JOBNAME: No Job Name PAGE: 1 SESS: 29 OUTPUT: Fri May 4 10:35:13 2007
/orchid2/orchid2/267/80208/slipops

Decisions of the United States
Court of International Trade

Slip Op. 07–59

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

SHINYEI CORPORATION OF AMERICA, Plaintiff, v. UNITED STATES, Defendant.

Consolidated
Court No. 00–00130

Held: Plaintiff's motion for partial summary judgment denied. Defendant's cross-motion for summary judgment granted. Final judgment entered for Defendant.

April 20, 2007

Charles H. Bayar, for Shinyei Corporation of America, plaintiff.
Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*James A. Curley*), for the United States, defendant.

OPINION

TSOUCALAS, Senior Judge: This matter comes before the Court pursuant to the decision of the Court of Appeals for the Federal Circuit ("CAFC") in *Shinyei Corp. of Am. v. United States*, ("*Shinyei CAFC*") 355 F.3d 1297 (Fed. Cir. 2004), and the CAFC mandate of March 12, 2004, reversing and remanding the judgment of this Court in *Shinyei Corp. of Am. v. United States*, *(*"*Shinyei CIT*") 27 CIT 305, 248 F. Supp. 2d 1350 (2003). The CAFC held that this Court erred in granting Defendant's motion to dismiss the action pursuant to USCIT R. 12(b)(1). Accordingly, the parties proceeded on the merits of the case consistent with the CAFC decision.

JURISDICTION

Shinyei is pleading an Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2000) ("APA"), cause of action and this Court has juris-

diction over the matter pursuant to 28 U.S.C. § 1581(i)(4) (2000).[1] *See Shinyei CAFC*, 355 F.3d at 1304–05.

STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether there are any genuine issues of fact that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if it might affect the outcome of the suit under the governing law. *See id*. Accordingly, the Court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). When genuine issues of material fact are not in dispute, summary judgment is appropriate if a moving party is entitled to judgment as a matter of law. *See* USCIT R. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

DISCUSSION

I. Background

A. Procedural History

Plaintiff, Shinyei Corporation of America ("Shinyei"), a United States corporation wholly owned by Shinyei Kaisha Company ("Kaisha"), a Japanese trading company, filed a complaint with this Court on March 23, 2000. On September 25, 2002, this Court granted Shinyei's motion for leave to amend its complaint, in which Shinyei sought to declare certain instructions issued by the United States Department of Commerce ("Commerce") in violation of 19 U.S.C. § 1675(a)(2) (1988 & Supp. 1993). As such, Shinyei moved to remand this case to Commerce for the purpose of issuing corrected instructions with regard to liquidation of the forty-two Shinyei entries of certain bearings. *See Shinyei CIT*, 27 CIT at 306, 248 F. Supp. 2d at 1351. Subsequently, on October 8, 2002, Defendant moved to dismiss this case pursuant to USCIT R. 12(b)(1) for lack of subject matter jurisdiction and USCIT R. 12(b)(5) for failure to state a claim on which relief can be granted. *See Shinyei CIT*, 27 CIT at 306, 248 F. Supp. 2d at 1352. On February 14, 2003, this Court granted Defendant's motion to dismiss under USCIT R. 12(b)(1). *See Shinyei CIT*, 27 CIT at 328, 248 F. Supp. 2d at 1360. On January 20, 2004, the CAFC reversed, and remanded the action for further proceedings on the merits. *See Shinyei CAFC*, 355 F.3d at 1312. On

---

[1] "The APA is not a jurisdictional statute and 'does not give an independent basis for finding jurisdiction in the Court of International Trade.' " *Shinyei CAFC*, 355 F.3d at 1304; *citing to Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1552 (Fed.Cir. 1983). The CAFC has ruled that the Plaintiff in the case at bar has jurisdiction under 28 U.S.C. § 1581(i)(4). *See Shinyei CAFC*, 355 F.3d at 1304–05.

