UIC Law Review

Volume 39 | Issue 1 Article 6

Fall 2005

Injunctions Against Liquidation in Trade Remedy Cases: A Petitioner's View, 39 J. Marshall L. Rev. 45 (2005)

Jeffrey M. Telep

INJUNCTIONS AGAINST LIQUIDATION IN TRADE REMEDY CASES: A PETITIONERS' VIEW

JEFFREY M. TELEP*

I. INTRODUCTION

The Tariff Act of 1930 grants the United States Court of International Trade ("CIT") the authority to grant injunctions against liquidation of entries that are the subject of antidumping or countervailing duty determinations during litigation of those determinations. Injunctions against liquidation are designed to ensure that entries covered by an antidumping or countervailing duty order are liquidated in accordance with the court's decisions.[1]

First, injunctions prevent liquidation by the Bureau of Customs and Border Protection ("Customs") until the final assessment rate is determined in litigation. Second, injunctions ensure that entries subject to an antidumping or countervailing duty order are liquidated in accordance with the final court decision in the action. Third, injunctions ensure that entries will not be deemed liquidated during litigation of an antidumping or countervailing duty determination.

This article will address whether recent decisions of the CIT and the United States Court of Appeals for the Federal Circuit ("Federal Circuit") on injunction issues fulfill these purposes. Specifically, this paper will address (a) the statutory scheme for injunctions against liquidation, (b) the standards for issuing injunctions against liquidation, (c) the duration of injunctions against liquidation, (d) inadvertent and erroneous liquidations in violation of injunctions, and (e) the relationship between injunctions and the deemed-liquidation statute.

II. THE STATUTORY SCHEME

Section 516a(c)(2) of the Tariff Act of 1930, 19 U.S.C. § 1516a(c)(2), authorizes the CIT to grant injunctions against liquidation of entries during litigation of antidumping and countervailing duty determinations:

---

* Jeffrey M. Telep is an attorney with King & Spalding, LLP.

1. Ensuring that entries are liquidated in accordance with the final and conclusive court decision is obviously important to petitioners. Petitioners stand to receive substantial competitive benefits from the correct assessment of antidumping and countervailing duties and, in some instances, a distribution as an affected domestic producer under the Continued Dumping And Subsidy Offset Act of 2000, 19 U.S.C. § 1675c ("CDSOA").

> 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.[2]

Injunctions granted under this section are part of the broader statutory scheme and have consequences for liquidation.

First, petitioners in a trade remedy case before the CIT must secure an injunction if they want to prevent Customs from liquidating entries covered by an antidumping or countervailing duty determination while the litigation is pending. Once the entries are liquidated, the liquidations become final and conclusive as to all persons with few exceptions:

> [D]ecisions of the Customs Service, including the legality of all orders and findings entering into the same, as to . . . (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade . . . .[3]

As described in the statute, the filing of a protest can prevent liquidation from becoming final, but that right is granted to importers, not petitioners. Under 19 U.S.C. § 1514(c)(2), the persons entitled to file protests include "(A) importers or consignees shown on the entry papers, or their sureties; (B) any person paying any charge or exaction; (C) any person seeking entry or delivery; (D) any person filing a claim for drawback; . . . or (F) any authorized agent of [these persons]." The list does not include domestic "interested parties" or "parties to the proceeding" within the meaning of 19 U.S.C. § 1516a(a)(2) and 1677(9)(F).

Moreover, reliquidation is limited by statute to a few situations, and petitioners are mostly powerless to effect a reliquidation unilaterally. For example, Customs may voluntarily reliquidate an entry within ninety days of the original liquidation:

---

2. 19 U.S.C. § 1516a(c)(2) (2000). In addition to the injunctive authority specifically provided by section 1516a(c)(2), the CIT has broad injunctive powers, as it "possess[es] all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585 (2000); *see also* Borlem S.A.-Empreedimentos Industriais v. United States, 913 F.2d 933, 937 (Fed. Cir. 1990)("[T]he legislative history of 28 U.S.C. § 1585 provides the Court of International Trade 'with all the necessary remedial powers in law and equity possessed by other federal courts established under Article III of the Constitution'"). In addition, 28 U.S.C. § 2643(c)(1) authorizes the CIT to "order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders or remand, injunctions, and writs of mandamus and prohibition."

