr. Bjelland Seafoods A/S v. United States*, 19 CIT 35, 51 (1995).

[47] It is important to emphasize that the analysis of the four-factor test discussed herein is limited to cases in which a party is seeking to enjoin only the liquidation of entries. Parties seeking to enjoin other types of agency action in connection with appeals of antidumping or countervailing duty determinations must, in addition to satisfying the other three factors, make an affirmative showing of a likelihood of actual irreparable harm to the plaintiff. Such a showing typically requires evidence of a likelihood that the plaintiff's business will be significantly impaired, or even destroyed, in the absence of the requested relief. Mere economic harm is not sufficient. *See, e.g., GPX Int'l Tire Corp. v. United States*, 587 F. Supp. 2d 1278 (Ct. Int'l Trade 2008); *Queen's Flowers de Colombia v. United States*, 947 F. Supp. 503 (Ct. Int'l Trade 1996). In addition, while, the court typically finds that continued suspension of liquidation is at most an inconvenience to the government, *Interredec, Inc. v. United States*, 652 F. Supp. 1550, 1557 (Ct. Int'l Trade 1987), the court may find the balance of hardships is weighed differently where the proposed injunction would have a more intrusive impact on the government's administration of the antidumping or countervailing duty laws. *NSK Ltd. v. United States*, 350 F. Supp. 2d 1128, 1133 (Ct. Int'l Trade 2004).

[48] 452 F.3d 1289, 1294 (Fed. Cir. 2006) ("[A]s the Court of International Trade has explained, the 'greater the potential harm to the plaintiff, the lesser the burden on Plaintiffs to make the required showing of likelihood of success on the merits.'" (quoting *SKF USA Inc.*, 316 F. Supp. 2d at 1329)).

Bush,[49] *Parkdale Int'l v. United States*;[50] *Corus Staal BV v. United States*.[51] Consequently, it is normally sufficient for a plaintiff to show that its legal claim presents a question that is "serious, substantial, difficult, and doubtful." *Carpenter Technology Corp. v. United States*;[52] *Ugine-Savoie Imphy v. United States*.[53]

The CIT has made clear, however, that it does not read *Zenith Radio* to provide for the automatic issuance of a preliminary injunction in 28 U.S.C. § 1581(c) cases in all circumstances. In *Carpenter Technology Corp. v. United States*,[54] the CIT denied a motion for preliminary injunction against liquidation despite agreeing with the plaintiff that denial of the injunction would cause irreparable harm under the *Zenith Radio* rule. The plaintiff, a domestic producer, filed a challenge to Commerce's final review results in an antidumping duty case on stainless steel bar from Germany under 28 U.S.C. § 1581(c). The plaintiff filed a motion for preliminary injunction against liquidation, but the motion was filed out of time.[55] The court determined that the plaintiff had failed to show good cause, and therefore denied plaintiff's application to file its motion out of time.[56]

The court also held, however, that even if the motion had been accepted out of time, the court would have denied the motion on the grounds that the plaintiff had failed to establish a sufficient likelihood of success on the merits. The court recognized that absent an injunction, the

[49] 217 F. Supp. 2d 1347, 1353-54 (Ct. Int'l Trade 2002) ("In reviewing the factors, the court employs a 'sliding scale.' Consequently, the factors do not necessarily carry equal weight. The crucial factor is irreparable injury." (citations omitted)).

[50] 13 CIT 1728, 1740 (2007).

[51] 515 F. Supp. 2d 1337, 1346 (Ct. Int'l Trade 2007).

[52] 469 F. Supp. 2d 1313, 1323-24 (Ct. Int'l Trade 2007).

[53] 121 F. Supp. 2d 684, 689 (Ct. Int'l Trade 2000).

[54] 469 F. Supp. 2d 1313, 1323-24 (Ct. Int'l Trade 2007).

[55] *Id.* at 1315. The government had consented to the issuance of a preliminary injunction, but defendant intervenors opposed the issuance of the injunction on the grounds that it was out of time. *Id.* at 1316.

[56] *Id.* at 1319.

subject entries would be liquidated in accordance with the challenged review results and the action would become moot, but found this fact alone was insufficient to support granting the preliminary injunction:

> Commerce concluded the relevant administrative review and issued liquidation instructions to the Bureau of Customs and Border Protection. As a result, Customs may liquidate the subject entries at any time. . . . Accordingly, this Court finds that Carpenter Technology met its burden regarding this prong of the test, as "the consequences of liquidation . . . constitute irreparable injury." *Zenith*, 710 F.2d at 810. However, *Zenith* does not require imposition of a preliminary injunction simply because a domestic producer may be deprived of meaningful judicial review if entries are liquidated. Rather, the burden remains on Carpenter Technology to sufficiently satisfy the remaining factors the court considers before granting a preliminary injunction.[57]

The court went on to undertake a detailed analysis of the merits of the claim presented by the plaintiff in its complaint. The court concluded, based on a review of the administrative record and the arguments of the parties presented in the motion and opposition to the preliminary injunction and in a hearing held in connection therewith, that the plaintiff had failed to demonstrate that it presented a question that was "serious, substantial, difficult or doubtful."[58] [59]

More recently, the CIT denied motions for preliminary injunction against liquidation in *NSK Bearings Europe Ltd v. United States* and *NSK Ltd. v United States*, two related cases brought under 28 U.S.C. § 1581(c) in which the plaintiffs were seeking to challenge only

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[57] *Id*. at 1320.

[58] *Id.* at 1324. The court held that serious questions are those that cannot be resolved at the preliminary injunction hearing, and concluded that the issues raised by the plaintiff could be resolved by the court based on the papers filed by the parties and the arguments made at the preliminary injunction hearing. *Id.*

[59] The court reached the conclusion that the plaintiff's claim lacked merit even though the claim presented by the plaintiff was not purely legal in nature, but rather required some scrutiny of the administrative record. Plaintiff argued that Commerce had erred in basing the starting U.S. price in its dumping margin calculation on invoices issued by the German parent to its U.S. subsidiary. According to the plaintiff, this meant that Commerce had based the U.S. price on the transfer price between the parent and its subsidiary, rather than on the price charged to the unaffiliated U.S. customer. *Id* at 1321. The court concluded, however, that Commerce had correctly determined that while the invoices were indeed between the foreign producer and its U.S. subsidiary, the *prices* on those invoices were in fact the prices charged to the unaffiliated customer. In reaching this conclusion, it was necessary for the court to consider the invoices themselves, the Commerce verification report, and other record documents that established to the court's satisfaction that any discrepancies between the invoices and the prices paid by the unaffiliated U.S. customer were due to rounding. *Id.* at 1321-22.

Commerce's practice of "zeroing" dumping margins in antidumping administrative reviews. The court found that the plaintiffs would be irreparably harmed under the *Zenith Radio* principle, but nevertheless denied the injunction after concluding that in light of controlling Federal Circuit precedent affirming Commerce's zeroing practice, "plaintiffs have not demonstrated any likelihood that they can succeed on the merits of their claim."[60]

Carpenter Technology, *NSK Bearings*, and *NSK Ltd.* thus stand for the proposition that even in cases under 28 U.S.C. §1581(c), a plaintiff must be prepared to show at least some likelihood of success on the merits of its case. The Federal Circuit has similarly indicated that a showing of a likelihood of success remains a prerequisite for the issuance of a preliminary injunction against liquidation. "Even where the movant shows that it will be irreparably harmed in the absence of an injunction, 'the movant must demonstrate at least a 'fair chance of success on the merits' for a preliminary injunction to be appropriate.'" *Qingdao Taifa Group Co. v. United States*.[61]

The remaining two factors, the balance of hardships and the public interest, are rarely controversial in a motion for preliminary injunction against liquidation in actions filed under section 1581(c). Because the entries in question are already suspended, the continued suspension of liquidation during the pendency of the appeal is normally found to impose at most, an inconvenience to the government, and the courts normally conclude that the public interest is served by preserving the ability of the court to hear and resolve the appeal on the merits.[62]

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[60] *NSK Bearings Europe Ltd v. United States*, Slip Op. 10-118 at 9 (Ct. Int'l Trade Oct. 15, 2010); *NSK Ltd. v United States*, Slip Op. 10–117 at 9 (Ct. Int'l Trade Oct. 15, 2010).

