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A Look At Recent Liquidations Decisions: Less Fluidity And More Transparency

By

Jay R. Kraemer
&
Kerry Hotopp

Fried, Frank, Harris, Shriver & Jacobson LLP
Washington, DC

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I. INTRODUCTION

In most international trade law administrative proceedings, and the judicial appeals therefrom, the private parties typically focus their attention on whether, and to what extent, available trade law remedies will be applied to their own, or their competitors', imported goods. Once these issues have been fully litigated and a final decision rendered, what happens thereafter—the implementation of that final substantive decision—should, in principle, be no more than a ministerial implementation exercise by Customs.[1] Experience, however, indicates that the assumption of liquidation of an entry at the proper rate of duty "ain't necessarily so" in practice, and that counsel's job in securing a favorable result for the client may not end once Commerce or the courts have ruled on the substance of trade remedy claims. This paper is intended to help counsel to identify some of the pitfalls that may lead to unexpected results in the liquidation process and, hopefully, to take timely action to assure that their clients do not receive unwelcome surprises at the very end of the game, perhaps even snatching defeat from the jaws of victory.

II. APPLICABLE STATUTES

In trade law remedies practice, the "fat lady doesn't sing" until Customs has irrevocably liquidated the entries at issue. However, because of the interaction of the germane statutory provisions, it is not always obvious when, or in what manner, that will happen, or even has happened. In this paper, we will primarily consider the interaction of two of these provisions. The first is 19 U.S.C. §1504(d), which requires, in general terms, that Customs must liquidate an entry within six months after receiving proper notice that a statutory or court-ordered suspension of liquidation has been lifted. In the absence of such timely "active" liquidation, §1504(d) provides that Customs shall be "deemed" to have liquidated the entry at the duty rate asserted by the importer of record when the entry was made.[2] The second statutory provision of central importance here is 19 U.S.C. §1675(a), which provides for Commerce, upon request, to conduct

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[1] Formerly known as the United States Customs Service, within the Department of the Treasury, the agency responsible for collecting, holding, and eventually liquidating trade remedy duties was renamed the Bureau of Customs and Border Protection, and placed within the Department of Homeland Security, following the terrorist attacks of September 11, 2001. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §1502, 116 Stat. 2135, 2308 (2002); Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108-32 (2003). In this paper, this agency is referred to simply as "Customs," without regard to whether its actions took place before or after the reorganization.

[2] More specifically, §1504(d) requires Customs to liquidate entries:

> …within six months after receiving notice of the removal [of suspension of liquidation] from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry…not liquidated by the Customs Service within six months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record.

annual administrative reviews[3] of all outstanding antidumping and countervailing duty orders. Of particular interest for the purposes of this paper are:

a. §1675(a)(2)(C), which provides that the outcome of the administrative review "shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination;"

b. §1675(a)(3)(C), which provides that when the Commerce Department's final determination in an administrative review has been challenged in the courts and liquidation pursuant thereto has been judicially enjoined, Commerce shall, within ten days after a final judicial decision, send a notice thereof to be published in the *Federal Register* and issue instructions to Customs for the liquidation of the entries subject to that review; and

c. §1675(a)(3)(B), which provides that, once Commerce orders liquidation of entries from an administrative review, "such liquidation shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued."

In sum, therefore, §§1504(d) and 1675(a) establish three possible bases of liquidation: Commerce's final results in the administrative or new shipper review; the outcome of a judicial review challenge to Commerce's final results in such a proceeding; or deemed liquidation at the deposit rate of the entry in the absence of timely "active" liquidation by Customs.

III. SUMMARY OF THE RELEVANT LITIGATION

Sorting out which of these three potential bases of liquidation Congress intended be applied in a particular instance has been the source of a great deal of litigation over the past two decades. It is only relatively recently, however, that the courts have filled in most of the blanks in this picture, enabling counsel to proceed into the minefield of liquidation with a mental map identifying the location of, at least, most of the hazards. One of the most important decisions in this evolving process was *International Trading Co. v. United States,* 281 F. 3d 1268 (Fed. Cir. 2002)(*"International Trading"*), which made clear that, in most instances, the *Federal Register* notice published by Commerce announcing either the end of its periodic review or a final judicial decision constitutes both the termination of the suspension of liquidation and notice to Customs that such suspension has ended, thereby commencing the six-month period at the end of which

[3] For purposes of liquidation, the same rules apply to "new shipper" reviews as to administrative reviews. *See* 19 U.S.C. §1675(a)(2)(B). Following the completion of the investigation and issuance of an antidumping or countervailing duty order, liquidation is automatically suspended prior to the time when review of the subject entries may be requested and Commerce advises Customs whether such a request has been filed by an interested party. 19 U.S.C. §§1671b(d), 1671d(c)(1)(C), 1673b(d), and 1673d(c)(1)(C). Then, during the pendency of an administrative or new shipper review, Commerce will instruct Customs to suspend liquidation of the entries of the subject merchandise that are subject to that review, and to liquidate those that are not.

(and unless suspension of liquidation is resumed in the interim) deemed liquidation will occur.[4] As we shall see, however, the *International Trading* decision, while clarifying the application of the statute in important respects, also opened new questions, one of which has only recently been answered and another that remains unresolved.