3. 19 U.S.C. § 1514(a) (2000).

> A liquidation made in accordance with section 1500 of this title . . . may be reliquidated in any respect by the Customs Service, notwithstanding the filing of a protest, within ninety days from the date on which notice of the original liquidation is given or transmitted to the importer, his consignee, or agent.[4]

Prior to December 3, 2004, Customs was able to reliquidate an entry to correct errors within one year, but the error must have been adverse to the importer:[5]

> Notwithstanding a valid protest was not filed, the Customs Service may, . . . reliquidate an entry . . . to correct—(1) a clerical error, mistake of fact, or other inadvertence, . . . not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction . . . .[6]

These limited opportunities for reliquidation do not include reliquidations to correct a petitioner's failure to secure an injunction.[7]

Second, petitioners must secure an injunction if they want to receive the benefit of a favorable court decision in litigation arising from an adverse antidumping or countervailing duty determination. Entries subject to an antidumping or countervailing duty determination, the liquidation of which is enjoined under section 1516a(c)(2), must be liquidated in accordance with the final court decision in the action:

> 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 [19 U.S.C. § 1516a], shall be liquidated in accordance with the final court decision in the action.[8]

If no injunction is granted during the litigation, however, entries subject to an antidumping or countervailing duty determination must be liquidated in accordance with the administrative determination irrespective of the final court decision:

> 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 . . . .[9]

Third, petitioners must obtain an injunction to prevent entries covered by an antidumping or countervailing duty determination from becoming

---

4. *Id.* § 1501 (2000).
5. *Id.* § 1520(d) (2000).
6. *Id.* § 1520(c)(1) (2000)(deleted Dec. 4, 2003).
7. Other statutory provisions concerning reliquidation are contained in 28 U.S.C. § 2631 and 19 U.S.C. § 1509.
8. 19 U.S.C. § 1516a(e)(2) (2000).
9. *Id.* § 1516a(c)(1) (2000).

deemed liquidated by operation of law. Under the deemed liquidation statute,

> Except as provided in section 1675(a)(3) of this title, when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b) of this section, within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry (other than an entry with respect to which liquidation has been extended under subsection (b) of this section) not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record . . . .[10]

Thus, injunctions are necessary to prevent deemed liquidation of entries covered by antidumping and countervailing administrative determinations during litigation of those determinations.

III. STANDARDS FOR ISSUING INJUNCTIONS AGAINST LIQUIDATION

The standards for issuing an injunction under section 1516a(c)(2) are well-known. The party moving for an injunction must show that (a) it is likely to succeed on the merits, (b) it would suffer irreparable injury in the absence of an injunction, (c) the balance of hardships favors the moving party, and (d) the public interest favors an injunction.[11] "[T]he showing of likelihood of success on the merits is in inverse proportion to the severity of injury [to] the moving party . . . ."[12]

The courts generally have treated injunctions sought in litigation arising from antidumping and countervailing duty investigations differently from those sought in litigation arising from antidumping and countervailing

---

10. *Id.* § 1504(d) (2000).

11. FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993); UST, Inc. v. United States, 831 F.2d 1028, 1032 (Fed. Cir. 1987); Matsushita Elec. Indus. Co. v. United States, 823 F.2d 505, 509 (Fed. Cir. 1987); Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983); S.J. Stile Assocs. v. Snyder, 646 F.2d 522, 525 (C.C.P.A. 1981). Arguably, the public interest is always served by granting an injunction against liquidation. As recognized recently by the CIT,

> Certainly, the public interest is best served by preventing entries subject to antidumping duties from escaping the correct amount of such duties. Accordingly, 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 of the merits." *Smith-Corona Group v. United States*, 507 F. Supp. 1015, 1 Ct. Int'l Trade 89, 98 (1980). "As for the public interest, there can be no doubt that it is best served by ensuring that the [Department] complies with the law, and interprets and applies our international trade statutes uniformly and fairly." *Ceramica*, 590 F. Supp. 1260, 7 Ct. Int'l Trade at 397. Here, granting Plaintiffs [sic] motion for preliminary injunction will ensure judicial review of Commerce's determination and will further the public interest of an accurate assessment of antidumping duties.