March 22, 2004, this Court ordered that Shinyei proceed with the merits of the case consistent with the CAFC's opinion. *See Shinyei Corp. of Am. v. United States*, 28 CIT, ___, ___, Slip Op. 04–26, 2004 Ct. Intl. Trade LEXIS 26 (2004).

B. Factual Background

The full factual and procedural background of this case has been set forth in the prior decisions of the CAFC and this Court. *See Shinyei CAFC*, 355 F.3d 1297; *Shinyei CIT*, 27 CIT 305, 248 F. Supp. 2d 1350. The facts relevant to the instant inquiry are as follows. Between the May 1, 1990 and April 30, 1991 period of review ("POR"), Shinyei imported certain merchandise into the United States. The merchandise at issue ("Merchandise" or "Subject Entries" or "Disputed Entries") was purchased by Shinyei from Kaisha which, in turn, purchased the Merchandise from six Japanese manufacturers (collectively "Six Manufacturers"), namely, Fujino Iron Works Co., Ltd. ("Fujino"), Nakai Bearing Co., Ltd. ("Nakai"), Nankai Seiko Co., Ltd. ("Nankai"), Inoue Jikuuke Kogyo Co. ("Inoue"), Showa Pillow Block Mfg., Ltd. ("Showa") and Wada Seiko Co., Ltd. ("Wada"). *See Final Results of Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et. al.*, ("*Final Results*") 57 Fed. Reg. 28,360 (ITA June 24, 1992); *Shinyei CIT*, 27 CIT at 306–07, 248 F. Supp. 2d at 1352.

The Disputed Entries were subject to an antidumping investigation. *See Initiation of Antidumping Duty Investigation; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan*, 53 Fed. Reg. 15,076 (ITA Apr. 27, 1988); *Shinyei CIT*, 27 CIT at 307, 248 F. Supp. 2d at 1352. On November 9, 1988, Commerce published its preliminary determination with regard to this investigation instructing the United States Customs Service ("Customs") that: (1) liquidations of the Merchandise should be suspended; and (2) deposits or bonds should be required at a certain rate for future entries from all non-investigated manufacturers, producers, and exporters, including the Six Manufacturers. *See Preliminary Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan*, 53 Fed. Reg. 45,343; *Shinyei CIT*, 27 CIT at 307, 248 F. Supp. 2d at 1351. This deposit and bond rate was corrected by Commerce in the final determination. *See Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan* ("*Determination*"), 54 Fed. Reg. 19,101 (May 3, 1989); *see also Shinyei CIT*, 27 CIT at 307, 248 F. Supp. 2d at 1352. On the basis of this *Determination*, Commerce published an antidumping duty order. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spheri-*

cal Plain Bearings, and Parts Thereof From Japan, 54 Fed. Reg. 20,904 (ITA May 15, 1989); *Shinyei CIT*, 27 CIT at 307, 248 F. Supp. 2d at 1352.

During the second administrative review, Shinyei deposited estimated antidumping duties on the entries at issue. *See Shinyei CIT*, 27 CIT at 307, 248 F. Supp. 2d at 1352–53. On June 24, 1992, Commerce published the final results of the second review in which Commerce established specific antidumping duty deposit rates for the merchandise manufactured by the Six Manufacturers. *See Final Results*, 57 Fed. Reg. 28,360; *Shinyei CIT*, 27 CIT at 307, 248 F. Supp. 2d at 1353. Consequently, Commerce issued instructions ordering Customs to liquidate all merchandise of the type at issue that was imported from Japan during the POR (except for the products of certain manufacturers) at the rate designated in the *Determination*. *Shinyei CIT*, 27 CIT at 307, 248 F. Supp. 2d at 1353. The list of manufacturers exempted from the instructions included the Six Manufacturers. *See id*. Moreover, on February 23, 1998, Commerce summarized the rulings of this Court over the course of the antifriction bearing litigation when it published its amended final results. *See Amended Final Results of Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et. al.* ("*Amended Final Results*"), 63 Fed. Reg. 8908 (ITA Feb. 23, 1998); *Shinyei CIT*, 27 CIT at 307–08, 248 F. Supp. 2d at 1353.