In recent decisions, the Court of Appeals for the Federal Circuit ("CAFC") and the Court of International Trade ("CIT"), respectively, examined two of the statutory construction issues involved in the liquidation process that remained open after the CAFC's holdings in *International Trading*. These decisions -- one concerning Customs liquidating too slowly and the other concerning Customs potentially liquidating too quickly -- highlight problems that can arise after the substantive litigation is over. Together, they show how courts have attempted to address these hidden problems arising from the difficulty in interpreting the Tariff Act in a comprehensive and coherent manner.

In *Koyo Corp. v. United States*, 497 F.3d 1231 (Fed. Cir. 2007) ("*Koyo*"), Customs had failed to liquidate entries within the relevant time period, causing the subject entries to be deemed liquidated under §1504(d) as a matter of law. Implementing deemed liquidation, Customs then assessed a duty rate higher than that determined in plaintiff's judicial review challenge to the outcome of an antidumping duty administrative review. Rejecting the Government's argument that the deemed liquidation was "final and conclusive," the CAFC concluded that, under such circumstances, an importer can effectively invoke its protest rights under 19 U.S.C. §1514 to challenge such liquidation. Thus, the Court created a bright-line exception to the finality of deemed liquidation that both ensured an equitable result for the plaintiff in that case and imposed a greater degree of discipline on Customs to deter delay of liquidations in future cases. In so doing, the CAFC settled a longstanding debate over whether the importer (or its surety or other person responsible for paying the duty on an entry) retained some remedy in the wake of an erroneous deemed liquidation.

At the other end of the time spectrum is *Mukand International Ltd. v. United States*, 452 F. Supp. 2d 1329 (Ct. Int'l Trade 2006) ("*Mukand*"), in which Customs had liquidated the relevant entries, cutting off the importer's opportunity for judicial review before the importer obtained, or indeed even applied for, a CIT order enjoining that liquidation. The CIT upheld the liquidation, but suggested that Commerce should, in its future instructions to Customs, direct that agency to defer liquidation until the three-month window between the 90th day after *Federal Register* publication of the notice of the final substantive results and the date on which deemed liquidation would otherwise occur. Commerce, however, has not adopted such a policy, nor has

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[4] *International Trading* did not, however, mandate that *Federal Register* notice constitutes the only means by which Customs might be notified of a final substantive result, so as to start ticking the six-month clock for deemed liquidation. For instance, both *NEC Solutions (America), Inc. v. United States*, 411 F.3d 1340 (Fed. Cir. 2005) and *American International Chemical, Inc. v. United States*, 387 F. Supp. 2d 1258 (Ct. Int'l Trade 2005), found that in certain circumstances notice from Commerce to Customs via an e-mail would suffice to trigger the countdown toward deemed liquidation. By contrast, however, the *NEC* Court also decided that the mere service of a court opinion on attorneys at the Department of Justice was insufficient to notify Customs that suspension of liquidation had been removed, even though the Justice Department represents Customs as well as Commerce.

Congress stepped in to fix the problem. Thus, although, as described below, the CIT has twice revisited the issue in 2007, the risk of premature liquidation still looms.

IV. DISCUSSION

A. Liquidation and Its Effect on Pending Litigation Over the Proper Rate of Duty

Liquidation is defined by the applicable Customs regulation as the "final computation or ascertainment of duties…accruing on an entry" of subject merchandise. 19 C.F.R. §159.1. In principle, and consistent with clear statutory intent, it is Commerce's responsibility and authority (subject, of course, to judicial review) to establish the trade remedy duty rate, while Customs is tasked with promptly assessing that rate of duty, a purely ministerial undertaking. Liquidation occurs only once the rate of trade remedy duties has been fixed by Commerce, which then instructs Customs to terminate the suspension of liquidation and assess that specified rate of duty on specified entries.

As long as no periodic review of a duty order is requested and initiated, Commerce will instruct Customs to liquidate those entries made during each potential period of review at the rate(s) (including the "all others" rate) established during the investigation segment of the proceeding. Where an administrative or new shipper review is conducted, Commerce will instruct Customs to liquidate all entries subject to that review in accordance with the final results thereof. Commerce will also instruct Customs to liquidate entries of the subject merchandise made during the period of review, but not within the scope of an accepted request for review, at the previously prevailing duty rate. Likewise, if a subsequent administrative review is not conducted, Commerce will instruct Customs to continue liquidating the subject merchandise at the rate set in the next previous review, unless and until a further review is completed or the order is revoked. However, as noted above, if liquidation is not completed by Customs within six months of the lifting of suspension of liquidation and notice to Customs of that removal, Customs is directed by 19 U.S.C. §1504(d) to liquidate at the deposit rate effective as of the date of the entry—"deemed liquidation."