SKF USA, Inc. v. United States, 316 F. Supp. 2d 1322, 1329 (Ct. Int'l Trade 2004).

12. Smith-Corona Corp. v. United States, 11 Ct. Int'l Trade 954, 965 (1987) (quoting Hyundai Pipe Co. v. United States, 11 Ct. Int'l Trade 238, 243 (1987)).

duty administrative reviews. This distinction has long been recognized in the Federal Circuit and the CIT. In *Zenith Radio Corp. v. United States*,[13] the United States Department of Commerce ("Commerce") conducted a periodic administrative review of the antidumping duty order on television receivers from Japan. During the administrative review, Commerce found *de minimis* dumping margins and, therefore, instructed Customs to liquidate the entries made during the period of review without antidumping duties. Zenith challenged Commerce's administrative review determination in the CIT and requested a preliminary injunction to prevent liquidation of the challenged entries. The CIT denied Zenith's request for a preliminary injunction upon the ground that Zenith would not suffer irreparable harm if the injunction were denied. Zenith appealed the decision to the Federal Circuit, which reversed the CIT and held that Zenith would suffer irreparable injury if liquidation of the entries were not enjoined.[14] According to the Federal Circuit,

> [L]iquidation 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. The result of liquidating the '79-'80 entries would not be economic only. In this case, Zenith's *statutory right to obtain judicial review of the determination would be without meaning for the only entries permanently affected by that determination.*[15]

In addition, the Federal Circuit stated that "[n]ot even prospective relief will be available to Zenith for entries in the '79-'80 review period once liquidation occurs."[16] Prospective relief would be transitory at best because the antidumping duty margins established during the subsequent administrative review would replace the margin determined by the court in the existing review.[17]

In *FMC Corp. v. United States*,[18] the Federal Circuit altered the *Zenith* calculus somewhat by clarifying that irreparable injury alone is not dispositive of whether to grant an injunction during litigation arising from an administrative review. *FMC* involved a challenge to the antidumping margin as well as Commerce's revocation decision. FMC sought an injunction on the grounds that it would suffer *Zenith*-style irreparable injury if the entries were liquidated during the litigation. The Government contended that the possibility of reversing Commerce's revocation decision provided FMC with "meaningful judicial review."[19] The Federal Circuit agreed with FMC that liquidation of the entries covered by the review would constitute irreparable injury under *Zenith*, but nevertheless held that FMC was not entitled to an

13. 710 F.2d at 808.
14. *Id.*
15. *Id.* at 810 (emphasis added).
16. *Id.*
17. *Id.* at 810-11.
18. 3 F.3d at 427.
19. *Id.* at 430.

injunction because it had failed to show sufficient likelihood of success on the merits.

In recent years, the CIT has relied on *Zenith* and its reasoning to grant injunctions on the grounds that liquidation of entries subject to the litigation would moot the case and deprive the moving party of meaningful judicial review. Despite *FMC*, the CIT has not routinely denied injunctions in administrative review cases on the grounds that the moving party is unlikely to succeed on the merits or has failed to fulfill the other criteria for an injunction.

