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## What Does Optrex Mean for the Customs Bar?, 39 J. Marshall L. Rev. 23 (2005)

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# WHAT DOES *OPTREX* MEAN FOR THE CUSTOMS BAR?

JOHN B. PELLEGRINI\*

The decision in *United States v. Optrex America, Inc.*<sup>1</sup> has caused concern within the customs bar. This concern is well based since the decision held that counsel's advice is always discoverable by the government in penalty cases because the defendant's state of mind is "at issue." The decision states:

Similarly, in cases where a client's state of mind or knowledge, such as whether the client acted negligently, is at issue, "the attorney-client privilege with respect to attorney-client communications, that have bearing on that state of mind or knowledge is impliedly waived."<sup>2</sup>

*Optrex* was decided incorrectly unless the defendant interjected an advice of counsel defense.

## I. BACKGROUND

The government's claim in *Optrex* was that the importer-defendant was negligent in classifying certain liquid crystal panels and modules at entry.<sup>3</sup> While deposing the defendant's employees, the government inquired about advice received from counsel as to the entered classification. Defendant's counsel objected to the line of questioning, asserting the attorney-client privilege. The decision is not clear as to whether the defendant raised the advice of counsel as a defense. It appears that defendant did not raise this defense.

The decision refers to a number of government interrogatories. Interrogatory number forty-two asked whether defendant intended to rely upon the advice of counsel defense. This suggests that the defendant did not assert advice of counsel as a defense. However, the defendant did reveal that it had consulted counsel and other customs experts.<sup>4</sup>

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1. No. 02-00646, 2004 Ct. Int'l. Trade LEXIS 74 (July 1, 2004).

2. *Optrex Am., Inc.*, 2004 Ct. Int'l. Trade LEXIS at \*6 (citation omitted)(citing *King-Fisher Co. v. United States*, 58 Fed. Cl. 540, 572 (2003)). The reliance on *King-Fisher Co.* is questionable. In that case, the court said of the information at issue: "There is nothing to suggest that the government is seeking to obtain the substance of any 'privileged' communications between Mr. Reichstein and his client." *King-Fisher Co.*, 58 Fed. Cl. at 572.

3. The classification of imported merchandise determines the duty or tax imposed at importation. The importer is required to exercise reasonable care in classifying the merchandise.

4. A recent decision in the *Optrex* litigation clarifies this. In *United States v. Optrex*

## II. THE ATTORNEY-CLIENT PRIVILEGE IN THE CUSTOMS CONTEXT

Not all communications between counsel and clients are protected. The attorney-client privilege protects various communications from disclosure: 1) from a client; 2) to the client's lawyer or the lawyer's agent; 3) relating to the lawyer's rendering of legal advice; 4) made with the expectation of confidentiality; 5) not in furtherance of a future crime or tort; and 6) where the privilege has not been waived.<sup>5</sup>

Although the *Optrex* court did not address the question of whether the advice was privileged, it is useful to consider some of the elements of the privilege that might be viewed differently in the customs context. The attorney-client privilege generally does not protect the facts and circumstances of the communication. Thus, the defendant in *Optrex* could not have refused to answer questions about whether it had sought legal advice. The privilege protects communications from the client that request legal advice and encompasses the facts that counsel needs to provide the advice sought.<sup>6</sup>

Although the advice customs attorneys provide to importer clients normally qualify as privileged, there may be issues of concern. The first of these issues is whether customs attorneys provide legal advice. The privilege exists only when the attorney is acting as a legal advisor. Communications from an attorney acting in another capacity, such as a consultant, are not protected by the privilege. At first glance, this may be an issue in the customs context. This is because an importer may exercise reasonable care by consulting with non-attorneys.<sup>7</sup> Nevertheless, an importer who requests advice from counsel on questions of classification, value, origin, etc., is seeking legal advice. Accordingly, counsel applies legal principles to facts in providing advice. This legal advice is protected by the privilege.

A second issue is whether the advice is rendered with the expectation of confidentiality. Where the client intends that an otherwise privileged communication is to be disclosed beyond the attorney-client relationship, the privilege never attaches. For example, a client may provide information to counsel for the purpose of filing a ruling request. That communication is not

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*America, Inc.*, No. 02-00646, 2005 Ct. Int'l. Trade Lexis 168 (December 15, 2005) ("*Optrex II*"), the court denied the government's motion for leave to amend the complaint to add gross negligence and fraud counts to the original negligence count. The decision states that defendant asserted it had exercised reasonable care by consulting counsel and other experts. The court implicitly equates this with raising an advice-of-counsel defense.

5. THOMAS E. SPAHN, A PRACTITIONER'S GUIDE TO THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE (2001). Mr. Spahn is a partner with McGuireWoods, LLP. I relied heavily on this very useful publication in preparing this paper.

6. *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 805-06 (Fed. Cir. 2000); *Fine v. Facet Aerospace Prods. Co.*, 133 F.R.D. 439, 444 (S.D.N.Y. 1990).

7. This is not a farfetched concern. Courts have held that because preparation of tax returns and handling tax audits may or may not be performed by counsel, communications in connection with these activities are not privileged. *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000).

privileged.<sup>8</sup> Consequently, there is nothing peculiar about the customs practice that invalidates the attorney-client privilege.

### III. IMPLIED WAIVER

As noted above, the privilege may be waived and the waiver need not be express. The most common implied waiver occurs when a party claims a defense based upon the advice of counsel. In such cases the other party is entitled to access to that advice.<sup>9</sup> Thus, had the *Optrex* defendant defended against the government's claims on the basis of advice of counsel, the government would have been entitled to discover the otherwise privileged communication. This implied waiver should not be of great concern to importers or their counsel since an importer-defendant will not assert an advice-of-counsel defense unless it followed that advice.

Does an importer who shares the privileged communication with its customs broker waive the privilege? There is substantial likelihood that it does. The courts have held that disclosure of privileged communications to third parties such as accountants<sup>10</sup> and auditors<sup>11</sup> operates to waive the privilege. There are exceptions here and one could make the case that sharing a privileged communication with a licensed customs broker does not amount to a waiver.

The issue in *Optrex* is whether the communication between the importer and counsel is discoverable when the importer-defendant in a customs civil penalty case reveals that it consulted with counsel, but does not advance an advice-of-counsel defense. *Optrex* seems to answer the question in the affirmative. The better answer is maybe. The defendant in *Optrex* revealed that it had sought legal advice with respect to the classification of its imports. This does not waive the privilege, because the fact that one consults counsel is not privileged.

*Optrex* relies upon what is referred to as the "at issue" doctrine. Under this doctrine, courts have held that the attorney-client privilege does not apply where the party's state of mind, such as good faith, is "at issue." The doctrine has come under harsh criticism from courts, including the court cited to in the *Optrex* case: *Rhone-Poulenc Rorer, Inc.*<sup>12</sup>

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8. *United States v. Sudikoff*, 36 F.Supp. 2d 1196, 1204-05 (C.D. Cal 1999). Note that the courts differ on whether drafts of documents intended to be disclosed are privileged.

9. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992); *United States v. Workman*, 138 F.3d 1261, 1263-64 (8th Cir. 1998) (party's claim that its tax position was reasonable because it was based on advice of counsel puts advice at issue and waives the privilege); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3rd Cir. 1994).

10. *United States ex. rel. Mayman v. Martin Marietta Corp.*, 886 F.Supp. 1243, 1249 (D. Md. 1995).

11. *In re Subpoena Duces Tecum served on Wilkie Farr & Gallagher*, No. M8-85, 1997 WL 1183969 at \*1-2 (S.D.N.Y. Mar. 14, 1997).

12. *Optrex Am., Inc.*, 2004 Ct. Int'l. Trade LEXIS at \*6.

Some decisions have extended the finding of a waiver of the privilege to cases in which the client's state of mind may be in issue in the litigation. These courts have

If the “at issue” doctrine becomes the rule in negligence cases pursuant to section 592 of the Tariff Act,<sup>13</sup> the attorney-client privilege may disappear with respect to the advice given by counsel to importers regarding classification, valuation, origin, etc. This may not be a problem where the importer follows the advice, even if the government disagrees with the advice. However, where the importer does not follow the advice, the government’s access to the advice undoubtedly will create difficulty for importers and their counsel.<sup>14</sup>

### *The Inference Issue*

It is no surprise that the government is very interested in why a defendant who reveals that it sought legal advice would not assert the advice-of-counsel defense. The common inference is that the importer did not follow the advice. However, not following counsel’s advice does not necessarily mean that the importer was negligent. Until recently, the government could have argued that refusal to disclose the legal advice created an inference that the advice was not favorable and did not support the importer’s entered classification, valuation, origin, etc.

The government’s interest in the fact that an importer sought the advice of counsel but did not advance the advice as a defense may diminish as a result of the federal circuit’s decision in *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*<sup>15</sup> In an *en banc* decision, the court held that an adverse inference that a legal opinion was or would have been unfavorable may not be drawn when a party invokes the attorney-client privilege.<sup>16</sup> This decision overrules long-standing federal circuit precedent. Although this precedent was developed in patent infringement cases, it clearly would have had significant influence in customs penalty cases.

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allowed the opposing party discovery of confidential attorney client communications in order to test the client’s contentions. *See, e.g.,* *Buyers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983); *Hearn v. Rhay*, 68 F.R.D. 574, 579-80 (E.D. Wash. 1975). These decisions are of dubious validity. While the opinions dress up their analysis with a checklist of factors, they appear to rest on a conclusion that the information sought is relevant and should in fairness be disclosed. Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of the issue.

*Rhone-Poulenc Rorer, Inc.* 32 F.3d at 864.

13. *See* The Tariff Act of 1930, 19 U.S.C. § 1592 (2000) (providing that civil penalties for violation of the customs laws are based on the actual or potential loss of revenue and are capped at the domestic value of the merchandise (usually the wholesale price in the United States)).

14. In *Optrex II*, the government’s motion was based in part on the assertion that communications from counsel were evidence of fraud, presumably because the defendant did not follow counsel’s advice.

15. 383 F.3d 1337 (Fed. Cir. 2004).

16. *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH*, 383 F.3d at 1341.

### *The Scope of Disclosure*

Counsel's advice is discoverable when the importer interjects an advice-of-counsel defense or otherwise waives the privilege. When this occurs, questions arise as to what must be turned over. The choices are to limit the scope of the waiver to the particular communication or to extend the scope of the waiver to include all communications on the same subject matter, for example, the underlying legal rationale of the advice.

First, it is clear that the government will have access to the factual information upon which the advice is based. It is the general rule that an importer must provide all of the relevant facts to counsel. Therefore, the facts provided to counsel, on which the advice was based, should be available to the government. However, counsel's legal reasoning (work product) is not, or should not be, available to the government unless it was communicated to the client.<sup>17</sup> After all, the question is whether the importer reasonably relied upon the advice, not whether the advice was reasonable.<sup>18</sup> Counsel's legal reasoning simply is not relevant to the question of whether the importer reasonably relied upon counsel's advice.

There is one caveat here. Reliance upon advice that is not even colorable, such as advice that snow skis are classified as water skis, would not be a defense to negligence.

### *The Response to Optrex*

It is too early to know just what *Optrex* means for customs attorneys. At a minimum, it is a reminder that they should take all appropriate steps to ensure that their advice to clients will be protected. The following questions are relevant considerations for customs attorneys:

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17. *See Steelecase, Inc. v. Haworth, Inc.*, 954 F.Supp. 1195, 1199-1200 (W.D. Mich. 1997).

By asserting advice-of-counsel as a defense to willful infringement, [the client] has waived the attorney-client privilege that would otherwise be applicable to communications between attorney and client concerning the subject matter, all documents referring to counsel's opinions, and all documents in possession of [the client] bearing upon its state of mind. The waiver does not extend to attorney work product or documents upon which the attorney relied, unless they were somehow disclosed to [the client].

*Id.* *See also* *Kaarup v. St. Paul Fire and Marine Ins., Co.*, 436 N.W.2d 17, 21 (S.D. 1989).

"We do not believe, as some courts have held, that the defense of advice of counsel waives the attorney/client privilege with respect to all communication between client and counsel concerning the transaction for which counsel's advice was sought. We find that the attorney/client privilege is waived only to the extent necessary to reveal the advice given by an attorney that is placed in issue by the defense of advice of counsel." (citation omitted).

*Id.*

18. One assumes that in such cases, the legal rationale will be asserted in arguing that the importer's claims were correct. The issue may be important, however, when the reasoning changes or is refined.

1. Do you label qualifying communications as “attorney-client privilege?” This does not create the privilege but it does make it much more likely that the communication will be segregated in discovery responses and the privilege asserted. It also makes it more likely that the client will maintain the communication in confidence.
2. Should customs attorneys advise clients that they should not ask for advice unless they intend to follow it?
3. Should customs attorneys inform clients that their advice may be discoverable by the government if a penalty action is commenced?
4. Should advice be limited to laying out the relevant facts and stating the advice without detailed legal reasoning?

#### IV. CONCLUSION

The *Optrex* decision poses challenges to the Customs bar. Some may read the decision as suggesting that the strength of the attorney-client privilege in the customs context may be less robust than most of us had thought. I disagree. Advice to clients that meets the understood requirements of the privilege is entitled to protection unless the client makes an express or implied waiver. I do not believe that there was any such waiver in *Optrex*.