Liquidation is, as a general matter, "final and conclusive" on all parties, including the United States, unless it has been timely protested to Customs.[5] Because of this final character, the CAFC and CIT have long held that a party's cause of action challenging a determination by Commerce becomes moot if all the entries subject to that determination have been liquidated and no timely protest has been filed. As the CAFC explained, "[o]nce liquidation occurs, a

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[5] In order to preserve the remedy, such protest must be made to Customs in accordance with the requirements of 19 U.S.C. §1514(c). If Customs denies the protest, the aggrieved party may file a civil action in the CIT contesting that denial. *See* 19 U.S.C. §1504(a). The protest remedy is to some degree one-sided, in the sense that it is available to the importer, its surety, and others who may be responsible for paying the duties, but not to the Government or to petitioners or domestic interested parties in a trade remedy proceeding. Thus, as we shall see below, the caselaw now provides for a remedy (through the protest vehicle) for deemed liquidation when the rate at which it occurs is too high, but not, as a practical matter, when the deemed liquidation rate is lower than the periodic review rate finally determined by Commerce or the courts.

subsequent decision by the trial court on the merits…can have no effect on the dumping duties assessed…."[6] Thus, a final liquidation deprives the courts of authority either to order reliquidation to correct an error by Commerce,[7] or to correct an error in liquidation by offsetting it in a subsequent administrative review.[8] Accordingly, in order to ensure the preservation of a party's statutory right to judicial review of the results of an administrative or new shipper review with respect to all entries covered by such review, that party must act promptly to have the CIT reimpose on Customs a suspension of liquidation. Such a renewed suspension of liquidation may be requested in the form of a temporary restraining order or a preliminary injunction under 19 U.S.C. §1516a(c)(2)[9] (unless the subject merchandise is from a NAFTA country, in which case suspension can be obtained under §1516a(g)(5)(C)).

B. *International Trading*

In statutory construction, as in other aspects of life, it often appears that "no good deed goes unpunished." Frequently, as here, clarification of one statutory provision leads to the need to explain how that provision, so construed, can operate in consonance with other provisions *in pari material*. To some extent, the concerns addressed in this paper – liquidating too quickly and liquidating too slowly – have their origins in the CAFC's holdings in *International Trading*. In that case, the CAFC was confronted with the question of whether Commerce's publication of its final administrative review results in the *Federal Register* both lifts the suspension of liquidation and provides notice to Customs that suspension has been removed, for purposes of mandatory "deemed" liquidation under 19 U.S.C. §1504(d). If so, then the Government would be bound by the results of the deemed liquidation, even if the rate of duty so assessed were less than the rate established by the final results of the review. If not, then the deemed liquidation clock would not

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6 *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983); *see also Mukand*, 452 F. Supp. 2d at 1334.

7 *See, e.g., SKF USA, Inc., et al. v. United States*, No. 2007-1039, 2007 U.S. App. LEXIS 20919 (Fed. Cir. Aug. 30, 2007) (unpublished), in which deemed liquidation rendered moot the plaintiffs' challenge to Commerce's final results in an antidumping administrative review, notwithstanding that such challenge had been timely filed in the CIT and plaintiffs' partial consent motion for a preliminary injunction (in which the Government contested only the duration of the injunction) was pending before the Court when the six-month period under §1504(d) expired. The preliminary injunction was later granted by the CIT, but the CAFC rejected the argument that it could be applied retroactively, *nunc pro tunc*.

8 *See Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347 (Fed. Cir. 2006).

9 To obtain a preliminary injunction against premature liquidation, the moving party must show that: 1) it will be immediately and irreparably injured by the liquidation; 2) there is a likelihood of success on the merits; 3) the public interest would be better served by enjoining liquidation; and 4) the balance of hardship on all the parties favors continuing suspension of liquidation until the court can reach the merits of plaintiff's claims. *See Zenith*, 710 F.2d at 809, 811. Under the CAFC's decision in *Zenith*, "the inability of reviewing courts to meaningfully correct the review determination is irreparable injury," a factor that must be included in determining whether a preliminary injunction should be granted. *Id. at* 811. Far from being extraordinary relief, in the context of judicial review of the outcome of trade remedy administrative and new shipper reviews, preliminary injunctions against liquidation of the subject entries, if timely requested, are routinely granted in order to prevent mootness from overtaking virtually all such litigation.

start "ticking" until sometime subsequent to the *Federal Register* publication (*e.g.*, when Commerce sent its detailed liquidation instructions to Customs), and the Government might avoid the consequences of its own delay.

As in all of these liquidation cases, the facts (and particularly the sequence of events) are critical here. In *International Trading*, the plaintiff imported shop towels from Bangladesh subject to an antidumping order with a required cash deposit of 2.72%. After conducting an administrative review, Commerce revised the antidumping duty rate to 42.31% for shop towels entered during the period of review, and published the results in the *Federal Register* of February 12, 1996. The following day, Commerce sent an e-mail message to Customs, notifying it of the completion of the administrative review and referring to the published notice thereof, but advising Customs not to liquidate any of the subject entries until it received Commerce's liquidation instructions. Six and a half months later, on August 29, 1996, Commerce sent another e-mail message to Customs directing Customs to liquidate the entries at the review rate published in the *Federal Register*. In October (and roughly eight months after publication in the *Federal Register*), Customs liquidated the entries at the higher rate, as instructed.