By contrast, the CIT generally has refused to extend *Zenith* to enjoin liquidation of entries in litigation of antidumping and countervailing duty investigations. In the seminal case on this issue, *Am. Spring Wire Corp. v. United States*,[20] petitioners challenged a negative injury determination of the International Trade Commission ("ITC") and requested that the CIT enjoin liquidation of entries of steel wire strands pending the resolution of the litigation. To establish that they had suffered irreparable injury, petitioners relied solely upon the holding in *Zenith*. In *Am. Spring Wire Corp.*, the CIT distinguished *Zenith* upon the grounds that *Zenith* involved judicial review of an administrative review of an antidumping duty order rather than judicial review of a negative injury determination. According to the CIT, administrative reviews focus upon discrete periods of time and affect finite numbers of entries. Thus, the unique nature of the administrative review under consideration was dispositive of the holding in *Zenith*:

> [I]f a court [reviewing the administrative review determination] does not enjoin liquidation of entries pending resolution of challenges to the section 751 review then under consideration, the practical effect will be to moot the controversy and, at the same time, deprive plaintiffs of their right to judicial review of the agency's section 751 review determination.[21]

Recent decisions of the CIT continue to require an independent showing of irreparable injury apart from *Zenith*-style injury when an injunction against liquidation is sought in litigation arising from an antidumping or countervailing duty investigation. In *Altx, Inc. v. United States*, for example, the CIT denied an injunction sought during litigation of the ITC's injury determination on the grounds that the moving party would not suffer irreparable harm should the requested injunction be denied.[22] According to the CIT, "*Zenith* does not apply here because the instant case involves an appeal of [an] injury determination in an investigation, rather than an administrative review."[23]

---

20. 7 Ct. Int'l Trade 2, 3 (1984).

21. *Id.* at 5. *Accord* Trent Tube Div. v. United States, 14 Ct. Int'l Trade 587, 588 (1990) (liquidation of entries alone does not constitute irreparable harm); Budd Wheel & Brake Div. v. United States, 12 Ct. Int'l Trade 1020, 1023 (1988).

22. 211 F. Supp. 2d 1378, 1382 (Ct. Int'l Trade 2002).

23. *Id.* at 1380. *Accord Dupont Teijin Films USA v. United States*, No. 02-00463, 2003 Ct. Int'l Trade LEXIS 159 (Dec. 4, 2003)(denying an injunction request made during litigation of an affirmative antidumping determination on the same grounds).

In *Fuyao Glass Indus. Group Co. v. United States*, the plaintiff-importer challenged a final antidumping determination and sought an injunction.[24] The plaintiff claimed that it would suffer irreparable injury absent an injunction because it was considering withdrawing its outstanding request for an administrative review. If it did, then entries covered by the first administrative review would be liquidated at the cash deposit rate, effectively mooting the litigation. The court denied plaintiff's motion, concluding that the plaintiff's court claim remained viable so long as it continued its administrative review request, and that such a decision lay within the singular control of the plaintiff.

Had Fuyao not requested an administrative review, however, it is likely that the CIT would have granted an injunction. Ordinarily, entries made between the affirmative preliminary determination in the investigation and the end of the first review period are covered by the first administrative review and assessed at the rate set by the review. If no review is requested, however, entries covered by the investigation are assessed at the cash deposit rate under Commerce's automatic assessment regulation, 19 C.F.R. § 351.212(c). Thus, if no administrative review had been requested, Fuyao's first administrative review entries would have been assessed at the cash deposit rate established by the investigation. If it had prevailed in its litigation, Fuyao would have been entitled to a lower cash deposit rate, and Commerce would have been required to assess Fuyao's first administrative review entries at the lower rate under the automatic assessment regulation.[25]But without an injunction, Fuyao's first administrative review entries already would have been liquidated at the higher cash deposit rate applicable upon entry, effectively depriving Fuyao of the lower cash deposit rate established by the final court decision. The CIT likely would have considered this harm to be irreparable under the *Zenith* and *FMC* standards.[26]

In the end, the CIT's recent decisions in *Altx*, *Dupont Teijin*, and *Fuyao Glass* regarding the standard for issuing injunctions effectively ensure that entries are liquidated at the rate determined in the final court decision in the action.

IV. DURATION OF INJUNCTIONS

For years, the standard practice of the CIT was for a party appealing an adverse CIT decision to the Federal Circuit to seek a stay pending appeal, which effectively extended the injunction against liquidation issued under

24. Fuyao Glass Indus. Group Co. v United States, No. 02-00282, 2003 Ct. Int'l Trade LEXIS 98 (July 31, 2003). *See also* Fuyao Glass Indus. Group Co. v United States, No. 02-00282, 2003 Ct. Int'l Trade LEXIS 97 (July 31, 2003) (reaching the same result).