[61] 581 F.3d 1375, 1381 (Fed. Cir. 2009).

[62] *Qingdao Taifa Group Co.*, 581 F.3d at 1382; *SKF USA Inc.*, 316 F. Supp. 2d at 1328-29; *OKI Elec. Indus. Co. v. United States*, 669 F. Supp. 480, 486 (Ct. Int'l Trade 1987). However, in the recent *NSK* decisions, the court held that where the plaintiff had not demonstrated any likelihood of success on the merits, the public interest would be better served by allowing liquidation to proceed in the normal course. *NSK Bearings Europe Ltd v. United*

E. Is An Injunction An Affirmative Requirement To Retroactive Application of A CIT Decision?

To this point, the discussion of preliminary injunctions against liquidation in cases brought under section 1581(c) has focused on the need to preserve the suspension of liquidation in order to prevent the entries that are subject to the challenged determination from being liquidated at the antidumping or countervailing duty rates that the plaintiff seeks to challenge in its appeal. Thus, the preliminary injunction serves the traditional function of maintaining the *status quo* during the pendency of the appeal. In certain appeals of original Commerce or ITC determinations, however, a preliminary injunction may not be necessary to prevent liquidation, because liquidation of the entries is already suspended. This happens when the entries subject to the original determinations (that is, the entries on or after the date on which Commerce first suspended liquidation in connection with its affirmative preliminary or final determination) are the subject of an on-going administrative review by Commerce.

As noted *supra*, entries subject to an administrative review remain suspended by operation of law.[63] Thus, where an administrative review of the first review period has been requested, a party challenging the validity of an original Commerce fair value or subsidy determination, or an affirmative ITC injury determination, would not need a preliminary injunction to prevent liquidation of the entries and arguably would be unable to establish a likelihood of irreparable harm under the *Zenith Radio* rule. Indeed, the CIT has denied motions

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States, Slip Op. 10-118 at 10 (Ct. Int'l Trade Oct. 15, 2010); *NSK Ltd. v United States*, Slip Op. 10–117 at 10 (Ct. Int'l Trade Oct. 15, 2010).

[63] 19 C.F.R. § 351.212(c)(2); *see Am. Permac, Inc. v. United States*, 642 F. Supp. 1187, 1191 (Ct. Int'l Trade 1986).

for preliminary injunctions under such circumstances, finding that there had been no showing of irreparable harm.[64]

The government, however, has taken the position in at least some previous cases that the CIT's issuance of a preliminary injunction against liquidation under section 516A(c)(2) also has a substantive legal consequence beyond merely preserving the *status quo* by insuring that the entries are not liquidated. According to the government, a preliminary injunction against liquidation is also a legal prerequisite for the CIT to be able to grant retroactive relief in connection with whatever decision the CIT may issue on the merits. Under this theory, where no preliminary injunction has been issued by the CIT, a decision that results in a change to the agency's original determination will apply only prospectively, to those imports that enter on and after the date that notice of the court's decision has been published in the *Federal Register*. Given the fact that the final resolution of a challenge to an agency determination under 28 U.S.C. § 1581(c) can often take 12-18 months, or longer, depending on factors such as the scope and number of remands required, this would mean that antidumping and/or countervailing duties could be imposed on substantial volumes of imported merchandise even where the CIT ultimately determined that the underlying antidumping or countervailing duty determinations were unlawful, and even where those entries were still unliquidated at the time of the court's decision.

The government's position derives from a reading of section 516A(c) and (e), which provide as follows:

> **(c) Liquidation of entries**
>
> **(1) Liquidation in accordance with determination**

[64] *See Fuyao Glass Indus. Group Co. v. United States*, 27 CIT 1166 (2003).

> Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.
>
> **(2) Injunctive relief**
>
> In the case of a determination described in paragraph (2) of subsection (a) of this section by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.
>
> . . . .
>
> **(e) Liquidation in accordance with final decision**
>
> If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—
>
> **(1)** entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and
>
> **(2)** entries, the liquidation of which was enjoined under subsection (c)(2) of this section,
>
> shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

Standing alone, section 516A(e) seems to provide that where the CIT reverses the agency in whole or in part, the only entries that are to be liquidated "in accordance with the final court

decision in the action" are those entries that entered on and after the date of publication in the *Federal Register* of the notice of the CIT's decision (the so-called *Timken* notice)[65] and those entries whose liquidation had been enjoined by the court. Other entries, that is entries that entered before the date of the *Timken* notice but were not covered by an injunction, would be liquidated at the rate in the original determination, even where the CIT has held that the original Commerce or ITC determination was unlawful, and even if those entries remained unliquidated at the time of the court's final decision.

The government took this position in *Jilin Henghe Pharm. Co. v. United States*.[66] In *Jilin* the plaintiff challenged Commerce's calculation of a 10.85 percent margin in the original investigation pertaining to bulk aspirin from China. On remand, Commerce recalculated Jilin's dumping margin as *de minimis* and determined that Jilin should therefore be excluded from the antidumping duty order. Commerce's amended determination was affirmed by the court. Thereafter, Commerce published the *Timken* notice of an adverse court decision. In the meantime, Commerce had conducted and completed two administrative reviews in which it also found zero or *de minimis* dumping margins by Jilin. A review of the third review period was requested but then withdrawn, and Commerce therefore rescinded that review just a few days before the CIT's final decision in the appeal of the fair value determination. The entries during the third review period remained unliquidated, however, because of the administrative review proceeding.

When it came time to issue liquidation instructions for the third review entries, Commerce instructed CBP to liquidate all unliquidated entries that entered before the date of

[65] *See Timken Co. v. United States*, 893 F.2d 337, 340 (Fed. Cir. 1990). In *Timken* the Federal Circuit construed 19 U.S.C. § 1516a(c) and (e) to require Commerce to publish a notice in the *Federal Register* within 10 days of a judicial decision that is contrary to a determination of the agency.

[66] 342 F. Supp. 2d 1301 (Ct. Int'l Trade 2004), *judgment vacated*, 2005 U.S. App. LEXIS 4434 (Feb. 22, 2005).

publication of the *Timken* notice at the 10.85 percent deposit rate determined in the original investigation, despite the fact that the CIT had invalidated that determination and affirmed Commerce's finding on remand that the correct antidumping rate for Jilin during the investigation was *de minimis*, so that no antidumping duty order ever should have been issued. Commerce based its liquidation instructions on its reading of section 516A(a)(1) and (e). Because Jilin had never obtained a preliminary injunction against liquidation of the entries, Commerce contended that the third review entries that entered before the date of the *Timken* notice must be liquidated "in accordance with the determination of the . . . administering authority." Section 516A(a)(1). Commerce thus read section 516A(e) narrowly to permit liquidation in accordance with the court's decision only of those entries whose liquidation had been enjoined by the CIT, but not of other entries that remain unliquidated due to the suspension by operation of law that arises from administrative reviews.[67] If this view were correct, then a plaintiff would need to request an injunction against liquidation in every appeal of an original Commerce or ITC determination, even if there was no danger of the entries being liquidated because they were suspended pursuant to an on-going administrative review.

Jilin challenged Commerce's liquidations at the CIT in an action under 28 U.S.C. § 1581(i),[68] arguing that because the antidumping duty order as to Jilin had been conclusively invalidated by the CIT, Commerce could not lawfully continue to impose antidumping duties on any unliquidated entries, regardless of whether they entered before or after the date of the *Timken* notice.