The plaintiff, International Trading, protested the liquidations, arguing that because Customs did not liquidate the entries within six months after receiving notice of the completion of the administrative review, the entries had, on August 12, 1996, been "deemed liquidated" under 19 U.S.C. §1504(d) at the 2.72% cash deposit rate. The CAFC agreed. The key holdings were that suspension of liquidation had been lifted and Customs notified of that removal when Commerce published the final results of its administrative review in the *Federal Register*. The CAFC specifically rejected the Government's argument that the six-month period under § 1504(d) could not begin to run until Commerce had sent Customs detailed liquidation instructions.[10] The Court pointed out that the deemed liquidation statute "quite reasonably imposes requirements of expedition on both Commerce and Customs" and that any actual deemed liquidation was "the consequence of Customs' failure to liquidate within that six-month period." *International Trading*, 281 F.3d at 1273. It also noted that, since suspension of liquidation is begun by *Federal Register* notice, the "virtue of parallelism" is served by recognizing its removal by the same procedural mechanism. *Id.* at 1272. In sum, the Court treated deemed liquidation as a discipline intended to require the Government to act in a timely manner. The CAFC held, in effect, that the Government could not reliquidate, even in accordance with Commerce's accurate instructions, entries that had already been deemed liquidated due to the lapse of time, because allowing the Government to do so would undermine the congressional intent behind §1504(d).

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[10] In this regard, the CAFC also rejected the Government's concern that commencing the six-month deemed liquidation period with *Federal Register* publication would leave parties with inadequate time to challenge the review results in the CIT, because it would require Customs and Commerce to act "quickly" to liquidate in accordance with those results before the deemed-liquidation clock struck midnight. *International Trading*, 281 F.3d at 1273-74. Apparently to address this concern, less than six months after *International Trading* was decided, Commerce announced that, effective as of August 9, 2002, it would "issue liquidation instructions pursuant to administrative reviews…to the U.S. Customs Service within 15 days of publication of the final results…." Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Administrative Reviews, (Dep't. of Commerce, Aug. 9, 2002)(available at http://www.ia.doc.gov/download/liquidation-announcement.html).

C. Failure to Act Resulting in Deemed Liquidation

1. Deemed Liquidation

As explained above, once Commerce provides adequate notice to Customs that suspension of liquidation has been removed with respect to entries within the period of review, Customs has six months to liquidate those entries at the rates established by Commerce (including rates Commerce sets under judicial mandate), or they will be "deemed liquidated" under §1504(d). Under that statutory provision, three circumstances must all occur for an entry to be deemed liquidated:

- The entry's suspension of liquidation must be removed;
- Customs must receive adequate notice of the removal of the suspension; and
- Customs must fail to liquidate the entry within six months of receiving such notice.

See Fujitsu General America, Inc. v. United States, 283 F.3d 1364, 1376 (Fed. Cir. 2002). *International Trading* expressly held that publication in the *Federal Register* constitutes adequate notice to Customs that suspension of liquidation has ended. If Customs fails actively to liquidate the subject entries within six months from the date of that publication, §1504(d) unequivocally requires that they be liquidated at the duty deposit rate prevailing at entry of the goods. But what if such deemed liquidation deprives the importer of the benefit of a review result it may have struggled to secure over the course of months or years in administrative proceedings and judicial review?

A decade ago, the CAFC determined that deemed liquidation is "final and conclusive," and that once entries have been deemed liquidated, the Government is bound thereby and cannot reliquidate the entries (barring extraordinary circumstances such as fraud). *United States v. Cherry Hill Textiles*, 112 F.3d 1550, 1559 (Fed. Cir. 1997). In *Cherry Hill*, deemed liquidation was raised as a defense to the Government's effort to claim additional duties due. If the Government could simply reliquidate entries after they had been deemed liquidated (*i.e.*, by Customs' own failure actively to liquidate them within the time permitted), reasoned the CAFC, it would undermine the purpose of the deemed liquidation statute – "to bring finality to the duty assessment process." *Id.* As a consequence of *Cherry Hill*, the Government is now clearly precluded from subsequently acting to amend a deemed liquidation which erroneously occurred due solely to Customs' inaction. The facts in *Cherry Hill*, however, did not involve a protest under §1514, since the importer in that case was benefited by the deemed liquidation and had no incentive to protest it. Therefore, *Cherry Hill* left open the question of whether an importer could, pursuant to §1514(a), protest the amount of duty assessed on entries that had been deemed liquidated under §1504(d).

2. *Koyo Corp. v. United States*

That question of statutory interpretation was raised, and answered by the CAFC, in *Koyo*, where the Court held that an importer (or other party of like interest) *could* protest a deemed liquidation. In that case, plaintiff Koyo had imported ball bearings from Japan that were

subject to antidumping duty orders. Between October 1990 and September 1991 (the relevant period of review), Koyo paid cash deposits of between 48% and 78% on ten entries of bearings. Customs suspended liquidation of the entries pending an administrative review and the subsequent litigation, which ended in 1998 with Koyo securing significant reductions in the duty rates, down to a range of 1.89% to 26.81%. In April of that year, Commerce published the final results in the *Federal Register*, thereby, per *International Trading*, notifying Customs of the end of suspension of liquidation and commencing the countdown to deemed liquidation. More than a year later, Customs determined that the subject entries were deemed liquidated, and liquidated them at the higher rates applied to the bearings upon entry, ignoring the significantly lower rates that resulted from the administrative review process. Koyo filed protests with Customs of these deemed liquidations.[11]