25. Ipsco, Inc. v. United States, 12 Ct. Int'l Trade 676, 678-79 (1988); Oki Elec. Indus. Co. v. United States, 11 Ct. Int'l Trade 624, 631 n.2 (1987).

26. *See, e.g.*, Asociacion Colombiana de Exportadores de Flores v. United States, 916 F.2d 1571 (Fed. Cir. 1990) (affirming the CIT's order of injunction against liquidation of entries covered by an antidumping investigation when respondents did not request an administrative review).

section 1516a(c)(2) until the Federal Circuit issued its decision.[27] Recently, there has been a spate of litigation addressing the issue of whether an injunction against liquidation under section 1516a(c)(2) automatically extends through the Federal Circuit appeal. The Federal Circuit recently decided this issue in *Yancheng Baolong Biochemical Products Co. v. United States*.[28] In *Yancheng*, the CIT issued an injunction against liquidation during litigation of the final results of an administrative review.[29] At the conclusion of the litigation in the CIT, Commerce ordered Customs to liquidate certain entries covered by the administrative review and advised the importer that the liquidations would occur unless a stay pending appeal was granted. Before the plaintiff-importer obtained a stay pending appeal, Customs liquidated most of these entries. The CIT then issued an order to show cause why the Government should not be held in contempt for violating its injunction.

In response, the Government contended that, under the Federal Circuit's decision in *Fundicao Tupy S.A. v. United States*,[30] preliminary injunctions dissolve upon the issuance of the CIT's final judgment. If a litigant wants to extend the injunction, it must obtain a stay pending appeal from either the CIT or the Federal Circuit. The CIT rejected these arguments. It held that injunctions against liquidation issued under section 1516a(c)(2) are not routine preliminary injunctions, but are creatures of statute that must be read in conjunction with other provisions in section 1516a. Section 1516a(e)(2), in particular, requires that entries, the liquidation of which has been suspended under section 1516a(c)(2), "shall be liquidated in accordance with the final court decision in the action," and that, under *Timken Co. v. United States*,[31] the "final court decision" in an action is the decision of the Federal Circuit. The CIT then held the Government in contempt for violating its order and the Government appealed.[32]

The Federal Circuit affirmed.[33] In its decision, the Federal Circuit essentially adopted the CIT's reasoning that (a) injunctions authorized by 19 U.S.C. § 1516a(c)(2) are creatures of statute, (b) the statute mandates that, when an injunction under this provision is issued, the entries covered by the injunction must "be liquidated in accordance with the final court decision in

27. Because so few trade remedy cases are reviewed by the Federal Circuit *en banc* or by the United States Supreme Court under a writ of *certiorari*, the Federal Circuit's decision is almost always the final and conclusive court decision in the action.

28. 406 F.3d 1377 (Fed. Cir. 2005).

29. Yancheng Baolong Biochemical Prod. Co. v. United States, 277 F. Supp. 2d 1349, 1350 (Ct. Int'l Trade 2003), *aff'd*, 406 F.3d 1377 (Fed. Cir. 2005).

30. 841 F.2d 1101, 1103-04 (Fed. Cir. 1988).

31. 893 F.2d 337, 339 (Fed. Cir. 1990).

32. While the appeal was pending, the CIT issued several decisions that, consistent with *Yancheng*, extend injunctions issued under section 1516a(c)(2) through the appeal to the Federal Circuit. Corus Staal BV v. United States, No. 04-00316, 2004 Ct. Int'l Trade LEXIS 131 (Oct. 19, 2004); PAM S.A. v. United States, 340 F. Supp. 2d 1362 (Ct. Int'l Trade June 10, 2004); Norsk Hydro Canada, Inc. v. United States, 341 F. Supp. 2d 1263, 1264 (Ct. Int'l Trade 2004); *SKF USA Inc.*, 316 F. Supp. 2d at 1338.