# PRELIMINARY INJUNCTIONS: A RESPONDENT'S PERSPECTIVE

STUART M. ROSEN, JENNIFER J. RHODES, AND W. ANDREW RYU\*

## INTRODUCTION

Preliminary injunctions are fundamental to a respondent's right to meaningful judicial review of antidumping and countervailing duty determinations by the U.S. Department of Commerce (Commerce) and of injury determinations by the U.S. International Trade Commission (ITC). Injunctions against liquidation preserve the status quo during litigation.<sup>1</sup> Injunctions also provide the mechanism for a respondent to obtain refunds (with interest) of cash deposits respecting antidumping or countervailing duties required by the Department of Commerce as a result of determinations that are deemed by the courts to be unsupported by substantial evidence or otherwise not in accordance with the law.<sup>2</sup> The need for this mechanism to preserve the U.S. Court of International Trade's (CIT) jurisdiction and meaningful judicial review stands in contrast to the statutory judicial review and potential refund mechanism for the erroneous appraisal or collection of normal Customs duties. The statute requires an importer to protest such action, to exhaust administrative remedies, and to pay duties deemed owed by Customs prior to the CIT's assertion of jurisdiction over the matter.<sup>3</sup>

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\* This article was prepared by Stuart M. Rosen, Jennifer J. Rhodes, and W. Andrew Ryu of Weil, Gotshal & Manges LLP for the United States Court of International Trade's November 2004 Judicial Conference.

1. *See, e.g., SKF USA Inc. v. United States*, 316 F. Supp. 2d 1322, 1326 (Ct. Int'l Trade 2004) (stating that although a preliminary injunction is an extraordinary remedy, it is used to preserve the parties' positions until court adjudication).

2. *See, e.g., id.* at 1327 ("After an antidumping review determination, if a party's entries are liquidated prior to judicial review of the determination and antidumping duties are assessed, any outstanding challenges as to those entries are rendered moot because liquidation, absent errors by Commerce or Customs, places the entries outside the jurisdiction of the court."). *See also Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983) ("The statutory scheme has no provision permitting reliquidation in this case or imposition of higher [or lower] dumping duties after liquidation if [plaintiff] is successful on the merits.").

3. *See* 19 U.S.C. §§ 1514–1515 (2000) (setting forth the processes for protests against Customs Service determinations and for protest review); 28 U.S.C. § 2637(a) (2000) ("A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515] may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced . . .").



## I. THE STATUTORY AUTHORITY AND STANDARDS FOR INJUNCTIVE RELIEF

### A. *Providing Injunctive Relief*

The CIT has broad authority to grant injunctive relief against liquidation and in other appropriate circumstances. For instance, section 516A(c)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(c)(1), provides:

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) 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 . . . 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.<sup>4</sup>

Furthermore, section 516A(c)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(c)(2), provides:

In the case of a determination described in paragraph (2) of subsection (a) [stating the determinations by the Secretary, the administering authority, or the Commission subject to judicial review under this section], 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.<sup>5</sup>

This section works in conjunction with section 516A(e)(2) of the Tariff Act of 1930, as amended 19 U.S.C. § 1516a(e)(2), which provides in pertinent part:

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 — — . . . (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.<sup>6</sup>

Rule 65(a) of the Rules of the CIT sets forth the procedural requirements for any preliminary injunction issued by the court, and provides that, “[n]o preliminary injunction shall be issued without notice to the adverse party.”<sup>7</sup> The CIT has additional authority to grant other forms of injunctive relief under the All Writs Act, 28 U.S.C. § 1651, to protect its

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4. 19 U.S.C. § 1516a(c)(1) (2000) (emphasis added).

5. 19 U.S.C. § 1516a(c)(2) (emphasis added).

6. 19 U.S.C. § 1516a(e)(2) (emphasis added).

7. CT. INT’L TRADE R. 65(a)(1).

exclusive jurisdiction,<sup>8</sup> or by way of its other equitable and remedial powers under 28 U.S.C. § 2643.<sup>9</sup>

### B. *The Four Factors*

In providing injunctive relief, the CIT considers the four factors involved for such relief. The required factors are: (1) absent the requested relief, the movant will suffer immediate irreparable harm;

(2) there exists in the movant's favor a likelihood of success; (3) the public interest would be better served by the requested relief; and (4) the balance of hardships on all the parties tips in favor of injunctive relief.<sup>10</sup>

In considering whether a party established these factors, the court in its analysis "employs a 'sliding scale,' and, consequently, need not assign to each factor equal weight."<sup>11</sup> That said, all the factors must be met.<sup>12</sup> The absence of one factor may be sufficient, given the weight, or lack of it, assigned to other factors, to justify the denial of injunctive relief.<sup>13</sup> It is well-established that whether the foundation for injunctive relief was established and whether such relief, therefore, is appropriate, are matters "largely within the discretion of the trial court."<sup>14</sup>

### C. *Irreparable Harm*

#### 1. *The Seminal Decision: Zenith Radio Corp. v. United States*

Irreparable harm is the "crucial element" for injunctive relief.<sup>15</sup> The courts have long held that irreparable harm is established when there is "a viable threat of serious harm which cannot be undone . . . . A preliminary injunction will not be issued simply to prevent a mere possibility of injury, even where prospective injury is great."<sup>16</sup>

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8. See *Zenith Elecs. Corp. v. United States*, 884 F.2d 556, 562 (Fed. Cir. 1989) (stating that courts are allowed to issue "all writs necessary or appropriate" pursuant to the All Writs Act).

9. See 28 U.S.C. § 2643(c) (2000) (allowing the court to "order any other form of relief that is appropriate in a civil action"); *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004) (stating that the CIT is given broad remedial powers under § 2643).

10. *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993) (citing *Zenith*, 710 F.2d at 809).

11. *Elkem Metals Co. v. United States*, 25 Ct. Int'l Trade 186, 190 (2001) (citing *FMC Corp.*, 3 F.3d at 427).

12. See *U.S. Ass'n of Imps. of Textiles and Apparel v. United States*, 413 F.3d 1344, 1347 (Fed. Cir. 2005) (reversing the CIT's grant of injunctive relief on the ground that the plaintiff failed to establish the "likelihood of success prong").

13. See *FMC Corp.*, 3 F.3d at 427 (stating that the weakness of one factor may be overcome by the strength of another).

14. *Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1578 (Fed. Cir. 1990).

15. *Fuyao Glass Indus. Group Co., Ltd. v. United States*, No. 02-00282, 2003 WL 22058668, at \*3 (Ct. Int'l Trade Sept. 2, 2003).