The CAFC examined two issues in *Koyo*: 1) whether an importer had the statutory authority to protest a deemed liquidation, since it is considered "final and conclusive," and 2) if it could make such a protest, what duty rate would apply. First, the CAFC ruled that Koyo, unlike the Government, could in fact challenge deemed liquidation, as long as Koyo complied with the requirements under §1514(a)[12] and filed its protests within the 90-day[13] time limit. In so ruling, a majority of the three-judge panel concluded that Congress "enacted the deemed liquidation statute to prevent Customs from belatedly assessing additional duties and from indefinitely retaining duties deposited in excess." *Koyo*, 497 F.3d at 1240. Thus, *Koyo* was a continuation of the Court's previous jurisprudence that deemed liquidation was meant to provide effective remedies to importers aggrieved by governmental delay, and thereby to deter such delay.

Second, the panel majority also determined that the applicable duty rate after a timely protest of a deemed liquidation is the revised duty rate from the review process, since "deemed liquidation makes liquidation final. It does not, however, determine the final duty rate imposed on the imported goods." *Koyo*, 497 F.3d at 1241.[14] In reaching this result, the majority reasoned

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11 Of these protests, the CAFC found that two (covering nine of the entries) had been timely filed, but that there was as material issue of fact concerning the timeliness of Koyo's third protest. This latter issue was, therefore, remanded to the CIT, while the CAFC went on to render judgment with respect to the first two protests.

12 The relevant portion of that provision states:

> decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to -- . . . (2) the classification and rate and amount of duties chargeable; . . . (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained there, 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 . . . (emphasis added).

13 The statute was amended in 2004 to provide for a 180-day time limit. 19 U.S.C. §1514(c)(3), as amended by Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, §2103, 118 Stat. 2434, 2597 (2004). This amendment was not retroactive to the entries at issue in *Koyo*.

14 It is on this second issue that Judge Lourie parted ways with the other two panel members, dissenting because he construed §1514(a) to mean that the only "relevant inquiry in the protest is whether Customs properly concluded that the entries were deemed liquidated by operation of law." *Koyo*, 497 F.3d at 1244.

that, if Customs could simply wait and allow the entries to be irrevocably deemed liquidated at a higher duty rate, it would "render virtually meaningless the entire antidumping duty administrative and judicial review determination and review process as provided in the tariff statutes and regulations." *Id*. at 1242. Noting that "[t]he final review results are the substantive legal bases for assessing antidumping duties," while "the character of deemed liquidation is procedural not substantive," the panel majority held that, if the deposit rate assessed for deemed liquidation were "adverse to the party being assessed the duties because it is contrary to the final review results then it is unlawful and has no substantive effect." *Id.* However, they warned, if no timely protest is filed, the deemed liquidation is final as to all parties, including the importer.

As a consequence of the CAFC's decisions in *Cherry Hill* and *Koyo*, therefore, deemed liquidation is final and conclusive as to the Government,[15] but is subject to timely protest by the importer, its surety, others responsible for paying the duty, or their respective agents.[16] Thus, the *Koyo* decision appears finally to settle the procedural issue of who can protest a deemed liquidation, as follows:

Can a Party Protest a Deemed Liquidation?

	Revised Rate *Lower* Than Deposit Rate	**Revised Rate *Higher* Than Deposit Rate**
Government/Petitioner	No	No
Importer/Surety/Etc.	Yes	Yes (but against self-interest to protest)

In sum, *Koyo* effectively clarifies the rights of importers to protest deemed liquidation. However, it leaves with the importer who prevails in the ultimate outcome of a periodic review the burden of active vigilance, first to assure that Commerce acts promptly to issue its liquidation instructions to Customs, next to assure that Customs acts on those instructions in a timely manner, before deemed liquidation occurs, and failing that, finally to make timely protest of the deemed liquidation.[17]

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15 Although the rationale that the Government should not benefit from its own delay resulting in deemed liquidation does not apply to the petitioners and other domestic parties seeking higher duties, the latter are no less bound by the finality of liquidation and share in the inability to protest it. This absence of a "level playing field," resulting from the statutory limits on who can file a protest, was particularly significant prior to October 1, 2007, when the so-called Byrd Amendment provided for the proceeds of antidumping and countervailing duty assessments on entries to be distributed to trade remedy petitioners and those domestic industry participants supporting the petition.

16 Those authorized to file a protest are listed in 19 U.S.C. §1514(c)(2).

17 In *Koyo*, the Government conceded the existence of two protest periods, the first measured from the date of the deemed liquidation and the second from the date on which Customs gives notice of the deemed liquidation or of liquidation at the deemed liquidation rate. *Id.* at 1240.

It is Customs' practice not to liquidate until it has received instructions to do so from Commerce, and Customs does not regard the *Federal Register* notice of final results of a review as such notice. Accordingly a delay in Commerce's issuance of those instructions may leave Customs insufficient time to complete liquidation within the six months allowed, placing importers once again in the factual situation faced by Koyo.[18] On the other hand, problems may also arise when Commerce issues its liquidation instructions, and Customs acts upon them, before a party can perfect its appeal from the review results and secure an injunction against liquidation. It is those problems to which we next turn our attention.