On October 22, 1998, Commerce issued final amended instructions to Customs regarding the liquidation of all second review entries of the merchandise at issue from Japan produced by Nankai. *See Shinyei CIT*, 27 CIT at 308, 248 F. Supp. 2d at 1353. On June 26, 1998, Commerce issued instructions to Customs regarding the liquidation of all second review entries of [the merchandise at issue] from Japan produced by Fujino. *See id*.

Shinyei commenced this action on March 23, 2000, in order to enforce the second review results and contest Commerce's instructions with respect to Nankai and Fujino. *See Shinyei CIT*, 27 CIT at 308–312, 248 F. Supp. 2d at 1353–56. Shinyei argued that the Court had jurisdiction under both the Administrative Procedure Act ("APA")and 28 U.S.C. § 1581(i)(4). *See id*. Shinyei did not seek, and the Court did not issue, any injunction to suspend liquidation of the entries at issue pending its final decision. *See Shinyei CIT*, 27 CIT at 308, 248 F. Supp. 2d at 1353. On August 1, 2000, Commerce issued a clean-up instruction to Customs to liquidate, as entered, all second review period entries of the merchandise at issue from Japan that had not been liquidated under previously-issued instructions. *See id*. The liquidation of these entries, occurred between September 8, 2000, and February 9, 2001. On November 1, 2000, Shinyei protested the no-change liquidation to entry 032–0153132–8 ("032 Entries"), and Customs granted the protest in part. *See* Def.'s Statement of Material

Facts Not in Dispute at 3. Customs proceeded to reliquidate the entry and issued Shinyei a refund. *See id.* All but two of the entries were liquidated before December 15, 2000. *See Shinyei CIT*, 27 CIT at 308, 248 F. Supp. 2d at 1353.

On September 25, 2002, this Court granted Shinyei's motion for leave of the Court to amend its complaint filed on March 23, 2000. Shinyei limited its claim to Commerce's error stating that Commerce issued certain liquidation instructions to Customs to implement the results of an antidumping administrative review and in violation of 19 U.S.C. § 1675(a)(2), the instructions did not permit the review results to be the basis for assessments of antidumping duty on entries for which Shinyei was the importer of record. As a consequence, Shinyei argued, Customs liquidated the entries at issue under other, inapplicable instructions resulting in a substantial and erroneous assessments of excessive antidumping duties on the entries at issue, as well as the attendant denial of interest on excess deposits of antidumping duty that should have been refunded. *See Shinyei CIT*, 27 CIT at 308–09, 248 F. Supp. 2d at 1353–54.

Shinyei specifically contested the Nankai and Fujino instructions. With respect to the Nankai instructions, Shinyei argued that Commerce did not advise Customs that Shinyei was the importer of the entries at issue or that Kaisha acted as an intermediary. With respect to the Fujino instructions Shinyei argued that Commerce incorrectly omitted specific assesment rates that were calculated in the second review for five other United States customers. Shinyei further argued the Commerce failed to advise Customs that Shinyei was the importer of the entries at issue, or that Kaisha had once again acted as an intermediary. *See Shinyei CAFC*, 355 F.3d at 1303–04.

Subsequently, Defendant, on October 8, 2002, moved to dismiss this case pursuant to USCIT R. 12(b)(1) for lack of subject matter jurisdiction and USCIT R. 12(b)(5) for failure to state a claim upon which relief can be granted. *See Shinyei CIT*, 27 CIT at 309, 248 F. Supp. 2d at 1354. This Court granted Defendant's motion to dismiss under USCIT R. 12(b)(1) for lack of jurisdiction on February 14, 2003. *Shinyei CIT*, 27 CIT at 328, 248 F. Supp. 2d at 1361. On January 20, 2004, the CAFC reversed and remanded the case for further proceedings on the merits. *See Shinyei CAFC*, 355 F.3d at 1312.