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[67] *Id.* at 1307-08.

[68] As discussed in the following section, liquidation instructions may be challenged under 28 U.S.C. 1581(i). *See Ugine & Alz Belgium v. United States*, 452 F.3d 1289 (Fed. Cir. 2006); *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304-05 (Fed. Cir. 2004); *Consol. Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003).

The court agreed. Relying in part on the Federal Circuit's decision in *Timken*, the court concluded that once an agency determination has been invalidated by a decision of the CIT, entries may no longer be liquidated pursuant to that determination, regardless of when they entered. The court rejected Commerce's statutory argument that an injunction against liquidation was a prerequisite to applying the court's decision to pre-*Timken* notice entries:

> Moreover, 19 U.S.C. § 1516a(c)(1) and 19 U.S.C. § 1516a(e) cannot be read to legitimate the liquidation of Jilin's entries under Commerce's now discredited determination. To read the statutory provisions in that way fails to give force and effect to this Court's decisions, in that it allows liquidations to continue under a legally invalid determination. Once Commerce's final antidumping determination has been invalidated, it cannot serve as a legal basis for the imposition of antidumping duties on Plaintiffs' entries.[69]

Significantly, the court concluded that while it retained the ability to issue a preliminary injunction against liquidation of the entries,[70] an injunction was not necessary in order to provide relief to Jilin. Instead, the court issued a declaratory judgment that Commerce's liquidation instructions were unlawful.[71]

The CIT confronted a similar issue in a different statutory context in *Tembec, Inc. v. United States*.[72] The ITC had issued an affirmative threat of injury determination on softwood lumber from Canada, leading to the issuance of antidumping and countervailing duty orders. Various Canadian parties challenged the ITC's determination before a NAFTA Binational

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[69] *Jilin*, 342 F. Supp. 2d at 1309-10.

[70] In *Laclede Steel Co. v. United States*, 928 F. Supp. 1182 (Ct. Int'l Trade 1996), the CIT faced a similar situation. The CIT had reversed certain aspects of Commerce's original antidumping determination, which resulted in the antidumping duty rate being lowered to 4.08 percent. When review requests for two subsequent review periods for another producer were withdrawn, the CIT granted an injunction preventing Commerce from liquidating those entries at the original rate pursuant to Commerce's automatic liquidation regulation. *See id.* at 1187 ("there is no reason why this Court's judgment should not be given its full effect with respect to entries made prior to the Court of International Trade's decision which have been administratively suspended up until the time that requests for administrative review were withdrawn.")

[71] The government appealed the decision in *Jilin* to the Federal Circuit. While the appeal was pending, Jilin moved to vacate the CIT's decision, thereby mooting the appeal.

[72] 461 F. Supp. 2d 1355 (Ct. Int'l Trade 2006). *judgment vacated*, 475 F. Supp. 2d 1393 (Ct. Int'l Trade 2007).

Panel.[73] After multiple remands, the ITC reached a negative determination, which was affirmed by the Panel. When Commerce failed to revoke the antidumping and countervailing duty determinations in response to the Binational Panel determination, the Canadian parties filed suit in the CIT under 28 U.S.C. § 1581(i), claiming that as a result of the reversal of the ITC's injury determination, Commerce was required by U.S. law to revoke the antidumping and countervailing duty orders *ab initio* and liquidate all unliquidated entries without the imposition of antidumping or countervailing duties.[74]

Commerce took the position that even assuming that the Binational Panel determination required revocation of the orders, section 516Aa(g) of the Tariff Act of 1930, which governs review by NAFTA panel proceedings, required that all entries of merchandise that entered before the date of the *Timken* notice issued in connection with the Binational Panel decision were to be liquidated in accordance with the original affirmative injury determination (*i.e.* with the imposition of antidumping and countervailing duties). Commerce's position was based on section 516A(g)(5)(B), which closely parallels section 516A(c)(1):

> In the case of a determination for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, entries of merchandise covered by such determination shall be liquidated in accordance with the determination of the administering authority or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the administering authority of [the *Timken*

[73] In the case of antidumping and countervailing duty determinations involving Mexico and Canada, parties can bring challenges that would otherwise fall within the scope of the CIT's jurisdiction under 28 U.S.C. § 1581(c) before special binational dispute settlement panels established pursuant to the North American Free Trade Agreement. *See* North American Free Trade Agreement, Chap. 19, December 17, 1992, 32 I.L.M. 612. *See* section 516A(g) of the Tariff Act of 1930, 19 U.S.C. § 1516a(g).

[74] Commerce's position was that the Binational Panel's reversal of the original ITC affirmative determination did not require revocation of the underlying orders because the ITC's original determination had been superseded by a subsequent affirmative determination issued pursuant to section 129 of the Uruguay Round Agreements Act that "implemented" a separate WTO dispute settlement finding concerning the same original ITC determination. Commerce's position was rejected in *Tembec v. United States*, 441 F. Supp. 2d 1302 (Ct. Int'l Trade 2006) wherein the CIT held that the section 129 determination did not authorize Commerce to "implement" an affirmative injury determination issued under section 129(a), and that the final decision of the NAFTA Binational Panel rendered the orders unsupported by an affirmative injury determination.

> notice] of a final decision of a binational panel, or of an extraordinary challenge committee, not in harmony with that determination. Such notice of a decision shall be published within 10 days of the date of the issuance of the panel or committee decision.[75]

NAFTA panels are not Article III courts and were not given the statutory authority to issue injunctions. However, section 516A(g)(5)(C) directs Commerce to administratively continue the suspension of liquidation during NAFTA panel reviews upon the request of the parties. That suspension authority, however, was expressly limited to Binational Panel reviews of antidumping or countervailing duty administrative reviews, and did not apply to Binational Panel reviews of original Commerce or ITC determinations.[76] Commerce argued that the failure of the statute to provide for the administrative suspension of entries in the case of Binational Panel reviews of original determinations indicated an express Congressional intent that the results of such Binational Panel reviews should not apply to entries made before the date of the *Timken* notice.[77]

The CIT disagreed, holding that where an antidumping or countervailing duty order has been invalidated as a result of Binational Panel review, entries may no longer be liquidated in accordance with that order. Central to the court's holding was its conclusion that in drafting section 516A(g), Congress intended to provide the same scope of relief from a successful

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[75] 19 U.S.C. § 1516a(g)(5)(B).

[76] The legislative history of the Binational Panel review provisions indicated an intent for the scope of the administrative suspension authority provided for by section 516A(g)(5)(C) to permit suspension in the same circumstances in which injunctions against liquidation were available from the CIT. *Timken*, 461 F. Supp. 2d at 1363. At the time that the original version of section 516A(g) was adopted, it was not clear that injunctions against liquidation were routinely available in CIT appeals of original determinations. *See* discussion at part III-B, *supra*.

[77] Section 516A(g) has no provision parallel to section 516A(e) that expressly provides for liquidation of entries in accordance with the results of a Binational Panel review, even in cases where the challenged determination is an administrative review, and the entries have been administratively suspended pursuant to section 516A(g)(5)(c). Yet Commerce conceded that in such circumstances, the adverse panel decision would govern the liquidation of the entries suspended under 516A(g)(5)(c). *See Tembec*, 461 F. Supp. 2d at 1366. Commerce thus took the position that the administrative suspension provided for in section 516A(g)(5)(c), like the suspension pursuant to preliminary injunction provided for in section 516A(c)(2), acted not only to preserve the *status quo*, but was also a substantive legal prerequisite for applying the result of a Binational Panel decision to entries before the date of the *Timken* notice.