D. The Risk of Premature Liquidation

1. State of the Law Before *Mukand*

The problem addressed in *Mukand,* like that in *Koyo,* is one of timing. As noted above, the issue of premature liquidation was raised by the Government in *International Trading*, where it argued that the holdings in that case might force Commerce to issue its liquidation instructions precipitously, leading Customs to liquidate entries before a party could commence judicial review and obtain an injunction to preserve the *status quo*. The CAFC cast aside those concerns, explaining that its holding did "not force Commerce and Customs to act so quickly that importers will be deprived of their rights to seek correction of ministerial errors or judicial review of the final results." *International Trading*, 281 F.3d at 1274.

Pursuant to the applicable statutes and court rules, an interested party who participates in an administrative or new shipper review before the Commerce Department has up to 90 days after the publication of Commerce's results in the *Federal Register* to seek a preliminary injunction from the CIT. Under 19 U.S.C. §1516a(a)(2)(A) and USCIT Rule 3(a)(2), an aggrieved party has thirty days after publication of the *Federal Register* notice to file a summons in the CIT and an additional thirty days to file a complaint. The CIT Rules then give that party up to a further 30 days after the date of service of the complaint to file a motion for a preliminary injunction. *See* CIT Rule 56.2(a). Once such an injunction is in place, liquidations that occur in violation thereof are void, and the subject entries may be reliquidated.[19]

The law is unclear, however, on how quickly Customs may liquidate entries subject to a Commerce Department review once that review has ended. The applicable statutes set time

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[18] In the past, some importers have been able to secure *mandamus* relief from the CIT to compel Customs to liquidate entries before they were deemed liquidated. One may speculate that the ruling in *Koyo*, demonstrating the availability of a remedy for the importer in the event of an impending "erroneous" deemed liquidation, may prevent the grant of such extraordinary equitable relief in the future, at least for the benefit of parties who would have the right to file a protest with Customs in such circumstances.

[19] *See, e.g., Nippon Steel Corp. v. United States*, No. 99-08-00466, 2006 Ct. Intl. Trade LEXIS 93, (Ct. Int'l Trade June 27, 2006), in which Chief Judge Restani held that liquidation of entries in violation of an injunction is void and the Government may correct its own mistake by reliquidation, even if such reliquidation results in the application of a higher duty rate, at least in the absence of evidence of improper purpose, negligence, or undue delay in making the correction.

limits to prevent unreasonable delay, but are silent on the topic of rapid liquidation, providing no minimum waiting period before Commerce may issue, and Customs implement, instructions to liquidate. As noted above, in August 2002, in apparent response to the holdings in *International Trading,* Commerce adopted a policy under which it would issue liquidation instructions to Customs within 15 days after publication in the *Federal Register*. In 2004, however, one judge in the CIT held that this policy was not in accordance with law, because, in his view, it contravened the statutory timeframe allowing parties 60 days during which to file a summons and complaint. *Tianjin Mach. Imp. & Exp. Corp. v. United* States, 353 F. Supp. 2d 1294 (Ct. Int'l Trade 2004).[20] The Court in *Tianjin* did not go on to provide any guidance of its own on the proper timeframe for liquidation in lieu of the 15-day policy, nor did Commerce alter its 15-day policy in light of *Tianjin.* Not surprisingly, more litigation ensued.

2. *Mukand* and its Progeny

Mukand, unlike *Tianjin,* presented more than a facial challenge to Commerce's 15-day policy. There, the issue was potential mootness of plaintiffs' challenge to the final results of the periodic review, resulting from the actual liquidation of plaintiffs' entries before they moved for, and were granted, a preliminary injunction against liquidation. In *Mukand,* the plaintiffs had complied with the statutory and CIT rules framework in filing their summons 30 days after Commerce's notice in the *Federal Register* and their complaint 31 days after that (the extra day being due to the weekend). Commerce, however, issued liquidation instructions 35 days after publication of the *Federal Register* notice, and Customs liquidated the subject entries on the 75th day. When plaintiffs filed their consent motion for a preliminary injunction on the 97th day, and the Court granted it on the 116th day, all parties were unaware that liquidation had occurred some 41 days earlier. When they learned of the liquidations, plaintiffs filed a new action challenging them as premature. After finding that it had jurisdiction under 28 U.S.C. §1581(i), however, the CIT ruled that plaintiffs had failed to state a claim on which relief could be granted and dismissed the case.

In dismissing *Mukand,* Judge Gordon pointed out that the plaintiffs' problems arose not because of the 15-day policy (since Commerce had, in fact, not issued its instructions until the 35th day after publication), but the fact that liquidation took place before the preliminary injunction became effective (or, indeed, was even requested). Judge Gordon then pointed out that the *Tianjin* holding did not cover the facts in *Mukand,* nor did it address liquidation. Absent anything in §1516a or USCIT Rule 56.2 establishing an automatic stay of liquidation following the completion of an administrative review, the Court concluded that Congress, in §§1516a(c)(1) and (c)(2), "placed the responsibility on interested parties to act affirmatively and request an injunction." *Mukand,* 452 F.Supp.2d at 1334. Accordingly, the challenged liquidations were valid.