In a letter from the Defendant dated May 27, 2004, this Court was advised that both parties were discussing proposals to resolve the case at bar. *See* Letter to the Hon. Nicholas Tsoucalas from Mr. James A. Curley, May 27, 2004. A follow up letter, dated July 29, 2004, advised this Court that resolution was likely. However, no resolution between the parties was achieved. *See* Letter to the Hon. Nicholas Tsoucalas from Mr. James A. Curley, July 29, 2004.

On December 29, 2005 Shinyei filed its Motion for Consolidation and for Leave to File Consolidated Complaint ("Consolidation Mo-

tion") along with a Consolidated Complaint. The Government filed papers in opposition to Shinyei's Consolidation Motion on January 13, 2006. On January 26, 2006, the Court ordered that Court Numbers 00–00130, 01–00707, 03–00688 and 04–00252 be consolidated under Court Number 00–00130.

II. Contentions of the Parties

A. Shinyei's Contentions

Shinyei contends that the main issue is whether the deemed liquidation of the Merchandise is valid. *See* Mem. Of Law in Support of Pl.'s Mot. for Partial Summary Judg. ("Shinyei Mem.") at 1. Shinyei states that it agrees "with the Government that publication of the Commerce Notice removed the suspension of liquidation of the Subject Entries and constituted notice to Customs of such removal[.]" Shinyei Mem. at 8. Shinyei "further agree[s] that Customs did not actually liquidate any of the Subject Entries under 19 U.S.C. § 1500 within six months [of] February 23, 1998[.]" *Id.* at 9.

Shinyei, however, contends that *Koyo Corp. v. United States*, ("*Koyo*"), 30 CIT ___, 407 F. Supp. 2d 1305 (2005) holds that 19 U.S.C. § 1504(d) cannot be read or applied so that entries are deemed liquidated with antidumping duty assessed at the deposit rate required at the time of entry, when that result is adverse to the importer and contrary to lower antidumping duty assessment rates determined in final court decisions and/or specified in Commerce antidumping duty assessment instructions as such an application of § 1504(d) would create an absurd, and therefore impermissible, result. *See* Shinyei Mem. at 9. Shinyei clarifies that it does not rely completely on *Koyo* "because its absurdity holding assumes the Government's [incorrect] position that an importer has no post-liquidation remedies against an adverse deemed liquidation[.] *See* Shinyei Mem. at 10–11. As such, Shinyei concludes that it accepts *arguendo* the Government's contention that the Subject Entries were deemed liquidated at the cash deposit rate ("no-change") on August 23, 1998, by operation of 19 U.S.C. § 1504(d). *See id.* at 11.

Shinyei further contends that the language of 19 U.S.C. § 1504 is procedural and not substantive in nature. *See id.* at 12–21. Shinyei explains that deemed liquidation is affected by operation of 19 U.S.C. § 1504, based on the pretense that Customs has decided upon a no-change result by not acting within the prescribed time period. *See id.* at 14. Shinyei contends that 19 U.S.C. § 1675 requires Commerce "to conduct a periodic review to determine, among other things, antidumping duty assessment rates for the subject goods." *Id.* at 17. Shinyei further contends that under 19 U.S.C. § 1675(a)(2)(c) the final review results become the basis for the liquidation of the suspended entries. *See id.* at 17. As such, Shinyei argues that Customs has no decision-making authority related to 19 U.S.C. § 1675 periodic reviews. *See id.* at 17. Shinyei contends that

Customs' role is purely ministerial, as they are merely required to liquidate entries in accordances with a final review result or final court decision based on Commerce's instructions. *See id.* at 17–18.

Shinyei stresses that they disagree with the Government's interpretation of 19 U.S.C. § 1504(d), which requires prescribed no-change results to become the basis for liquidation instead of Commerce's final review results and/or a courts' final decision. *See id.* at 18. Shinyei contends that such an interpretation would: 1) impliedly nullify statutes and statutory determinations; 2)allow an agency charged with implementing a party's rights to destroy those same rights by not implementing them properly; 3)undercut Commerce's authority in the assessment of antidumping duties; 4)allow Customs to vitiate its ministerial duty by refusing to take any action. *See* Shinyei Mem. at 18–20.