33. *Yancheng*, 406 F.3d at 1379.

the action," and (c) the final court decision in the action was the decision by the Federal Circuit.[34] Therefore, injunctions issued under section 1516a(c)(2) do not expire upon issuance of the CIT's final judgment but extend through all appeals.[35]

From a petitioner's perspective, the Federal Circuit correctly decided *Yancheng*. As described above, the purpose of issuing injunctions against liquidation is to ensure that entries covered by antidumping and countervailing duty orders are liquidated in accordance with the final court decision. No public policy is served by requiring a litigant to satisfy a second, independent test of entitlement to an injunction pending appeal, particularly when the denial of the injunction would result in the liquidation of entries and the denial of meaningful judicial review contrary to *Zenith*.

V. INADVERTENT AND ERRONEOUS LIQUIDATIONS IN VIOLATION OF INJUNCTIONS

Inadvertent liquidations are an area of particular concern to petitioners. In order to obtain relief under the antidumping or countervailing duty law, petitioners must initiate costly proceedings before Commerce and the ITC, and must show the existence of both injury and dumping or countervailable subsidies. These administrative determinations are frequently litigated in the CIT and Federal Circuit at substantial cost to petitioners, who already are suffering financial harm due to unfair trade practices. When it inadvertently liquidates an entry without assessing the full amount of antidumping or countervailing duties, Customs undermines not only petitioners' efforts but also those of the agencies charged with the administration of the trade remedy laws and the courts charged with jurisdiction to adjudicate disputes under those laws.

While inadvertent liquidations are a nuisance to importers, who can always file a protest, they are a disaster to petitioners, who do not have the right to protest. Rather, these liquidations are "final and conclusive" as to petitioners.[36] Although Customs can voluntarily reliquidate them under 19 U.S.C. § 1501 within ninety days, reliquidation does not provide a complete remedy, particularly when the final rate of duty is not known until the conclusion of the litigation.

The CIT has consistently made clear its belief that entries subject to injunctions against liquidation under section 1516a(c)(2) cannot be liquidated at any rate other than one in accordance with the final court decision:

---

34. *Id.* at 1381-82.

35. *Id.* at 1382.

36. 19 U.S.C. § 1514(a); CEMEX, S.A. v. United States, 384 F.3d 1314, 1322-23 (Fed. Cir. 2004).

> Where liquidation is enjoined by order of the court, liquidation may only be at the rate ultimately approved by the court. To permit liquidation at any other rate violates the clear mandate of the unfair trade laws, not to mention the final judgment of the court entered in the cases in which the injunctions were issued.[37]

When inadvertent liquidations occur in violation of an injunction against liquidation, the CIT has protected its injunctions by declaring the liquidations to be void *ab initio*. In *AK Steel Corp. v. United States*,[38] for example, the CIT entered an injunction under section 1516a(c)(2), suspending the liquidation of entries covered by an administrative review.[39] Customs liquidated certain entries covered by the injunction and argued that the "final and conclusive" language of section 1514(a) prevented the CIT from reviewing those liquidations.[40] The CIT, however, held that the illegal liquidations were null and void:

> A claim for an unqualified right to commit an admittedly illegal act and then invoke a statute to assert immunity in such illegality is breathtaking for its chutzpah. . . . The plaintiff-petitioner did all that it could to comply with what is statutorily required of it in order to preserve its action. It has no standing to challenge [by protest] the illegality of these liquidations in any event because it is not an importer, and Congress made clear that 19 U.S.C. § 1516a and not § 1514 was the mechanism governing challenges to antidumping duty determinations. Where 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. To reach any other result would be absurd.[41]

In other cases involving inadvertent liquidation contrary to an outstanding injunction, the CIT has remedied the violation by ordering reliquidation under 19 U.S.C. § 1520 at the rate set by the final court decision.[42] In *Eurodif, S.A. v. United States*, the court did not need to conclude that the liquidations were void *ab initio* because of the availability of reliquidation as a remedy.[43] *Eurodif* does not provide much comfort for petitioners: reliquidation under section 1520 provides a viable remedy only (a) when the importer, not the petitioner,[44] seeks reliquidation and (b) when

---

37. LG Elecs. U.S.A. Inc. v. United States, 21 Ct. Int'l Trade 1421, 1428-29 (1997) (citations omitted). *Accord Yancheng*, 277 F. Supp. 2d at 1358 ("Once enjoined under § 1516a(c)(2), liquidation of the entries must proceed under [19 U.S.C. § 1516a(e)] . . . .").