Binational Panel review as was available from judicial review by the CIT.[78] And in the view of the *Tembec* court, there was no question that parties who sought judicial review of original determinations before the CIT were entitled to have the results of that review applied to *all* unliquidated entries, including those that entered before the date of the *Timken* notice:

> When the subsections were drafted, there was no disagreement that if a periodic review were requested and an injunction granted, all unliquidated merchandise would be liquidated in accordance with the ultimate determination of: (1) the appeal of the periodic review; or (2) the appeal of the underlying AD duty order. *See Sonco Steel Tube Div., Ferrum, Inc. v. United States*, 12 CIT 990, 993, 698 F. Supp. 927, 930 (1988) ("Apparently, there is agreement that where requested annual reviews have not been completed before a court decision finding an affirmative antidumping determination invalid there is no basis for liquidation with antidumping duties. Therefore, a court order totally invalidating an [agency's] original determination, which order occurs in the midst of an annual review, will result in the suspended entries being liquidated with no antidumping duties, even though they were entered prior to the court's decision.").[79]

Thus, although *Tembec* dealt with section 516A(g), the court's holding implicitly rejects the government's reading of section 516A(e) as well.

Read together, *Jilin* and *Tembec* indicate that the CIT rejects the government's position that the issuance of a preliminary injunction against liquidation under section 516A(c)(2) is a necessary substantive element in order for a judicial decision invalidating an original Commerce or ITC determination to apply to entries made before the date of the *Timken* notice. In both cases, however, the judgments were vacated due to subsequent developments before the government could appeal them to the Federal Circuit.[80] Given the relatively rare circumstances

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[78] *Tembec*, 461 F. Supp. 2d at 1363-64.

[79] *Id.* at 1365.

[80] At least one decision of the Federal Circuit has summarized the operation of section 516A(c) and (e) in a manner that is superficially consistent with the government's reading. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1307-08 (Fed. Cir. 2004) ("Thus, under section 516A's parallel liquidation and injunction provisions, subject merchandise that is entered prior to publication of the final decision of the Court of International Trade or this court is liquidated as entered unless liquidation is enjoined. *Id.* § 1516a(c). In contrast, merchandise entered after the final decision of the Court of International Trade or this court must be liquidated in accordance with that final decision. *Id.* § 1516a(e).")

in which the issue arises (appeals of original Commerce or ITC determinations in which no preliminary injunction was requested because the affected entries are already suspended) it is not clear whether the government still holds to its position that there can be no retroactive effect to a CIT decision invaliding an AD or CVD order in the absence of an injunction under section 516A(c)(2).[81] Plaintiffs, however, need to be aware of this potential reading of the statute and be prepared to challenge any action by Commerce to try to liquidate pre-*Timken* notice entries at rates other than those provided for in the CIT's decision.

F. Should Liquidation Be Suspended By Statute During Appeals Under § 1581(c)?

Given the fact that *Zenith Radio* establishes a virtual *per se* rule that liquidation of entries subject to an antidumping or countervailing duty order constitutes irreparable harm in cases under 28 U.S.C. § 1581(c), and given the fact that preliminary injunctions in such cases are routinely issued, normally with the consent of all parties, including the government, it has been suggested that section 516A of the Tariff Act of 1930 should be amended to provide that the suspension of liquidation continues by operation of law during the pendency of such appeals. Advocates of such a proposal argue that it would simplify appeals under 28 U.S.C. § 1581(c) by eliminating unnecessary paperwork for the parties and the court, as well as possibly avoiding the problems with the issuance and enforcement of preliminary injunctions against liquidation that occasionally arise under present law.[82]

It is unclear, however, that automatic suspension of liquidation in section 1581(c) cases is either necessary or desirable. First, in the majority of cases, where all parties consent to the

[81] The government's position creates a potential "catch-22" for litigants. If liquidation of the entries is already suspended by an on-going administrative review, a plaintiff arguably cannot make a showing of irreparable harm under the *Zenith Radio* rule. *Fuyao Glass Indus. Group Co. v. United States*, 27 CIT 1166, 1169-70 (2003). Yet, according to the government, the failure to obtain an injunction precludes the application of the court's decision to those entries.

[82] *See* http://www.citba.org/CITJurisdictionLegislation.php (summary of proposed legislation "United States Court of International Trade Improvement Act", Proposed Legislation (August 2010)).

injunction, the procedural burden on the court and the parties is minimal. Second, as demonstrated by the recent decisions in *NSK Bearings Europe* and *NSK Ltd.*, the preliminary injunction process, with its requirement that the plaintiff be able to establish at least some likelihood of success on the merits, provides an avenue for the summary disposition of meritless appeals at an early stage in the litigation.

Third, many of the problems arising from the issuance and enforcement of preliminary injunctions against liquidation in section 1581(c) cases arise not from the injunction of liquidation *per se*, but rather from the government's insistence that injunction orders include provisions that (i) make the injunction contingent upon the plaintiff's personal service of the injunction order on designated officials at Commerce and CBP, and (ii) provide for a five-day "grace period" after such service before the injunctions become effective.[83] The government requests these provisions as a condition for consent, and plaintiffs generally agree to accept them in order to avoid procedural wrangling over the issuance of the injunction. But neither provision seems necessary or desirable. As the CIT has observed, it is unusual to place the burden of notifying a defendant of the existence of an injunction on counsel for the plaintiff rather than on the defendant's own counsel.[84] Furthermore, given the availability of email communication, the burden on defense counsel of notifying the appropriate Commerce and CBP officials of the existence of an injunction would appear to be minimal. The additional five day "grace period" is

[83] *See Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187, 1189 (Fed. Cir. 2009) (entries subject to injunction were liquidated on the fourth day of the five day grace period before the injunction took effect.); *Clearon Corp. v. United States,* 2010 Ct. Intl. Trade LEXIS 89 *16-20 (Aug. 9, 2010) (preliminary injunction order not served on Commerce and CBP personnel and the deemed liquidation period had expired); *Shandong Huarong Mach. Co., Ltd. v. United States*, 2008 Ct. Intl. Trade LEXIS 129 (Dec. 10, 2008) (preliminary injunction order not served on Commerce and CBP officials and entries were deemed liquidated); *SKF USA Inc. v. United States*, 512 F.3d 1326, 1328-29 (Fed. Cir. 2007) (deemed liquidation period expired after plaintiff's motion for preliminary injunction but before the injunction was issued by the CIT; the entries were deemed liquidated by operation of law and the appeal was mooted even though the government had consented to the issuance of an injunction against liquidation).

[84] *Clearon Corp.,* 2010 Ct. Intl. Trade LEXIS 89 at *12.

justified as necessary to avoid the risk of exposure to a contempt citation in the case that some Customs port official inadvertently liquidates the entries before receiving word of the injunction.[85] But it seems highly improbable that the court would impose contempt citations in response to genuinely inadvertent liquidations that take place within the first five days after entry of the injunctions,[86] and the CIT has already held that any liquidations in violation of the terms of an injunction are void *ab initio*.

Moreover, any legislative change providing for automatic suspension of liquidation should be limited strictly to those circumstances covered by the current *Zenith Radio* rule. In particular, there should be no automatic suspension of liquidation in cases in which plaintiffs are appealing *negative* Commerce fair value or subsidy determinations, or negative ITC injury determinations.[87] Rather, suspension of liquidation in such cases should remain available only where a plaintiff can satisfy the four-factor test for injunctive relief, including a demonstration of actual irreparable harm. The reasons for this are two-fold. First, as existing case law recognizes, the absence of the suspension of liquidation does not render appeals of negative original determinations meaningless or deprive plaintiffs of a remedy should they prevail on the merits of their appeal.[88]

Second, the suspension of liquidation in an antidumping or countervailing duty investigation is an event that has significant legal and economic consequences for importers,

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[85] *Id*. at *15.

[86] Furthermore, the government could avoid the risk of inadvertent liquidations entirely were it to abandon its policy of issuing liquidation instructions 15 days after publication of final review results, a policy that at least two judges of the CIT have held to be unlawful. *See* note 43, *supra*.