Shinyei further contends that importers are entitled to the same remedies under 19 U.S.C. § 1500 as under 19 U.S.C. § 1504(d). *See id.* at 21. Shinyei specifies that although reliquidation under 19 U.S.C. § 1501 is limited to liquidations made pursuant to 19 U.S.C. § 1500, an importer's right to protest under § 1514(a) is not conditioned upon § 1500. *See id.* at 21–22. Shinyei contends that the legislative history of § 1504(d) indicates that deemed liquidation was created for the benefit of importers. *See id.* at 24. Congress did not intend the statute to curtail importers remedies. *See id.* Shinyei asserts that Congress enacted § 1504(d) in order to prevent Customs from imposing additional duties after a prolonged period of time and to facilitate returns on deposits made at the time of entry. *See id.* Referencing the legislative history of 19 U.S.C. § 1504(d), Shinyei argues that "[i]nstead of being able merely to delay duty refunds indefinitely by delaying actual liquidation under the prior law, [if a deemed liquidation is not protestable] Customs could . . . deny duty refunds forever by delaying actual liquidation for the specified time periods, resulting in no-change deemed liquidations that cannot be reviewed or reliquidated" *Id.* Shinyei further contends that the Customs regulations themselves explicitly provide for the protesting of a deemed liquidation. *See id.* at 25 (citing to 19 C.F.R. §§ 159.9(c)(2)(i)–(iii)). Shinyei states that as Customs never published bulletin notices of the deemed liquidations under 19 C.F.R. § 159.9(c)(2)(ii), Shinyei's time to file a protest as provided for in 19 C.F.R. § 159.9(c)(2)(iii), has not expired. *See id.* at 33–34.

Shinyei further contends "that the Government's position that an importer has no post-liquidation remedy against an adverse deemed liquidation suffers from two constitutional infirmities, and so should be rejected." *Id.* at 27. Shinyei proceeds to list those "constitutional infirmities" as involving (1) due process and (2) equal protection. *Id.* at 25–32. Under the due process claim, Shinyei argues that barring an importer from contesting a deemed liquidation amounts to a deprivation of property without due process. *See id.* at 25–32 (citing to

Logan v. Zimmerman Brush Co. ("*Logan*"), 455 U.S. 422 (1982)). Shinyei interprets the majority opinion in *Logan* as holding that a state agency's inaction does not bar an employee's claim or property interests. *See* Shinyei Mem. at 29 (citing to *Logan*, 455 U.S. at 424–38.) Under the equal protection claim, Shinyei relies on the concurring opinion in *Logan* which it interprets as stating that agency inaction is not rationally related to any legitimate government purpose. *See* Shinyei Mem. at 30–31 (citing to *Logan*, 455 U.S. at 438–42).

Finally, Shinyei asserts that to the extent that the assessments were caused by Commerce Decisions, it has a cause of action for direct judicial review of the assessments in this Court under the APA and additionally has exclusive jurisdiction under 28 U.S.C. § 1581(i). *See* Shinyei Mem. at 30–31; *citing to Shinyei CAFC*, 355 F.3d at 1304–10. Shinyei further argues that to the extent that the assessments were caused by Customs Decisions, it has a cause of action for judicial review of the assessment under 19 U.S.C. § 1514(a), over which the CIT has exclusive jurisdiction pursuant to 28 U.S.C. § 1581(a). Shinyei claims that the Court has exclusive jurisdiction because Shinyei timely filed protests with Customs against the assessments made in the actual liquidations; timely commenced civil actions in this court seeking judicial review after Customs denied the protest; and timely paid all duties, charges and fees assessed on the Subject Entries by the actual liquidations. *See* Shinyei Mem. at 33–34.