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[20] In the facial challenge to the 15-day policy presented in *Tianjin,* Senior Judge Goldberg expressed particular concern that both the Court and litigants would be burdened by the 15-day policy causing plaintiffs routinely to file their complaints and seek a preliminary injunction within fifteen days after *Federal Register* publication in order to prevent liquidation from rendering moot their claims, rather than taking the time allowed by §1516a to assess the merits of those claims and the potential utility of judicial review.

Judge Gordon recognized in *Mukand*, however, the unsatisfactory state of the law with respect to premature liquidations. He suggested that, unless Congress saw fit to provide some "fix" to the problem, Commerce could address it (injecting "needed certainty to the liquidation process" and perhaps reducing the premature filing of lawsuits) by including in its instructions a directive that Customs liquidate no sooner than the 90th day after *Federal Register* publication, but prior to the date on which deemed liquidation would occur. *Id.* As with *Tianjin*, Commerce also did not alter its 15-day policy in light of *Mukand.*

Since *Mukand* was handed down in 2006, the CIT has twice rejected challenges to Commerce's 15-day policy and has explicitly backed away from *Tianjin's* holding that the policy is unlawful. First, in *Mittal Steel Galati S.A. v. United States*, 491 F.Supp.2d 1273 (Ct. Int'l Trade 2007) ("*Mittal I")*, Judge Gordon concluded that §1516a had no impact on Commerce's authority to issue liquidation instructions and, therefore, provided no basis to require Commerce to delay issuing liquidation instructions. Rather, explained the Court in *Mittal I*, the only statute directly relevant to Commerce's authority to issue liquidation instructions is 19 U.S.C. §1675(a)(3)(B), which provides that Customs should liquidate entries "promptly" after suspension is lifted, and "to the greatest extent practicable" (and presumably before deemed liquidation occurs) within 90 days after Commerce issues those instructions. In the absence of more explicit statutory direction, Judge Gordon concluded in *Mittal I* that Commerce's 15-day policy constituted an exercise in statutory gap-filling which, at least on its face, was not unreasonable. *Id.* at 1281.[21]

Although Judge Gordon refused, in *Mittal I*, to strike down Commerce's 15-day policy, he expressly pointed out that it is "not without its flaws." *Id.* These flaws, and the policy's impact on potential plaintiffs and the CIT, were described as follows:

> [T]he policy and its potential threat of rapid liquidation leaves interested parties contemplating suit in the [CIT] in a difficult situation. The lack of certainty of when liquidation will occur, coupled with the rule that liquidation moots a challenge to the assessed rates of the subject entries, practically, if not necessarily, requires interested parties to file a protective summons, complaint, and motion for a preliminary injunction against liquidation almost immediately after publication of the final results in the Federal Register, and also obtain a temporary restraining order ("TRO") against liquidation pending the [CIT's] issuance of a preliminary injunction.[22]

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[21] The *Mittal I* court warned, however, that at some point, an excess of celerity in liquidation could be considered unreasonable. While Judge Gordon did not say just "how quickly is too quickly " (and he reiterated that the 75 days in *Mukand* between publication and liquidation was not too soon, as a matter of law), he laid down a sort of "judicial marker" that liquidation so rapid "as to practically foreclose interested parties from obtaining judicial review of subject entries…would render Commerce's policy unreasonable," and, therefore, unlawful. *Id.* at 1281. Accordingly, how quick is too quick would necessarily continue to be subject to sorting out on a case-by-case basis. *Id.*

[22] *Mittal I,* 491 F.Supp.2d at 1282 (footnotes omitted). One can hardly imagine a court issuing a clearer "lessons learned" statement for counsel whose clients may be harmed by premature liquidation.

Judge Gordon concluded his opinion in *Mittal I* by noting that his suggestion in *Mukand* that Commerce should revise its 15-day policy so as to cause Customs to defer liquidation remained "unsolicited advice," since Commerce's discretion concerning when to issue its instructions was constrained only "by the requirement of reasonableness." *Id.*

Some two months after *Mittal I* was decided, another judge of the CIT handed down a ruling further endorsing, albeit with clear misgivings as to its considered merit, the legality of Commerce's 15-day policy. In *Mittal Steel Galati S.A. v. United States*, 502 F.Supp.2d 1295 (Ct. Int'l Trade) *appeal dismissed*, 2007 U.S. App. LEXIS 26955 (Fed. Cir. Oct. 15, 2007) ("*Mittal II")*, Judge Pogue confronted a challenge to an administrative review, after the completion of which Commerce had issued its liquidation instructions 23 days after publication of the notice of the final results and Customs had liquidated some of the subject entries 22 days later, on the 45th day after publication (while counsel for plaintiff and defendant were still negotiating the terms of the injunction). In *Mittal II*, Judge Pogue concluded that, for all its shortcomings, Commerce's 15-day policy "advances a reasonable and—albeit not compelling—persuasive interpretation" of the statute. *Id. at* 1317. As in *Mittal I* (which he cited approvingly), Judge Pogue in *Mittal II* concluded that the policy was a reasonable exercise in statutory gap-filling.