16. *S.J. Stiles Assoc. Ltd. v. Synder*, 646 F.2d 522, 524 (C.C.P.A. 1981) (rejecting Customs brokers' application for a preliminary injunction to restrain the implementation of

On this basis, the Federal Circuit rendered its seminal decision in *Zenith*, with respect to the establishment of irreparable harm in cases seeking to enjoin the liquidation of entries and the assessment of antidumping and/or countervailing duties in connection with a challenge to an annual review determination.<sup>17</sup> There, the court concluded that because liquidation would eliminate the only remedy available to the plaintiff-petitioner for an incorrect annual review determination, liquidation of entries would constitute irreparable harm, as not only would the plaintiff be harmed economically, but it would be denied the right to obtain meaningful judicial review.<sup>18</sup>

The CIT repeatedly applied *Zenith* and granted injunctions in cases where the movant asked for it, pending the outcome of the court's review of Commerce's findings in an underlying administrative review proceeding. This decision was based upon the ground that liquidation would permanently deprive the movant of its meaningful judicial review of Commerce's findings – "the inability of the reviewing court to 'meaningfully correct the review determination' constitutes irreparable injury."<sup>19</sup>

## 2. *Extending Zenith*

The CIT extended *Zenith* to other situations where a movant would be deprived of meaningful judicial review. For example, a preliminary injunction was available to enjoin the automatic assessment and liquidation of duties when an importer challenged an original antidumping order, but did not request an administrative review of the same.<sup>20</sup> A preliminary injunction was also available when an importer challenged the continuation of an antidumping or countervailing duty order pursuant to an ITC sunset review.<sup>21</sup>

The CIT, however, generally did not extend *Zenith* beyond its facts to satisfy the irreparable harm factor without additional evidence, which it often found lacking. For example, when a case involved an appeal of an investigation determination, rather than an administrative review determination, the CIT sometimes did not find irreparable harm.<sup>22</sup> Basically,

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a Customs directive due to their failure to establish irreparable harm).

17. *Zenith*, 710 F.2d at 810.

18. *Id.*

19. *SKF USA*, 316 F. Supp. 2d at 1327 (citing *Zenith*, 710 F.2d at 811).

20. See *OKI Elec. Indus. Co., Ltd. v. United States*, 11 Ct. Int'l Trade 624, 631 (1987) (finding liquidation and automatic assessment to cause irreparable harm, not only because of economic loss, but additionally by deprivation of meaningful judicial review). See also *Fuyao Glass*, 2003 WL 22058668, at \*3 (holding that an exporter, who withdrew its request for administrative review, was entitled to a preliminary injunction against liquidation to preserve exporter's challenge to the underlying antidumping duty order). Compare *Cambridge Lee Indus. v. United States*, 13 Ct. Int'l Trade 847, 847 (1989) (finding that a preliminary injunction was not available when the party seeking injunctive relief did not join the request for administrative review).

21. See *Ugine-Savoie Imphy v. United States*, 24 Ct. Int'l Trade 1246, 1249–51 (2000) (finding irreparable harm in a sunset review appeal (citing *NMB Sing. Ltd. v. United States*, 24 Ct. Int'l Trade 1239 (2000))).

22. See *Altx, Inc. v. United States*, 211 F. Supp. 2d 1378, 1381 (Ct. Int'l Trade 2002) (citing *Trent Tube Div., Crucible Materials Corp. v. United States*, 14 Ct. Int'l Trade 587, 588 (1990) (holding that "additional evidence" must be shown by plaintiff-petitioners, as

the court held that “[u]nlike an annual review, a negative injury determination affects liquidation of all future entries, not just those made within a specific time period. In such a situation, liquidation does not substantially curtail available judicial remedies.”<sup>23</sup> Thus, “in cases involving negative injury determinations, a party seeking a preliminary injunction must submit actual evidence of irreparable harm rather than relying on the mere fact of liquidation.”<sup>24</sup>

In *Altx, Inc. v. United States*, the CIT denied injunctive relief to domestic manufacturers, rejecting the argument that the liquidation of entries coupled with the “loss of duty revenue under the Continued Dumping and Subsidy Offset Act (“CDO”) constitute[d] irreparable harm.”<sup>25</sup> The CIT held that the plaintiff’s assertions about lost revenue under the CDO were speculative given the evidence presented.<sup>26</sup> To carry its burden to establish irreparable harm, the CIT stated: “Altx must produce affidavits or other evidence showing, with more specificity, expected lost antidumping duties on liquidated entries, the amount of antidumping duties to be raised in the event of the issuance of an antidumping duty order, and the amount of qualified expenditures [under CDO] to be expected following an order.”<sup>27</sup>

The CIT was hesitant to grant a preliminary injunction in cases involving requests for injunctive relief against government acts other than liquidation.<sup>28</sup> In *Shandong Huarong General Group Corp. v. United States*, the exporter-plaintiff argued, under *Zenith*, that it would suffer irreparable harm if forced to post cash deposits on entries at the new, higher rate determined by Commerce, as it would be “forced out of business” and thereby lose its ability to obtain meaningful judicial review.<sup>29</sup> The CIT rejected the plaintiff’s argument, finding that the plaintiff’s sole reliance on an affidavit from a “major” customer, which stated that if forced to pay cash deposits it would be unable to continue importing, was insufficient to show irreparable harm when the plaintiff failed to produce additional evidence showing how these sales would impact its overall financial position, the lack of cash reserves, the lack of viable alternative markets, and the lack of sales of non-subject merchandise.<sup>30</sup> Additionally, the CIT stated as a general matter that affidavits submitted by interested parties were weak evidence of

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liquidation of entries without duties is not per se irreparable harm in the context of investigation determinations) (emphasis in original).

23. *Sandoz Chems. Corp. v. United States*, 17 Ct. Int’l Trade 1061, 1063 (1993).

24. *Id.*

25. *Altx*, 211 F. Supp. 2d at 1381.

26. *Id.* at 1381–82.

27. *Id.* at 1381.

28. *See, e.g., Corus Group PLC v. Bush*, 217 F. Supp. 2d 1347, 1359 (Ct. Int’l Trade 2002) (rejecting plaintiff-respondent’s motion for injunctive relief to enjoin Customs from collecting additional duties in accordance with presidential proclamation); *Shandong Huarong Gen. Group Corp. v. United States*, 24 Ct. Int’l Trade 1279, 1285 (2000) (rejecting injunctive relief on the basis of no finding of irreparable harm when plaintiff requested an “injunction against collection of new rate pending judicial review”).

29. *Shandong*, 24 Ct. Int’l Trade at 1282.