During Oral Argument held on October 26, 2006, Shinyei argued that an Order signed by the Court on July 14, 1992 ("the Order"), which the government had referred to as being a preliminary injunction, was in fact not a preliminary injunction at all. *See* Trans. Oral Arg of October 26, 2006 at 45–49. Shinyei specifically refers to paragraph 3 of the Order, and claims that the language indicates a mandatory injunction or a permanent mandatory injunction. *See id.* at 45–49. Shinyei reaffirmed this point in a letter to the Court dated November 3, 2006, in which Shinyei attached the aforementioned Order. *See* Letter to the Hon. Nicholas Tsoucalas from Mr. Charles H. Bayer, November 3, 2006 ("Nov. Letter"). Paragraph 3 of the Order reads:

> ORDERED that the entries shall be liquidated in accordance with the final court decision as provided in 19 U.S.C. § 1516a(e), notwithstanding the provisions of 19 U.S.C. § 1504(d).

See Order, *Federal-Mogul Corp. v. United States*, Court No. 92–06–00422, July 14, 1992. Shinyei argues that Paragraph 3 of the Order "requires that all of the [Disputed Entries] be actually liquidated at the final review rate notwithstanding any deemed liquidation, whether they merit additional assessments or refunds." Pl.'s Mem.

Law Reply Def's Resp. Pl.'s Mot. Partial Summary Judgment ("Pl's Reply") at 10.

On December 15, 2006, Shinyei once again contacted this Court via letter, this time advising the Court of the December 14, 2006 CAFC decision, *Norsk Hydro Canada, Inc. v. United States* ("*Norsk*"), 472 F.3d 1347 (Fed.Cir. 2006). *See* Letter to the Hon. Nicholas Tsoucalas from Mr. Charles H. Bayer, December 15, 2006. ("Dec. Letter"). In the Dec. Letter, Shinyei contends that the recent CAFC decision supports its position that a deemed liquidation adverse to an importer is protestable under 19 U.S.C. § 1514. Shinyei further contends that the *Norsk* decision further holds that Customs is required to give proper notice of liquidation whether the liquidation is actual or deemed and that the publication of the bulletin notice of liquidation is the actual trigger for deciding the start of the protest period. *See* Dec. Letter at 2.

B. Defendant's Contentions

The Government asserts that as Customs failed to liquidate the Disputed Entries within the six month period as required by 19 U.S.C. § 1504(d), the entries were deemed liquidated by operationof law on August 23, 1998, "at the rate and amount of duty deposited by Shinyei at the time of entry." Def's Brief Opp'n Pl's Mot. Partial Sum. J. and in Support of Cross-Motion for Sum. J. ("Gov't Brief") at 9. Accordingly, the Government argues that Commerce's publication of the amended final results in the Federal Register on February 23, 1998, removed the suspension on the liquidation of the Disputed Entries. *See id.* at 8–9; (citing to *Fujitsu Gen. America, Inc. v. United States*, 283 F.3d 1364, 1381–82 (Fed. Cir. 2002)). The Government's main argument is that as the Disputed Entries "were actually liquidated at the deemed liquidated rate and amount of duties, Shinyei has failed to state a claim on which relief can be granted. This action, therefore should be dismissed." *Id.* at 9–10.

The Government further asserts that the deemed liquidation of the Disputed Entries was final. *See id.* at 11 (citing to *United States v. Cherry Hill Textiles, Inc.* ("*Cherry Hill*"), 112 F.3d 1550, 1560 (Fed.Cir. 1997)). The Government contends that "whenever the courts have determined that an entry was deemed liquidated under § 1504(d), they have set aside Customs' actual liquidation and have treated the deemed liquidation as final." *Id.* at 12–13 (citing to *NEC Solutions (Am.), Inc. v. United States*, 411 F.3d 1340, 1343, 1346 (Fed. Cir. 2005)); *Int'l Trading Co. v. United States*, 281 F.3d at 1270–71, 1276 (Fed. Cir. 2002); *American Int'l Chem., Inc. v. United States*, 29 CIT ____ , ____ , 387 F. Supp 2d 1269–70 (2005).