[87] This could be accomplished by amending section 516A to provide for the continuation of suspension of liquidation during the pendency of the action in all cases where liquidation of entries is already suspended pursuant to 19 U.S.C. §§ 1671b(d)(2) and 1673b(d)(2) or 19 U.S.C. §§ 1671d(c) and 1673d(c).

[88] *Bomont Indus. v. United States*, 638 F. Supp. 1334 (Ct. Int'l Trade 1986); *Am. Spring Wire Corp. v. United States*, 578 F. Supp. 140, 1408 (Ct. Int'l Trade 1984).

foreign producers and exporters, and for trade as a whole. Under the United States retroactive assessment system, the suspension of liquidation subjects imports to an unlimited contingent liability for antidumping or countervailing duties.[89] As such, the suspension of liquidation creates a substantial burden on importers and on foreign producers and exporters, and therefore constitutes a significant disruption to trade. For this reason, U.S. trade law, which parallels the applicable Uruguay Round agreements, permits the imposition of the suspension of liquidation and other "provisional measures" in response to antidumping or countervailing duty claims only following preliminary affirmative determinations of both Commerce and the ITC.[90] Were the law to provide for the automatic suspension of liquidation in appeals of negative final determinations, domestic interested parties would be able to obtain significant substantive relief[91] that was denied by the applicable administrative agency charged by Congress with enforcing the law merely by filing a summons and complaint and without making any showing that the underlying determination was unlawful. Such a rule would stand on its head the presumption of correctness that attaches to agency decisions,[92] would encourage the filing of frivolous lawsuits by domestic petitioners merely to obtain suspension of liquidation, and would likely place the United States in violation of its international obligations.[93]

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[89] During the period before the date of issuance of an antidumping or countervailing duty order, the importer's liability is capped at the amount of the cash deposit or bond posted at the time of entry. *See* 19 U.S.C. §§ 1671f(a), 1673f(a).

[90] 1671b(d)(2); 1673b(d)(2); Statement of Administrative Action, H.R. Doc. No. 103-316 (1994) ("SAA") at 874, *reprinted in* 1994 U.S.C.C.A.N. 4040.

[91] *Nucor Corp. v. United States*, 412 F. Supp. 2d 1341, 1356 (Ct. Int'l Trade 2005); *Algoma Steel Corp., Ltd. v. United States*, 696 F. Supp. 656, 660 (Ct. Int'l Trade 1988); *Timken Co. v. United States*, 666 F. Supp. 1558, 1561 (Ct. Int'l Trade 1987).

[92] *Timken Co. v. United States*, 893 F.2d 337, 341-42 (Fed. Cir. 1990).

[93] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 7; Agreement on Subsidies and Countervailing Measures, Article 17 (authorizing provisional measures, including the suspension of liquidation, only in specific circumstances and for a limited duration).

IV. Injunctions Against Liquidation in Cases Under 28 U.S.C. § 1581(i)

While the majority of challenges to the imposition of antidumping and countervailing duties are governed by 28 U.S.C. § 1581(c) and section 516A of the Tariff Act of 1930, certain types of challenges can also be brought pursuant to 28 U.S.C. § 1581(i).[94] Although on its face section 1581(i) appears to provide very broad jurisdiction over any case that involves the "administration and enforcement" of trade and customs matters, the CIT and the Federal Circuit have consistently held that jurisdiction under section 1581(i) may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.[95] As applied to antidumping and countervailing duty cases, this means that the CIT has jurisdiction only as to those actions that could not have been brought under § 1581(c), or where the remedy available under that subsection would be manifestly inadequate. Among the types of challenges to antidumping and countervailing duty determinations that the CIT and the Federal Circuit have

[94] 28 U.S.C. § 1581(i) provides as follows:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States providing for –
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> (1) revenue from imports or tonnage;
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> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
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> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

[95] *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006); *Miller & Co. v. United States,* 824 F.2d 961, 963 (Fed. Cir. 1987); *Ford Motor Co. v. United States*, 2010 Ct. Intl. Trade LEXIS 83 *13-14 (July 22, 2010); *U.S. Steel Corp. v. United States*, 627 F. Supp. 2d 1374, 1381 (Ct. Int'l Trade 2009).

found may be brought under § 1581(i) are challenges to Commerce liquidation instructions,[96] challenges to the effective date of revocations of orders,[97] cases dealing with the Continued Dumping and Subsidy Offset Act[98] ("CDSOA" or "Byrd Amendment"),[99] actions to compel Commerce to issue a scope ruling,[100] and challenges to the lawfulness of Commerce's "Reseller Policy," which sets the assessment rate at which imports purchased from a foreign reseller of merchandise subject to an antidumping order will be liquidated.[101]

In most if not all instances, a party bringing an action challenging some aspect of the administration or enforcement of an antidumping or countervailing duty order under 28 U.S.C. § 1581(i) will want to seek an injunction against liquidation of the affected entries in order to prevent the entries from being liquidated at the rate or amount of antidumping or countervailing duties being challenged in the action. In *Mitsubishi Elec. Am. v. United States*,[102] the CIT applied the *Zenith Radio* rule to such actions brought under § 1581(i), holding that liquidation of the entries would cause irreparable harm to the plaintiff by preventing the court from providing any relief, thereby mooting the action and depriving the court of jurisdiction. The plaintiff in *Mitsubishi* sought to challenge antidumping duties assessed pursuant to the automatic assessment regulation which provides that entries for which no administrative review has been entered are to

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[96] *Ugine & Alz Belgium v United States*, 517 F. Supp. 2d 133, 1341 (Ct. Int'l Trade 2007), *aff'd* 551 F.3d 1339, 1347 (Fed. Cir. 2009); *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304-05 (Fed. Cir. 2004); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002-03 (Fed Cir. 2003).

[97] *Canadian Wheat Bd. v. United States*, 491 F. Supp. 2d 1234, 1238 (Ct. Int'l Trade 2007).

[98] 19 U.S.C. § 1675c (2000), Pub. L. No. 106-387, Title X § 1002, 114 Stat. 1549, *repealed by* Pub. L. No. 109-171, Title VII Subtitle F § 7601(a), 120 Stat. 154 (2006).

[99] *Sioux Honey Ass'n. v. Hartford Fire Insur. Co.*, 700 F. Supp. 2d 1330, 1339 (Ct. Int'l Trade 2010); *Southern Shrimp Alliance v. United States*, 617 F. Supp. 2d 1334, 1339 (Ct. Int'l Trade 2009).

[100] *Mukand Int'l v. United States*, 412 F. Supp. 2d 1312, 1318 (Ct. Int'l Trade 2005), *aff'd* 502 F.3d 1366 (Fed. Cir. 2007).

[101] *Parkdale Int'l Ltd. v. United States*, 491 F. Supp. 2d 1262, 1267 (Ct. Int'l Trade 2007).

[102] 848 F. Supp. 193 (Ct. Int'l Trade 1994).

be liquidated at the cash deposit rate imposed at the time of entry.[103] The plaintiff waited until the entries had been liquidated, protested the liquidation, and then challenged the denial of the protest pursuant to 28 U.S.C. § 1581(a). Alternatively, the plaintiff asserted jurisdiction under § 1581(i). The court held that the assessment of antidumping or countervailing duties in accordance with Commerce's liquidation instructions was not a protestable event, and the court therefore could not exercise jurisdiction under § 1581(a). The court found, however, that because the application of the automatic assessment regulation was not a determination listed in section 516A, judicial review would not have been available under § 1581(c), and that review under § 1581(i) therefore would have been appropriate.[104] The court concluded, however, that because the entries had been liquidated, it could not grant any relief and the action was therefore moot, citing *Zenith Radio*.[105]

Thus, after *Mitsubishi* it appears to have been understood that a plaintiff bringing an action challenging antidumping or countervailing duties under 28 U.S.C. § 1581(i) was identically situated to a plaintiff proceeding under § 1581(c) with respect to injunctions against liquidation of the affected entries, and could therefore make the requisite showing of irreparable harm by invoking the principle of *Zenith Radio*. This understanding, however, was called into question by the decision of the Federal Circuit in *Shinyei Corp. of Am. v. United States*.[106] In *Shinyei*, the plaintiff brought a challenge to liquidation instructions under 28 U.S.C. § 1581(i). The plaintiff had filed a petition for a writ of mandamus directing CBP to liquidate its entries at the rates determined by Commerce in the applicable antidumping duty administrative review.