30. *Id.* at 1282–85.

irreparable harm, and that what was needed was independent evidence showing exactly how these lost sales would force it out of business.<sup>31</sup>

Preliminary injunctions may not be available when cases involve liquidations unlikely to occur prior to the issuance of the CIT's decision on the merits.<sup>32</sup> In *Corus Group PLC v. Bush*, a foreign producer-plaintiff argued that it would suffer irreparable harm because the collection of additional duties on its entries and/or the liquidation of such entries would close one of its plants and have a "significant and irreversible adverse impact upon its business operations."<sup>33</sup> The CIT rejected this argument, finding that: (1) although the plaintiffs showed evidence of serious economic hardship as a result of the collection of additional duties, finding irreparable harm would create a per se rule given the vast number of importers affected by the additional duties with similar challenges; and (2) because the court was likely to resolve the merits of the case prior to the liquidation of the plaintiffs' entries, which can generally take up to a year from entry, harm from liquidation as noted in *Zenith* would be unlikely.<sup>34</sup>

Further, even if *Zenith* and its progeny are applicable and irreparable harm is established by lack of meaningful judicial review or other sufficient evidence of harm, the courts have held that injunctive relief may not be granted absent at least a minimal showing of the other factors required for injunctive relief.<sup>35</sup> That said, of course, to the extent the court finds no irreparable harm, the court need not reach the other three factors.<sup>36</sup>

#### D. Likelihood of Success on the Merits

The CIT stated that once irreparable harm is established, "it will ordinarily be sufficient that the movant has raised questions which are 'serious, substantial, difficult and doubtful.'"<sup>37</sup> In addition, "[t]he greater the potential harm to the plaintiff, the lesser the burden on [p]laintiffs to make the required showing of likelihood of success on the merits."<sup>38</sup>

Although establishing the likelihood of success is a lesser burden, the courts have rejected injunctive relief where the plaintiff failed to establish this factor. For example, in *FMC Corp. v. United States*, the Federal Circuit

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31. *Id.* at 1283 (citing *Shree Rama Enters. v. United States*, 21 Ct. Int'l Trade 1165, 1167 (1995); *Companhia Brasileira Carbureto de Calcio v. United States*, 18 Ct. Int'l Trade 215, 217 (1994)).

32. *See Corus*, 217 F. Supp. 2d at 1359 (rejecting injunctive relief to enjoin Customs from collecting additional duties on liquidation entries in accordance with presidential proclamation).

33. *Id.* at 1354.

34. *Id.* at 1355–56.

35. *See FMC Corp.*, 3 F.3d at 430 (stating that "[n]owhere in *Zenith* does it suggest that the harm suffered by FMC entitles FMC to an injunction absent a showing of likelihood of success on the merits").

36. *Altx*, 211 F. Supp. 2d at 1382.

37. *Timken Co. v. United States*, 6 Ct. Int'l Trade 76, 80 (1983) (quoting *County of Alameda v. Weinberger*, 520 F.2d 344, 349 n.12 (9th Cir. 1975)). *See also Uguine-Savoie Imphy*, 24 Ct. Int'l Trade at 1252 (noting that Plaintiffs "are required only to raise 'serious, substantial, difficult and doubtful' questions") (citations omitted).

38. *SKF USA*, 316 F. Supp. 2d at 1329.

found that the appellants-petitioners failed to establish the likelihood of success on the merits, as FMC's claims on their faces did not seriously challenge the legality or reasonableness of Commerce's determination.<sup>39</sup> In *NSK Ltd. v. United States*, the CIT denied a request for injunctive relief where the relief requested by the plaintiffs-respondents' substantive claims would force Commerce to act in a manner contrary to the law.<sup>40</sup>

#### E. Balance of the Hardships

"An inquiry into the balance of hardships requires [the] court to determine which party will suffer the greatest adverse effects as a result of the grant or denial of the preliminary injunction."<sup>41</sup> In the context of *Zenith*, generally the courts found the balance to favor the party seeking injunction. The courts held that the balance of hardships favors an injunction in most instances because "[t]he Government will, in fact, ultimately collect or refund, with interest, any amounts owed from or due to [the Government] at the conclusion of this litigation."<sup>42</sup>

In *Corus*, the CIT considered the impact of the imposition of Section 201 duties, and finding no irreparable harm, denied injunctive relief.<sup>43</sup> Even so, the CIT held that while the domestic industry suffered some hardship associated with increased low-priced imports, the balance of hardships favored the foreign producer, Corus, which demonstrated that the imposition of additional duties would result in substantial harm.<sup>44</sup> As stated above, however, this harm did not constitute the irreparable economic harm required for the grant of injunctive relief.<sup>45</sup>

#### F. Public Interest

"It is well settled that the public interest is served by 'ensuring that the ITA complies with the law, and interprets and applies [the] international trade statutes uniformly and fairly.'"<sup>46</sup> In the context of *Zenith*, the court deemed this factor satisfied, as the public interest is best served by assuring that parties can obtain effective judicial review.<sup>47</sup> Further, in *SKF USA Inc. v. United States*, the court held that "the public interest may be best maintained by 'the procedural safeguard of an injunction *pendente lite* to maintain the status quo of the unliquidated entries until a final resolution on

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39. *FMC Corp.*, 3 F.3d at 427–30.

40. *NSK Ltd. v. United States*, 350 F. Supp. 2d 1128, 1131–32 (Ct. Int'l Trade 2004). *See id.* (requesting that the Department change its model matching methodology prior to considering all the data and allowing interested parties to comment).

41. *Ugine-Savoie Imphy*, 24 Ct. Int'l Trade at 1250.

42. *SKF USA*, 316 F. Supp. 2d at 1328.

43. *Corus*, 217 F. Supp. 2d at 1354–56.

44. *Id.* at 1357.

45. *Id.*

46. *Ugine-Savoie Imphy*, 24 Ct. Int'l Trade at 1252 (citing *PPG Indus. v. United States*, 11 Ct. Int'l Trade 5, 9 (1987)) (quoting *Ceramica Regiomontana v. United States*, 7 Ct. Int'l Trade 390, 397 (1984)).

47. *See SKF USA*, 316 F. Supp. 2d at 1329 (stating that the public interest may best be served by an injunction that would maintain the "status quo" of the unliquidated entries).

the merits,” and that “granting Plaintiffs motion for preliminary injunction . . . will further the public interest of an accurate assessment of antidumping duties.”<sup>48</sup>

## II. THE DURATION OF CIT INJUNCTIVE RELIEF

### A. Dissolution of Preliminary Injunctions

A CIT preliminary injunction issued under 19 U.S.C. § 1516a(c)(2) dissolves upon a “final court decision” after the appeals process.<sup>49</sup> 19 U.S.C. § 1516a(e)(2), in pertinent part, provides:

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 — — . . . (2) entries, the liquidation of which was enjoined under subsection (c)(2) [the preliminary injunction subsection], shall be liquidated in accordance with the final court decision in the action.<sup>50</sup>

Further, it is well-settled under *Timken Co. v. United States*, that under section 1516a(e)(2), a decision that is appealable from the CIT is not a “final court decision” for purposes of liquidation under 19 U.S.C. § 1516a(e)(2).<sup>51</sup>

### B. CIT's Authority to Issue Preliminary Injunctions Challenged by Government

Despite the Federal Circuit's holding in *Timken*, the government challenged the authority of the CIT to issue a preliminary injunction, which extends until the issuance of a “final court decision,” in appeals to the United States Court of Appeals for the Federal Circuit.<sup>52</sup> In *Yancheng Baolong Biochemical Products Co., Ltd. v. United States*,<sup>53</sup> the government contended that when “the CIT renders an opinion that is ‘not in harmony’ with the agency's original determination, ‘it is necessary to suspend liquidation until there is a conclusive decision in the action,’” as defined by *Timken*.<sup>54</sup> The government asserted that “this type of automatic injunction following a CIT decision that is ‘not in harmony’ with the agency's original determination is referred to as a ‘*Timken*-injunction,’” and such an injunction “continues to suspend liquidation throughout the appeals process.”<sup>55</sup> However, the Government further contended that “if the CIT issues a decision that is ‘in harmony’ with the agency's original determination . . . any preliminary

48. *Id.* (quoting *Smith-Corona Group v. United States*, 1 Ct. Int'l Trade 89, 98 (1980)) (emphasis added).