38. 281 F. Supp. 2d 1318 (Ct. Int'l Trade 2003).

39. *Id.* at 1319.

40. *Id.* at 1321.

41. *Id.* at 1322-23 (citations omitted). *Accord* Allegheny Bradford Corp. v. United States, 342 F. Supp. 2d 1162, 1171-72 (Ct. Int'l Trade 2004) (declaring Customs' liquidation of entries in contravention of an injunction to be void *ab initio*).

42. *See, e.g.*, Eurodif, S.A. v. United States, 306 F. Supp. 2d 1288, 1290 (Ct. Int'l Trade 2004) (holding that the proper remedy for Customs' inadvertent liquidation is reliquidation at the rate set by the final court decision).

43. *Id.*

44. As described above, reliquidation under 19 U.S.C. § 1520(c) was available only when the liquidation error is "adverse to the importer."

the final assessment rate already has been determined by the final court decision.

Finally, the courts have held that an erroneous liquidation contrary to the final court decision in the action does not violate the injunction against liquidation so long as the erroneous liquidation occurs after the final court decision. In *CEMEX S.A. v. United States*,[45] Customs failed to liquidate certain entries at the final assessment rate determined by the CIT and Federal Circuit in litigation arising from an administrative review of the antidumping order on Mexican cement. Customs discovered its failure some two years later, at which time it concluded that the entries had been deemed liquidated under 19 U.S.C. § 1504(d). Upon review of the bulletin notices of deemed liquidation, petitioners filed a motion to enforce the CIT's judgment, challenging Customs' conclusion that the entries had been deemed liquidated. The CIT and Federal Circuit both held that the entries had not been deemed liquidated, but further held that Customs' posting of bulletin notices of deemed liquidation somehow effected a liquidation that was final and conclusive as to petitioners under 19 U.S.C. § 1514(a). The fact that the entries had been the subject of an injunction against liquidation during the litigation and were required to be liquidated in accordance with the final and conclusive court decision under 19 U.S.C. § 1516a(e)(2) was of no moment. Both courts held that even erroneous liquidations are final and conclusive as to petitioners regardless of whether they earlier were the subject of an injunction against liquidation.

In sum, from the petitioner's point of view, vigorous court enforcement of injunctions against liquidation is critical to the proper functioning of the antidumping and countervailing duty laws. As described throughout this article, the purpose of such injunctions is to ensure that entries covered by an antidumping or countervailing duty order are liquidated in accordance with the final court decision in the action. The CIT generally has fulfilled this purpose by holding inadvertent liquidations contrary to injunctions to be void *ab initio*, but *CEMEX* provides an example of a situation where the statutory purpose was defeated by Customs' liquidation error and where the courts were unwilling to remedy the error.

VI. DEEMED LIQUIDATION

The deemed liquidation statute presents the final area of concern to petitioners. Under the deemed liquidation statute, any entry not liquidated by Customs within six months after Customs receives notice of the removal of a court ordered suspension of liquidation shall be liquidated at the rate of duty asserted by the importer at the time of entry.[46] For petitioners, the application of the deemed liquidation statute to entries covered by antidumping and countervailing duty orders means that entries will be liquidated at the cash deposit rate established for those entries, rather than the final assessment rate established during the administrative review and

45. 384 F.3d at 1322.
46. 19 U.S.C. § 1504(d).

ensuing litigation. Thus, like inadvertent liquidation, deemed liquidation can strip petitioners of hard-won remedies, undermine the efforts of the agencies charged with the administration of the antidumping and countervailing duty laws, and vitiate the decisions of the CIT and the Federal Circuit.