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[103] The current version of the automatic assessment regulation is 19 C.F.R. § 351.212(c)(2010).

[104] *Mitsubishi*, 848 F. Supp. at 201.

[105] *Id.* at 203. The court also found that plaintiff had failed to file its action within the applicable statute of limitations. *Id.*

[106] 355 F.3d 1297, 1304-05 (Fed. Cir. 2004).

While that request was pending before the CIT, CBP liquidated the entries at higher antidumping duty rates.[107] The plaintiff then amended its complaint to request reliquidation of the entries. The government moved to dismiss the appeal as moot on the grounds that there was no statutory provision that authorized reliquidation of the entries, relying on *Zenith Radio* and *Mitsubishi*. The CIT agreed and dismissed the action.[108]

The Federal Circuit reversed, holding that the CIT was not divested of jurisdiction over the case by the government's unilateral action in liquidating the entries.[109] The court held that, contrary to the holding of *Mitsubishi*, in an action brought under 28 U.S.C. § 1581(i), the injunction and liquidation provisions of section 516A do not apply. Consequently, the Federal Circuit concluded, the holding of *Zenith Radio* that "the statutory scheme has no provision permitting reliquidation in this case or imposition of higher dumping duties after liquidation if Zenith is successful on the merits," and that once liquidation had occurred "the court would be powerless to grant the only effective remedy in response to Zenith's request for review: assessment of correct dumping duties on entries [subject to the review being challenged]", did *not* apply in an action brought under 28 U.S.C. § 1581(i).[110]

> We agree with Shinyei that *Zenith* is inapplicable to the present case, and that the trial court's "engrafting" of that holding, limited to section 516A actions, onto this case, an action under the APA, constitutes error. As we have recently held, a challenge to Commerce instructions on the ground that they do not correctly implement the published, amended administrative review results, "is not an action defined under section 516A of the Tariff Act." Section 516A is limited on its face to the judicial review of "determinations" in countervailing duty and antidumping duty proceedings. Section 516A enumerates specific "reviewable determinations," and provides the injunction and liquidation remedies discussed at length above. The case at bar is an action under the APA challenging Commerce instructions as

[107] *Id*. at 1303. Liquidation of the entries had been enjoined for some period of time in connection with a separate appeal of the underlying determination to which the plaintiff apparently was not a party. *Id*. at 1301.

[108] *Shinyei Corp. of Am. v. United States*, 248 F. Supp. 2d 1350, 1361 (Ct. Int'l Trade 2003).

[109] *Shinyei*, 355 F.3d at 1312.

[110] *Id.* at 1308 (quoting *Zenith Radio*, 710 F.2d at 810).

> in violation of section 1675(a)(2)(C); section 516A simply does not apply. This court's ruling in *Zenith*, to the extent it is properly extended outside the preliminary injunction context to jurisdictional rulings, was explicitly based on the liquidation and injunction provisions in section 516A, and those provisions are inapplicable here.[111]

The Federal Circuit thus held that the CIT retained jurisdiction to hear the plaintiff's claim on the merits, and it expressly rejected the argument that the plaintiff was required to move for a preliminary injunction against liquidation of the entries in order to preserve the CIT's ability to order relief.[112] Rather, the Federal Circuit held that should the plaintiff prevail, the CIT retained the equitable power to order the reliquidation of the entries at the correct rate of antidumping duties, and found that nothing in 19 U.S.C. § 1514 (providing that the liquidation of entries is "final and conclusive" unless a valid protest is filed) prohibited the court-ordered reliquidation under these circumstances.[113]

The Federal Circuit's decision in *Shinyei* potentially has significant implications for the availability of preliminary injunctions against liquidations in actions challenging antidumping and countervailing duties under 28 U.S.C. § 1581(i). Given *Shinyei*'s holding that the *Zenith Radio* doctrine does not apply to such actions, and given the ability of the CIT to order reliquidation of the affected entries should the plaintiff prevail on the merits, can a plaintiff proceeding under 28 U.S.C. § 1581(i) still establish the requisite irreparable harm to qualify for a preliminary injunction against liquidation? This question was first considered by the CIT in *Mukand Int'l v. United States*.[114] The plaintiff in that case filed an action at the CIT asserting

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[111] *Id*. at 1309 (internal citations omitted).

[112] *Id.* at 1310.

[113] *Id.* at 1310-12. In a subsequent decision, the Federal Circuit found that the expiration of the time limit for deemed liquidation pursuant to 19 U.S.C. § 1504 likewise was no bar to the CIT exercise of its equitable authority to order re-liquidation should the plaintiff prevail on the merits of its claim. *See Shinyei Corporation of Am. v. United States*, 524 F.3d 1274 (Fed. Cir. 2008).

[114] 412 F. Supp. 2d 1312, 1318 (Ct. Int'l Trade 2005), *aff'd* 502 F.3d 1366 (Fed. Cir. 2007).

jurisdiction under 28 U.S.C. § 1581(i) and seeking a writ of mandamus directing Commerce to issue a scope ruling that had not been completed within the deadline established in Commerce's regulations. In addition, because Commerce had in the meantime liquidated the entries that were the subject of the scope ruling, the plaintiff sought reliquidation of those entries pursuant to *Shinyei*.

The CIT denied the requested relief on the ground that the plaintiff had failed to diligently protect its rights by bringing its action before the entries were liquidated and then seeking a preliminary injunction against liquidation. Although the action had been filed within the statute of limitations applicable to actions under § 1581(i), the CIT held that "Mukand should have filed a § 1581(i) action with this Court as soon as it received notice of the potential liquidation of its entries and obtained injunctive relief against liquidation before Customs liquidated its entries."[115] While agreeing that *Shinyei* stood for the proposition that liquidation of entries does not necessarily deprive the CIT of jurisdiction, the court observed that *Shinyei* "recognized the strong presumption against reliquidation of entries where the plaintiff does not pursue all available avenues to prevent the unnecessary liquidation of entries by Customs."[116] [117] Thus, in *Mukand* the CIT not only assumed that following *Shinyei* a plaintiff in a case under 28

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[115] *Id*. at 1318.

[116] *Id*. at 1319.

[117] On appeal, the CIT's analysis was endorsed by the Federal Circuit:

> {I}n *Shinyei* we held that failure to file an injunction prior to liquidation does not divest the Court of International Trade of jurisdiction in a case such as this one. That holding does not speak to whether a litigant must diligently protect its rights in order to be entitled to relief by way of mandamus. Significantly, in *Shinyei* the importer diligently pursued its rights throughout by, among other things, filing a mandamus action before its entries were liquidated, a measure Mukand did not pursue. Mukand, by contrast, had adequate alternative remedies available to it but did not take advantage of those remedies in a timely fashion.

Mukand Int'l, Ltd. v. United States, 502 F.3d 1366, 1370 (Fed. Cir. 2007) (internal citation omitted). Thus the Federal Circuit, like the CIT, assumed that the existence of the CIT's equitable power to order reliquidation of entries recognized in *Shinyei* was not inconsistent with a plaintiff being able to qualify for injunction against liquidation based on the principle that liquidation of the entries would constitute irreparable harm.

U.S.C. § 1581(i) could still make a showing that the liquidation of the entries subject to the action would cause it irreparable harm, but found that the failure to timely seek such injunctive relief was sufficient grounds to deny *Shinyei* reliquidation.