49. 19 U.S.C. § 1516a(e)(2).

50. *Id.*

51. *SKF USA*, 316 F. Supp. 2d at 1330.

52. *Yancheng Baolong Biochemical Prods. Co. v. United States*, 406 F.3d 1377, 1379 (Fed. Cir. 2005).

53. *Yancheng Baolong Biochemical Prods. Co. v. United States*, 277 F. Supp. 2d 1349 (Ct. Int'l Trade 2003), *aff'd*, 406 F.3d 1377.

54. *Id.* at 1353 (citing *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990)).

55. *Id.* at 1354.

injunction issued by the CIT dissolves,” absent the application for a “new injunction pending appeal.”<sup>56</sup> The Government made additional arguments not discussed here.<sup>57</sup>

The CIT rejected the Government’s argument, finding, consistent with the Federal Circuit’s ruling in *Timken*, that to give full effect to § 1516a(e), liquidation must remain suspended under a preliminary injunction issued pursuant to § 1516a(c)(2) until the parties exhaust their appeals.<sup>58</sup> Further, the CIT noted that “[d]issolving the preliminary injunction after an ‘in harmony’ CIT decision would allow liquidation to occur immediately, possibly depriving the Federal Circuit of jurisdiction,” as it no longer has jurisdiction after the entries are liquidated.<sup>59</sup>

### C. Government’s Argument Rejected

The courts previously addressed this issue and largely rejected the Government’s argument that CIT-issued preliminary injunctions dissolve upon a final decision by the CIT. In *Fujitsu General America, Inc. v. United States*,<sup>60</sup> the Federal Circuit found that a preliminary injunction against liquidation issued by the CIT dissolved when “the time for petitioning the Supreme Court for a writ of certiorari expired,” or in other words, when the decision could no longer be appealed.<sup>61</sup>

Also, the CIT held in *SKF USA* that “[o]nly after a conclusive decision by either this or a court of appeals must a preliminary injunction be dissolved.”<sup>62</sup> In support of its argument on appeal, the Government pointed to the Federal Circuit’s decision in *Fundicao Tupy S.A. v. United States*, which quoted *Moore’s Federal Practice* for the proposition that “[a

56. *See id.* (finding the Government in contempt for liquidating entries in violation of a preliminary injunction after the Court entered judgment, as the injunction remained in effect pending the appeals process).

57. *See id.* at 1352–56 (discussing the Government’s unsuccessful arguments to distinguish prior federal circuit decisions).

58. *See id.* at 1358 (citing *Timken*, 893 F.2d at 339–40) (finding that “§ 1516a(e) does not require liquidation in accordance with an appealed CIT decision,” as “[a]n ‘action’ does not end when one court renders a decision, but continues through the appeal process”).

59. *Id.* at 1359–60 (citing *Zenith*, 710 F.2d at 810).

60. *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1379 (Fed. Cir. 2002).

61. *Id.*

[W]e see no reason not to extend the logic of *Timken* to the question before us . . . .

Thus, there is not a “final court decision” in an action that originates in the Court of International Trade and in which there is an appeal to the Federal Circuit until . . . the time for petitioning the Supreme Court for certiorari expires without the filing of a petition.

*Id.* (citing *Timken*, 893 F.2d at 340). *See also* *Hosiden Corp. v. Advanced Display Mfrs. of Am.*, 85 F.3d 589, 591 (Fed. Cir. 1996) (finding, consistent with *Timken*, that § 1516a(e) “requires that liquidation, once enjoined, remains suspended until there is a ‘conclusive court decision which decides the matter’”).

62. *SKF USA*, 316 F. Supp. 2d at 1335. *See also* *Pam S.P.A. v. United States*, 347 F. Supp. 2d 1362, 1369–70 (Ct. Int’l Trade 2004) (citing *Fujitsu*, 283 F.3d at 1379 and *Yancheng*, 277 F. Supp. 2d at 1349) (stating that a preliminary injunction does not persist through appeal).



preliminary injunction] is *ipso facto* dissolved by a dismissal of the complaint or the entry of a final decree in the cause.”<sup>63</sup> According to the Government, this quote articulated a general rule that preliminary injunctions dissolve when the CIT enters judgment on the merits. The CIT, in *Yancheng* and *SKF USA*, rejected the Government’s reasoning, finding *Fundicao Tupy* distinguishable on the merits, as the court there lacked jurisdiction to issue a preliminary injunction because the controversy was rendered moot on the merits, and also finding that nothing in that case stood for the proposition that all preliminary injunctions issued by the CIT dissolve upon the issuance of a judgment before the time to appeal has run.<sup>64</sup>

On May 11, 2004, the Federal Circuit rendered its decision in *Yancheng*, ruling that its prior precedent, including *Timken* and *Hosiden Corp. v. Advanced Display Manufacturers of America*, “forecloses any argument by the government that the preliminary injunction . . . was not intended to persist through the appeals process.”<sup>65</sup> Thus, it is now clear that preliminary injunctions issued by the CIT extend until the issuance of a “final court decision” in appeals at the Federal Circuit and until the time for appeal to the Supreme Court has expired.

### III. VIOLATIONS OF PRELIMINARY INJUNCTIONS

#### A. *The Government Is Accountable for Violations of CIT Preliminary Injunctions*

##### 1. *Liquidations in Contravention of Preliminary Injunctions Should be Given No Legal Effect*

When an entry is liquidated in violation of a preliminary injunction, such liquidation should be “void *ab initio*.”<sup>66</sup> In *AK Steel Corp. v. United States*, Customs liquidated entries in contravention of the CIT’s preliminary injunction.<sup>67</sup> Despite its conduct, however, the Government asserted the liquidations to be final, as the importer failed to protest the liquidations within the ninety-day protest period.<sup>68</sup> After hearing arguments, the CIT found that it “‘possesses all the powers in law and equity of, or as conferred by statute upon, a district court of the United States,’” and thus, the illegal liquidation of entries, contrary to the CIT’s preliminary injunctions, were

63. *Fundicao Tupy S.A. v. United States*, 841 F.2d 1101, 1103 (Fed. Cir. 1988).