In analyzing Commerce's 15-day policy, *Mittal II* found that Commerce was not due *Chevron* deference to its statutory interpretation, because the agency had neither established the policy using the formal notice-and-comment rulemaking process nor in a contested administrative proceeding. Rather, the Court noted, Commerce had merely announced the policy on its website. Because of this background, the policy was "entitled to respect…but only to the extent that [it had] the power to persuade." *Id.* at 1315 (internal citations omitted). Nevertheless, because of Commerce's "substantial experience" in antidumping matters, and because the policy made the antidumping duty process more transparent (in part, because Commerce repeated it in each germane *Federal Register* notice), the Court ultimately upheld it. However, the *Mittal II* Court also recognized that some assured pre-liquidation period—the Court suggested a total of 30 days split evenly between Commerce and Customs—"would be more indicative of Commerce's consideration of all the factors and interests involved in the adoption of its 15 Day Policy." *Id.* at 1317.

3. Continuing Problems with Premature Liquidation

As the following table shows, even under *Mukand*'s suggested 90-day waiting period approach, Customs may liquidate before the CIT issues a preliminary injunction:

Event	**Days after Federal Register Notice**	**Days after Liquidation**
Final Notice published in Federal Register	-	-
Summons Filed	30	-
Complaint Filed	60	-
Motion for Preliminary Injunction Filed	90	-
Commerce issues liquidation instructions	*91*	-
Customs liquidates	*101*	-

Preliminary Injunction Effective	105	4

Thus, for the time being, the guidance from Judge Gordon in *Mittal I* concerning expeditious filing of suits and requests for TROs and preliminary injunctions, burdensome though it be, appears to be the sole course open for prudent counsel to follow where premature liquidation may frustrate a client's objectives. The suggested approaches for Commerce action in *Mukand* and *Mittal II* are, at best, interim measures designed to prevent the most egregious instances of premature liquidation, and to provide parties aggrieved by Commerce's review results assurance of some reasonable chance to bring their claims to the CIT before "mootness falls." However, there seems little reason to believe that Commerce will voluntarily adopt either of those approaches, or indeed any other self-imposed limitation on how quickly it may cause liquidation to occur.

Absent a judicial determination that Commerce's implementation of its 15-day policy constitutes such a burden on the actual exercise of the right of judicial review as to become an "unreasonable" exercise in statutory gap-filling, Commerce has little incentive to impose greater discipline and transparency on the liquidation process. Obviously, the best remedy for this problem would be explicit direction from Congress (presumably based on information from Customs concerning how much time, in the computer age, it really needs to implement Commerce's liquidation instructions). The most likely result of such direction is probably an enforceable constraint along the lines of the approaches suggested in *Mukand* and *Mittal II*, and somewhere between the two in terms of the assured duration of the deferral of liquidation (*i.e.*, somewhere between 30 and 90 days after *Federal Register* publication). Customs could certainly make such approaches more workable by establishing mechanisms to prepare for liquidation, based on the Commerce instructions received, in advance of the date when liquidation is authorized to occur. While this would require Customs to prepare for more liquidations than would actually take place, that seems a far more equitable result than the current race to open, or shut, the courthouse door.

An alternative solution, and perhaps one more certain to avoid adverse consequences on potential plaintiffs, would be to require Commerce to suspend liquidation for so long as a potential litigant is on track to secure a preliminary injunction. Under this approach, as long the possibility existed, consistent with §1516a and USCIT Rule 56.2, that the CIT might grant a preliminary injunction, Commerce could not issue liquidation instructions. Thus, if a party did not file a summons within 30 days, a complaint within 60 days, or a motion for preliminary injunction within 90 days from publication of the final results, Commerce would be free to issue liquidation instructions unfettered by any request that Customs delay the liquidation. This approach, by connecting the issuance of liquidation instructions to the possibility of injunctive relief, would ensure that liquidation did not occur prematurely. Likewise, it would both maintain the burden on the potential plaintiff to abide by the statutory and CIT time limits and enable Commerce to issue instructions soon enough to make unintended deemed liquidations unlikely. Finally, it would also foster finality at the duty rate Congress intended, rather than at a rate haphazardly determined by a last-minute "gamesmanship" whose unpredictability undermines the credibility and integrity of both periodic reviews and the liquidation process.

V. CONCLUSION

As this paper has shown, considerable progress has been made in providing guidance by which counsel, particularly counsel for the importer, can ensure that liquidation will occur in accordance with the final administrative or judicial decision concerning the proper outcome of an administrative or new shipper review. Less certain is the prospect of getting into, and staying in, the CIT to challenge Commerce's final results in such reviews, due to the possibility of mootness arising from premature liquidation. Nonetheless, the first step to successful treatment is diagnosis of the problem, and the CIT has clearly demonstrated its recognition that Commerce's 15-day policy has, at least, the potential to defeat congressional intent that there be meaningful opportunity for judicial review. One can certainly hope that such recognition will, before long, result in identification and implementation of an effective cure.