While the plaintiff's appeal of the CIT's decision in *Mukand* was pending before the Federal Circuit, that court was called upon to address the injunction issue in *Ugine & Alz Belgium v. United States*.[118] In *Ugine & Alz* the plaintiffs brought an action under section 1581(i) challenging the lawfulness of Commerce liquidation instructions, contending that Commerce had improperly instructed CBP to assess antidumping duties on merchandise that had previously been determined to be outside the scope of the applicable antidumping order. The CIT had denied plaintiffs' motion for preliminary injunction on the ground that the plaintiffs were unlikely to prevail on the merits, and because the court believed that alternative relief might still be available by protesting the entries.[119] The plaintiffs appealed the denial of the preliminary injunction and the Federal Circuit reversed, holding that the liquidations were not protestable, and that the plaintiffs had established a sufficient likelihood of success on the merits.

While the case was on appeal before the Federal Circuit however, the defendant-intervenors argued that the injunction should be denied in any event because the plaintiffs were unable to show that liquidation of the entries during the pendency of the appeal would constitute irreparable harm. Relying on the Federal Circuit's holding in *Shinyei*, the intervenors argued that because the CIT had the ability to order reliquidation pursuant to *Shinyei* in the event that the plaintiffs prevailed on the merits, liquidation of the entries would not deprive the court of the ability to grant full relief to the plaintiffs should they prevail on the merits. Therefore, the intervenors argued, the plaintiffs could not show a likelihood of irreparable harm from

[118] 452 F.3d 1289 (Fed. Cir. 2006).

[119] *Id*. at 1292.

liquidation of the entries. The Federal Circuit disagreed, relying in part of the CIT's decision in *Mukand*.

The court observed that the nature of the plaintiffs' legal challenge to the liquidation instructions differed from that in *Shinyei*. The plaintiff in *Shinyei* had argued that Commerce's liquidation instructions were unlawful because they conflicted with the dumping margins determined in the underlying antidumping administrative review. Section 751(a)(2)(C) of the Tariff Act of 1930 provides that the results of the review "shall be the basis" for the liquidation of the affected entries.[120] The plaintiffs in *Ugine & Alz*, in contrast, were arguing that the liquidation instructions were unlawful because they conflicted with a later scope determination rendered in a review covering a subsequent review period. Thus, their claim was not grounded on section 751(a)(2)(C). The court concluded that this distinction called into question whether *Shinyei* liquidation would necessarily be available in this case.

> The difference between the two cases--and the possibility that *Shinyei* will not be interpreted to encompass the sort of claim at issue here--raises doubt whether Arcelor will have the opportunity to obtain reliquidation once its entries are liquidated, even if it is ultimately found to have a strong case on the merits.
> . . . .
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> Moreover, as has been made clear by the intervening decision of the Court of International Trade in *Mukand International, Inc. v. United States*, 412 F. Supp. 2d 1312 (2005), the question of the scope of *Shinyei* is a difficult one, for which the resolution is not obvious. In sum, it is not clear at this juncture that *Shinyei* would provide an adequate vehicle for Arcelor to litigate its claims before the Court of International Trade.[121]

Accordingly, the court concluded that the plaintiffs had made a "strong showing" of irreparable harm and were entitled to a preliminary injunction against liquidation while the CIT considered the case on the merits.

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[120] 19 U.S.C. § 1675(a)(2)(C).

[121] *Ugine & Alz*, 452 F.3d at 1297.

The CIT next considered this issue in *Am. Signature Inc. v. United States*.[122] The plaintiff brought an action challenging amended liquidation instructions following an antidumping administrative review. Commerce had initially issued liquidation instructions to CBP that reflected a significant ministerial error made by Commerce in calculating importer-specific antidumping duty assessment rates in the final review results.[123] Some time after the issuance of the instructions, and after some of the affected entries had already been liquidated, the domestic petitioners discovered the error in the assessment rates and alerted Commerce. Commerce then computed revised assessment rates and issued amended liquidation instructions. American Signature, Inc. ("ASI"), an affected U.S. importer, brought action under 28 U.S.C. § 1581(i), claiming that Commerce's amended liquidation instructions were unlawful because they were the product of an *ultra vires* amendment to the final review results. ASI sought a preliminary injunction against liquidation of any of its entries pending the outcome of its action.[124]

The government opposed the injunction arguing, *inter alia*, that ASI would not be irreparably harmed by the liquidation of its entries because the CIT could order the reliquidation of ASI's entries if ASI prevailed on the merits. The CIT agreed, and denied the motion for

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[122] 2009 Ct. Intl. Trade LEXIS 160 (Oct. 13, 2009).

[123] In an antidumping administrative review Commerce calculates dumping margins on U.S. sales transactions, not import entries, and calculates an overall weighted average dumping margin for each producer or exporter. Depending upon how an exporter structures its sales, a single import entry may comprise multiple sales, each with its own dumping margin, and vice versa. In addition, a producer may sell subject merchandise to multiple importers. Legal liability for the payment of antidumping duties, however, resides with the importer. Thus, for duty assessment purposes Commerce normally computes an antidumping assessment rate for each importer, which is normally calculated by dividing the total amount of antidumping duties determined to be owed on all sales entered by that importer, by the total entered value of those sales. *See* 19 C.F.R. § 351.212(b). This assessment rate can, and often does, vary from the final dumping margin published by Commerce in its notice of final review results, which is the weighted-average dumping margin on all of a producer or exporter's sales during the review period made to *all* importers, and is calculated using total adjusted export price or constructed export price, rather than entered value, as the denominator. The importer-specific assessment rates computed in an antidumping administrative review are considered proprietary and thus are not published in the *Federal Register* notice, but they are disclosed to the parties under APO as part of the disclosure of the dumping margin calculations provided for in 19 C.F.R. § 351.224.

[124] 2009 Ct. Intl. Trade LEXIS 160 at *9.

preliminary injunction. The court held ASI had established a likelihood of success on the merits, agreeing with ASI that Commerce's amended liquidation instructions amounted to an improper amendment to the final results of the administrative review.[125] The court also held, however, that ASI had not established a likelihood of irreparable harm from liquidation of the entries, and that the balance of hardships favored the government.[126] The court found that ASI would not be irreparably harmed by the liquidation of the entries because the court retained the power to reliquidate the entries pursuant to *Shinyei* should ASI prevail on the merits: "As such, ASI has an available and adequate remedy when, as, and if, Customs, pursuant to instructions from Commerce, liquidates ASI's entries, or reliquidates ASI's entries, in a manner that ASI believes is inconsistent with [the final review results]."[127] [128] In a subsequent order denying ASI's motion for stay pending appeal to the Federal Circuit, the court distinguished *Mukand* and *Ugine & Alz*, explaining that unlike the plaintiff in *Mukand*, ASI had brought its action immediately and thus could not be characterized as having slept on its rights, and that unlike the claim at issue in *Ugine & Alz*, ASI's legal claim was identical to that in *Shinyei*, namely a claim that Commerce's

[125] The court concluded that any such amendment to the final review results would be subject to Commerce's regulations governing the correction of ministerial errors. Because the time provided for under the regulations for correcting ministerial errors had run, the court indicated that it intended to remand the matter to Commerce for consideration of whether that time limit was waivable. *Id.* at *10-13.

[126] *Id*. at *13-15.

[127] *Id.* at *14.