64. *Yancheng*, 277 F. Supp. 2d at 1360; *SKF USA*, 316 F. Supp. 2d at 1331.

65. *Yancheng*, 406 F.3d at 1382.

66. *See* *AK Steel Corp. v. United States*, 281 F. Supp. 2d 1318, 1323 (Ct. Int’l Trade 2003) (finding that improper liquidations by Customs did not meet the “doctrine of finality,” rendering them void from the beginning); *Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1162, 1170 (Ct. Int’l Trade 2004) (holding that liquidations violating a court order are void *ab initio*). *See also* *LG Elecs. USA, Inc. v. United States*, 21 Ct. Int’l Trade 1421, 1429 (1997) (finding that liquidations that occur in violation of a court order have “no legal effect”).

67. *AK Steel Corp.*, 281 F. Supp. 2d at 1320.

68. *Id.* at 1321.

null and void.<sup>69</sup> Further, with respect to the government's claim that the ninety-day protest period expired with respect to certain entries, the court found that "[w]here liquidation occurs through an illegal act of Customs and in the absence of a protestable event, the doctrine of finality cannot be said to attach."<sup>70</sup> Similarly, in *Allegheny Bradford Corp. v. United States*, the CIT found liquidations in the face of an injunction to be void *ab initio*.<sup>71</sup>

## 2. Reliquidation as an Alternative

Alternatively, the CIT should order liquidated entries in violation of a preliminary injunction reliquidated in accordance with the "final court decision" per section 1516a(e). In *Eurodif S.A. v. United States*, although the CIT declined to declare liquidated entries "void," the court ordered that the two entries should be "reliquidate[d] . . . upon determination of the final and conclusive rate of duty in accordance with the court's injunction of June 25, 2002," and thereby ensured that the entries would be ultimately liquidated at the correct antidumping and countervailing duty rates as determined by the courts.<sup>72</sup> In addition, in *Eurodif*, the CIT prohibited Customs from distributing any funds from the illegal liquidations pursuant to the Continued Dumping and Subsidy Offset Act, 19 U.S.C. § 1675c(a), and required Customs to monitor its compliance with the court's injunctions in the affected cases.

## 3. Importers Should Not Bear the Burden of Remediating the Government's Conduct

In all of the cases cited above, the CIT squarely rejected the Government's attempt to force the importers to participate in additional administrative proceedings, e.g., the filing of a protest or section 1520(c) petition, as the appropriate remedy for Custom's illegal action. In *LG Electronics U.S.A., Inc. v. United States*, the CIT explained:

An importer is entitled to rely on a preliminary injunction . . . barring liquidation, obtained in an effort to resolve a dispute with Customs or Commerce. The importer's ordinary obligation to watch for notices of liquidation is suspended where the court has issued an order forbidding liquidation. This rule permits an importer to place trust in the judicial review process and to turn full attention to the judicial resolution of the dispute at hand. An agency cannot insist that an importer follow its administrative procedure when the agency's only action violates an injunction the importer obtained against that procedure in the course of a dispute with the agency.<sup>73</sup>

Indeed, in *AK Steel*, the court reasoned that the "[Government's] claim for an unqualified right to commit an admittedly illegal act and then invoke a

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69. *Id.* at 1323 (quoting 28 U.S.C. § 1585 (2000)).

70. *Id.* at 1322.

71. *Allegheny Bradford*, 342 F. Supp. 2d at 1170.

72. *Eurodif S.A. v. United States*, 306 F. Supp. 2d 1288, 1290–91 (Ct. Int'l Trade 2004).

73. *LG Elecs.*, 21 Ct. Int'l Trade at 1428 (finding that liquidations that occur in violation of a court order have "no legal effect").

statute to assert immunity in such illegality is breathtaking for itschutzpah.”<sup>74</sup> Likewise, in *Allegheny Bradford*, the CIT was even more forceful, stating that liquidation in contravention of a court order “creates a whole different ball game apart from the standard protest and judicial review framework provided by Congress.”<sup>75</sup> According to the CIT, “[t]he proper means to enforce an order of this Court against the Government is to seek relief in this Court; it is not to file a protest with Customs.”<sup>76</sup> Finally, in *Eurodif*, the CIT gave weight to the importers’ claims that the administrative proceedings suggested by the Government as remedies for the erroneous liquidations would only subject the importer to further harm and uncertainty with respect to the liquidated entries and provide little comfort that the entries would ultimately be appropriately liquidated.<sup>77</sup>

#### 4. *Importers Must Protect Their Rights*

Notwithstanding the CIT’s recent decisions remedying liquidations in violation of the court’s preliminary injunctions, importers should protect their rights and avail themselves of all of the administrative procedures available to them for redress of the erroneous liquidations, i.e., filing of protests against liquidation within the ninety-day protest period and/or 1520c petitions, as appropriate. These measures provide importers with protection in the absence of court action.

### IV. DEEMED LIQUIDATION AND PRELIMINARY INJUNCTIONS AGAINST LIQUIDATION

#### A. *Deemed Liquidation Regarding Entries for Which Liquidation is Enjoined by CIT Preliminary Injunction*

##### 1. *Removal of the Suspension of Liquidation*

Section 504(d) of the Tariff Act of 1930, 19 U.S.C. § 1504(d), which governs the deemed liquidation of entries whose liquidation previously was suspended by court order, provides in pertinent part:

Except as provided in section [1675(a)(3) of this title], when a suspension [of liquidation] required by statute or court order is removed, the Customs Service shall liquidate the entry . . . within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry . . . not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having

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74. *AK Steel Corp.*, 281 F. Supp. 2d at 1322.

75. *Allegheny Bradford*, 342 F. Supp. 2d at 1169.

76. *Id.* at 1170 (quoting *Yancheng*, 277 F. Supp. 2d at 1364).

77. *See Eurodif*, 306 F. Supp. 2d at 1290 (noting that the government did not comply with previous injunctions and prompting the court to require monitoring of compliance in the future).

been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record . . . .<sup>78</sup>

Section 1675(a)(3)(B) provides, in pertinent part:

If the administering authority orders any liquidation of entries pursuant to a review . . . such liquidation shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued. In any case in which liquidation has not occurred within that 90-day period, the Secretary of the Treasury shall, upon the request of the affected party, provide an explanation thereof.<sup>79</sup>

The CIT interpreted section 1504(d) to require the following for entries to be deemed liquidated: “(1)the suspension of liquidation that was in place must have been removed; (2)Customs must have received notice of the removal of the suspension; and

(3)Customs must not liquidate the entry at issue within six months of receiving such notice.”<sup>80</sup>

As discussed above, the suspension of liquidation resulting from a CIT preliminary injunction is removed when the time limit allowed for applying for a writ of *certiorari* for review in the U.S. Supreme Court expires, or in other words, after the appeals process is exhausted.<sup>81</sup> Otherwise, the entries may not be deemed liquidated.