As described above, the period for Customs to liquidate entries begins when the injunction dissolves and ends six months after Customs receives notice of the removal of court ordered suspension of liquidation. At this time, the entries are deemed liquidated. Therefore, it is important for petitioners to determine when an injunction dissolves. Fortunately, the Federal Circuit has made clear that injunctions issued under 19 U.S.C. § 1516a(c)(2) dissolve upon "the final court decision in the action."[47] Moreover, in cases appealed to the Federal Circuit, the court decision becomes "final" when the time for petitioning the United States Supreme Court for a writ of *certiorari* expires.[48] The time for petitioning the Supreme Court for a writ of *certiorari* expires ninety days from the date of the appellate court judgment.[49] Thus, the six-month period for deemed liquidation does not begin to run until ninety days after the Federal Circuit's final judgment. If no appeal is taken to the Federal Circuit, the six-month period for deemed liquidation begins sixty days after the CIT's final judgment, which is the period for filing a notice of appeal.

It similarly is important to know when Customs receives notice of the removal of a court ordered suspension of liquidation. The Federal Circuit has determined that notice under the statute must be "public and unambiguous."[50] Public and unambiguous notice may take many forms. Publication in the *Federal Register* of the final and conclusive court decision or final administrative determination clearly qualifies and, under *International Trading*, is the preferred method of notice.[51]

Although the requirements for "public and unambiguous" notice appear to be straightforward, confusion nevertheless may result. Typically, Commerce places the world on notice of an adverse court decision by publishing a "*Timken* notice" in the *Federal Register*.[52] The *Timken* notice must be published within ten days of the adverse court decision.[53] *CEMEX* and *Fujitsu General*, however, teach that in cases appealed to the Federal Circuit, an injunction against liquidation does not dissolve until the time for seeking a petition for writ of *certiorari* expires, which is ninety days after the Federal Circuit judgment. Moreover, *CEMEX* teaches that a *Timken* notice

47. *Yancheng*, 406 F.3d at 1381-82.

48. *CEMEX*, 384 F.3d at 1320; Fujitsu Gen. Am. Inc. v. United States, 283 F.3d 1364, 1379 (Fed. Cir. 2002).

49. SUP. CT. R. 13.

50. *CEMEX*, 384 F.3d at 1321; Int'l Trading Co. v. United States, 281 F.3d 1268, 1275-76 (Fed. Cir. 2002).

51. *Id.*

52. The term "*Timken* notice" refers to *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990), which interpreted the statutory requirement in 19 U.S.C. § 1516a(e) that Commerce publish a notice of adverse court decision in the *Federal Register* within ten days of the decision. *See supra* note 32.

53. 19 U.S.C. § 1516a(e).

published before the expiration of the time for seeking a petition for writ of *certiorari* does not provide "unambiguous" notice to Customs of the removal of court ordered suspension of liquidation.[54] Consequently, the statutory mechanism for providing public notice of a final and conclusive adverse court decision does not, under the Federal Circuit's precedents, provide Customs with public and unambiguous notice of the removal of the court ordered suspension of liquidation. Because no other mandatory statutory mechanism exists to provide predictable notice, it remains for Commerce to work through this issue and establish a uniform practice.

VII. CONCLUSION

Injunctions against liquidation under section 1516a(c)(2) serve many purposes. They prevent Customs from liquidating entries during the litigation of antidumping and countervailing duty determinations. They also ensure that entries are liquidated in accordance with the final court decision in the action. Finally, injunctions against liquidation prevent the deemed liquidation of entries while litigation is ongoing. Petitioners in trade remedy cases have a significant interest in having injunctions issued, monitored, and enforced so that entries subject to antidumping and countervailing duty orders are assessed duties at the rates determined by the courts. The Federal Circuit's and CIT's recent decisions in this area by and large fulfill the purposes and goals of injunctions against liquidation.

54. *CEMEX*, 384 F.3d at 1320-21.