[128] The government argued that were the court to grant ASI's injunction, certain of ASI's entries might never be liquidated in accordance with the amended liquidation instructions, even if the court ultimately upheld them as lawful. This is because by the time Commerce issued the amended liquidation instructions some of ASI's entries had already been liquidated in accordance with the original instructions. The government argued that the only statutory basis upon which to accomplish the reliquidation of those entries in accordance with the amended instructions was a voluntary reliquidation under 19 U.S.C. § 1501. That provision authorizes voluntary reliquidation by CBP only within 90 days of the date of the original reliquidation, and the government argued that this 90-day deadline could not be tolled or waived. Thus, the government argued, an injunction against liquidation of entries would have the effect of permanently fixing the duties to be assessed on those entries that had already been liquidated under the original liquidation instructions. The court accepted this view, and found that the balance of hardships therefore tipped in favor of the government. *Id*. at *14-16.

amended liquidation instructions were in violation of 19 U.S.C. § 1675(a)(C)(2) because they failed to faithfully implement the final review results.[129]

On appeal the Federal Circuit reversed, and held that ASI was entitled to the preliminary injunction. On the issue of irreparable harm, the court relied upon its previous decision in *Ugine & Alz*. The court quoted its prior statement that the scope of *Shinyei* relief was uncertain, and then stated that "as in [*Ugine & Alz*], we conclude that the possibility of *Shinyei* relief does not defeat ASI's claim of irreparable harm."[130] As noted *supra*, however, the Federal Circuit's decision on irreparable harm in *Ugine & Alz* had been based on the concern that *Shinyei* relief might not be available because the plaintiffs' claim in that case did not derive from 19 U.S.C. § 1675(a)(C)(2) as had been the case in *Shinyei*. ASI, in contrast, expressly relied on § 1675(a)(C)(2) and its legal claim otherwise appeared to be on all fours with that of *Shinyei*.

Taken together, *Mukand*, *Ugine & Alz*, and *Am. Signature* appear to conclusively establish that *Shinyei* has *not* overturned the rule of *Zenith Radio* in cases brought under 28 U.S.C. § 1581(i). Thus a plaintiff bringing an action challenging the imposition of antidumping or countervailing duties should normally be able to make a showing of irreparable harm by arguing that the subject entries otherwise would be liquidated at the rate of duties being challenged in the action. While liquidation of the entries in a § 1581(i) case does not necessarily divest the court of all jurisdiction, it seems clear that the Federal Circuit views the type of post-decision reliquidation ordered in *Shinyei* to be an extraordinary equitable remedy that is available

[129] *Am. Signature Inc. v. United States*, Court No. 09-00400 (Ct. Int'l Trade Oct. 26, 2009) at 12-13 (order denying prelim. inj. pending appeal).

[130] *Am. Signature, Inc. v. United States*, 598 F.3d 816, 829 (Fed. Cir. 2010). The Federal Circuit dealt with the government's argument that 19 U.S.C. § 1501 would prevent it from ever reliquidating the already liquidated entries by finding that section 1501 would not act as a bar to any court-ordered reliquidation, citing *Shinyei*. *Id*. at 829-830. The court thus suggested that court-ordered reliquidation of the kind recognized in *Shinyei* is available to the government as well as plaintiffs. Second, the court found that the 90-day deadline was waivable and noted that ASI had filed a voluntary waiver of the deadline in connection with its application for an injunction pending appeal. *Id.* at 830.

only in very unusual circumstances where the plaintiff has good grounds for not having sought a preliminary injunction before the entries were liquidated.[131]

While the Federal Circuit might have been more expansive in *Ugine & Alz* and *Am. Signature* in explaining why, notwithstanding *Shinyei*, it continues to regard liquidation of the entries subject to appeal to constitute irreparable harm, the result is a sound one. While it remains true as a matter of black-letter law that the issuance of a preliminary injunction is an "extraordinary remedy," the fact is that in the context of antidumping and countervailing duty appeals, injunctions against liquidation are the rule, rather than the exception. And there is no sound reason why this should be less so in actions challenging antidumping or countervailing duties under the CIT's residual jurisdiction under 28 U.S.C. § 1581(i) than in cases challenging final determinations in investigations and reviews under 28 U.S.C. § 1581(c).

Unlike other types of injunctions that might be issued against the government, enjoining liquidation of entries pending appeal does not significantly interfere with, or otherwise adversely impinge upon, the government's administration and enforcement of the antidumping and countervailing duty laws.[132] As discussed *supra*, the retrospective duty assessment system employed by the United States means that import entries subject to antidumping or countervailing duties are already suspended by operation of law for some period of time after entry. An injunction against liquidation of the entries pending appeal merely maintains the

[131] As noted by the CIT in *Mukand* it was not entirely clear from the decision in *Shinyei* why the previous injunction against liquidation in that case had expired. *Mukand*, 412 F. Supp. 2d at 1319, n.10. However, it seems clear that the *Shinyei* court viewed the government's liquidation of the entries in that case to have been improper in view of the pending application for writ of mandamus. *See Shinyei*, 355 F.3d at 1303, 1310.

[132] In contrast, other types of proposed injunctions in antidumping and countervailing duty cases often would be significantly more intrusive upon the government's administration of the law. *See GPX Int'l Tire Corp. v. United States*, 587 F. Supp. 2d 1278 (Ct. Int'l Trade 2008) (request for injunction against collection of cash deposits); *Gov't of the People's Repub. of China v. United States*, 483 F. Supp. 2d 1274 (Ct. Int'l Trade 2007) (request for injunction against conduct of countervailing duty investigation concerning a non-market economy); *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1353-57 (Fed. Cir. 2000) (request for injunction against allegedly *ultra vires* anticircumvention inquiry).

already existing suspension to permit the orderly disposition of the appeal and ensures that the entries will be liquidated in accordance with the final and conclusive determination of the proper amount of antidumping and countervailing duties to be imposed under the law. Because U.S. law imposes interest on underpayments of antidumping or countervailing duties,[133] the government loses no revenue as a result of the continued suspension.

Indeed, continuing the suspension of entries during appeal would appear to be in the interest of *all* parties to the appeal, including the government. Antidumping and countervailing duty cases can affect dozens of different importers and thousands of entries made in numerous customs ports of entry across the United States. Upon liquidation of the entries, CBP must interpret Commerce's liquidation instructions to ascertain the amount of antidumping or countervailing duties determined by Commerce to be applicable to each entry, compare that amount to the amount deposited at the time of entry, and then issue a refund of the excess deposit, or a bill for the additional duties owed, and in each case compute the appropriate interest thereon. If Commerce's duty calculations were subsequently overturned on appeal, CBP would then have to repeat the entire exercise, in some cases many years later, by reliquidating the entries, computing different duty amounts, calculating new interest payments, issuing new refunds or bills, *etc.* Considering the amount of time such appeals can involve, particularly if the CIT's decision is appealed to the Federal Circuit, the administrative burden on CBP of such reliquidations would be significant.[134]

[133] 19 U.S.C. § 1677g.

[134] Furthermore, once the entries are liquidated, there could be protests (concerning issues other than the antidumping or countervailing duties assessed) associated with those entries. If the CIT were to then order reliquidation pursuant to *Shinyei* while any such protests remained pending, the question would arise whether the reliquidation mooted the original protests, thereby requiring them to be re-filed.

The facts in *Am. Signature* illustrate this point. There, CBP had already liquidated some of the entries in accordance with Commerce's original liquidation instructions. Commerce then instructed CBP to stop liquidation in accordance with those instructions and instead liquidate all the entries in accordance with the amended liquidation instructions, which meant that CBP had to reliquidate the already liquidated entries, and act swiftly to do so within the 90-day deadline for reliquidation provided in 19 U.S.C. § 1501. In the absence of a preliminary injunction, when ASI prevailed on the merits of its appeal,[135] CBP would have had to reliquidate all the entries a second time (and some of the entries for a *third time*) at the same rates as in the original liquidation instructions! The issuance of a preliminary injunction against liquidation in such circumstances would seem to be clearly appropriate in order to permit the orderly resolution of the plaintiffs' legal claims while preventing the needless expenditure of resources on the part of the government and the private parties.

[135] In holding that ASI was entitled to a preliminary injunction, the Federal Circuit determined that ASI had demonstrated not only a likelihood, but a "certainty" of success on the merits of its case. *Am Signature*, 598 F.3d at 828.