## 2. Notice Required by Section 1504(d)

Notice of the removal of the suspension of liquidation pursuant to a CIT preliminary injunction should be unambiguous and public, and may be appropriately provided when Commerce or another agency publishes notice of the removal of the suspension of liquidation in the Federal Register or other public forum.<sup>82</sup> In *NEC Solutions (America), Inc. v. United States*, the Federal Circuit found notice of the removal of liquidation in the form of a publicly posted email from Commerce to Customs, which stated that “there should be no unliquidated entries,” to be sufficiently unambiguous and public, and rejected arguments that sufficient notice must include “explicit

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78. 19 U.S.C. § 1504(d) (2000).

79. 19 U.S.C. § 1675(a)(3)(B) (2000).

80. See *Fujitsu*, 283 F.3d at 1376 (finding no deemed liquidation because the entries were liquidated within six months of the receipt of notice).

81. *Id.* at 1379 (citing *Timken*, 893 F.2d 337). See also *Yancheng*, 406 F.3d at 1382 (discussing the requirement of a “final court decision”); *Cemex, S.A. v. United States*, 384 F.3d 1314, 1320 (Fed. Cir. 2004) (stating that “the suspension of liquidation under 19 U.S.C. § 1516a(c)(2) cannot be removed until the time for petitioning the Supreme Court for certiorari expires”).

82. See *Am. Int’l Chem., Inc. v. United States*, No. 02-00624, 2005 WL 1606318, at \*10 (Ct. Int’l Trade July 7, 2005) (citing *NEC Solutions (Am.), Inc. v. United States*, 411 F.3d 1340, 1348 (Fed. Cir. 2005) (finding an email from Commerce to Customs that was posted on Customs’ publicly available Electronic Bulletin Board sufficient notice of under Section 1504(d)); *Fujitsu*, 283 F.3d at 1381 (citing *Int’l Trading Co. v. United States*, 281 F.3d 1268, 1275 (Fed. Cir. 2002) (finding that Commerce’s publication of the final results of administrative review in the Federal Register constituted notice to Customs within the meaning of Section 1504(d)).

instructions to liquidate or use particular language in order to provide notice that the removal of suspension has occurred” or “inform[] Customs of the applicable duty rate.”<sup>83</sup>

In *Fujitsu*, the Federal Circuit specifically found that a court clerk’s notice to the Department of Justice or Fujitsu, or the availability of the court’s decision in the general media, did not constitute the notice required by the statute.<sup>84</sup> Likewise, in *Cemex, S.A. v. United States*, the Federal Circuit reiterated its position that the notice to Customs required by section 1504(d) must be “unambiguous and public” to trigger the six-month liquidation period.<sup>85</sup> There, the court found that a non-public e-mail instructing Customs to liquidate certain previously suspended entries was ineffective under the statute.<sup>86</sup> Accordingly, the entries were not deemed liquidated. The lack of notice of the removal of suspension of liquidation, however, did not alter the fact that the preliminary injunction issued by the CIT as part of the underlying litigation dissolved upon the final court decision. Therefore, liquidations which did in fact occur were not violative of a preliminary injunction.<sup>87</sup>

### 3. Six-Month Time Limitation Imposed by Section 1504(d)

To be deemed liquidated, entries must not be liquidated within six months of Commerce’s notice to Customs that the suspension of liquidation was removed.<sup>88</sup> In *International Trading Co. v. United States*, the Federal Circuit held that this provision applies to “any entry,” including “entries suspended on account of an administrative review (the class of entries to which the proviso in the first sentence of section 1504(d) referring to section 1675(a)(3) applies).”<sup>89</sup> The Federal Circuit rejected the argument that entries falling under section 1675(a)(3)(B), which requires Customs to liquidate such entries “promptly and, to the greatest extent practicable, within 90 days after the instructions are issued,” are not subject to the six-month time limit imposed by section 1504(d).<sup>90</sup>

Under the specific facts of *Fujitsu*, the Federal Circuit addressed the circumstance of when the agency violates its statutory obligation under 19 U.S.C. § 1516a(e)(2), to publish notice of a final court decision “within ten days from the date of the issuance of the court decision.”<sup>91</sup> There, Commerce published notice of the court decision over one year later.<sup>92</sup> The

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83. *NEC Solutions*, 277 F. Supp. 2d at 1345.

84. *Fujitsu*, 283 F.3d at 1379–80.

85. *Cemex*, 384 F.3d at 1321.

86. *Id.*

87. *See id.* at 1324 n.13 (noting that liquidations in violation of an injunctive order are distinguishable from the situation in *Cemex* and would escape the finality doctrine).

88. *See, e.g., Int’l Trading Co. v. United States*, 412 F.3d 1303, 1313 (Fed. Cir. 2005) (holding that the entry was deemed liquidated because Customs failed to liquidate within six months of Commerce’s notice).

89. *Id.* at 1312.

90. *Id.* (quoting 19 U.S.C. § 1675(a)(3)(B)).

91. *Fujitsu*, 283 F.3d at 1377 (quoting 19 U.S.C. § 1516a(e)(2)).

92. *Id.* at 1369.

Federal Circuit held, however, that while “frustrating,” Commerce’s delay did not affect the “unambiguous and public starting point for the six-month liquidation period,” i.e., publication in the Federal Register.<sup>93</sup> The court held that the ten-day rule was independent of the issue of determining the date upon which Customs received notice, or in other words, “[s]ection 1504(d) and 1516a(e) are separate statutes.”<sup>94</sup> The court reasoned that, “[s]ection 1504(d) governs deemed liquidation,” which under that section, “can occur only if Customs fails to liquidate entries within six months of having received notice of the removal of a suspension of liquidation.”<sup>95</sup> The court further noted that, “there is no language in section 1516a(e) that attaches a consequence to a failure by Commerce to meet the ten-day publication requirement, let alone the consequence of deemed liquidation under section 1504(d).”<sup>96</sup>

### CONCLUSION

Preliminary injunctions are essential for respondents to receive the full measure of judicial review guaranteed under the statute. As shown, however, injunctive relief is neither automatically granted by the CIT nor carefully implemented and monitored by the government in some instances. The bottom line is that respondents must (1) aggressively seek injunctive relief to protect their refund of erroneously imposed cash deposits and/or antidumping or countervailing duties and, once granted, (2) vigilantly guard the protection against improper liquidation afforded by injunctive relief.

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93. *Id.* at 1381–82.

94. *Id.* at 1382.

95. *Id.*

96. *Id.*