The Government further argues that as the Disputed Entries were deemed liquidated by operation of law, Customs did not make a decision to liquidate, and as such, Shinyei has no right to protest under 19 U.S.C. § 1514(a). *See* Gov't Brief at 14. However, the Government

then argues that "even if it is assumed, *arguendo*, that a protest against the deemed liquidation could have been filed, Shinyei did not file a timely protest or request for reliquidation." *Id.* at 15. The Government elaborates that as "the Federal Circuit noted, 'publication in the Federal Register is a familiar manner of providing notice to parties in antidumping proceedings.' " *Id.* at 15 (citing to *Int'l Trading*, 281 F.3d at 1275). According to the Government, "Commerce's publication of the amended final results and final court decision in the Federal register on February 28, 1998," was notice to both Customs and Shinyei that suspension of liquidation was removed. *Id.* at 15. Thus, the Government continues, Shinyei was on notice "that its entries would be deemed liquidated if not actually liquidated by Customs within six months, *i.e.*, by August 28 1998." *Id.* at 15–16. The Government continues:

> Shinyei did not request Customs, before August 28, 1998, to liquidate its entries, nor did it bring an action in the Court for writ of mandamus or for relief under the [APA]. Instead Shinyei waited until March 2000 to commence this action in which it sought a writ of mandamus against Customs directing it to liquidate the entries.

Id. at 16.

The Government then counters Shinyei's absurdity claim by asserting that 19 U.S.C. § 1504(d), as enacted in 1993, precludes such an interpretation. *See id.* at 17. The Government asserts that 19 U.S.C. § 1504(d) "covers all entries, which necessarily includes entries for which the rate asserted by Shinyei at the time of entry (the deposit rate) was higher than the administrative review rate[.]" *Id.* at 19. The Government further asserts that Congress enacted 19 U.S.C. § 1504 "in an effort to increase certainty and to bring finality to the liquidation process." *Id.* at 21 (citing to *Int'l Trading*, 281 F.3d at 1272; *Cherry Hill*, 112 F.3d at 1559). The Government further argues that its interpretation of 19 U.S.C. § 1504(d) could not be deemed absurd, as the CAFC has applied a previous version of the statute "to entries that were deemed liquidated although the administrative review rate was lower than the rate asserted by the importer at the time of entry." *Id.* at 23; citing to *Rheem Metalurgica S/A v. United States*, 160 F.3d 1357, 1359 (Fed. Cir. 1998).

The Government further contends that despite Shinyei's claim, Customs is not required to give notice of deemed liquidation. *See id.* at 26 (citing 19 U.S.C. § 1504(a)). Nonetheless, the Government argues, Shinyei received notice that suspension of liquidation was removed through Commerce's publication in the Federal Register of February 23, 1998. *See id.* at 26. The Government further clarifies that "if Customs had actually liquidated the [Disputed Entries] before August 23, 1998, it would have posted bulletin notices of deemed liquidation. Because Customs did not post such a notice, Shinyei

knew, or should have known, that the entries were deemed liquidated on that date." *Id.* at 26. Consequently, the Government concludes, Shinyei had reasonable notice, but simply failed to exercise its right to protest the deemed liquidation. *Id.* Furthermore, the government argues that the legislative history of § 1504 indicates Congress' intent that notice of deemed liquidation was unnecessary as it states that if an importer has not received notice of liquidation before the six month notice period expires, then the statute itself serves as notice of liquidation, and notification by Customs is therefore not necessary. *See id.* at 27–28. Additionally, the Government argues that as Shinyei had adequate remedies against deemed liquidation, Customs had not acted arbitrarily or capriciously in the case at bar, and as such, there has been no denial of Shinyei's equal protection rights. *See id.* at 28.

The Government then turns to its interpretation of *Koyo*. Initially the Government distinguishes the case at bar from *Koyo* by stating that in *Koyo*:

> the importer's entries were included in Commerce's instructions for liquidation at the lower administrative review rate. However, Customs determined that the importers' entries were deemed liquidated, and then actually liquidated the entries "no change" to reflect the deemed liquidation rate. Here, Customs did not determine that Shinyei's entries were deemed liquidated, and applied Commerce's instructions to liquidate the entries at the deposit rate.

See Gov't Brief at 29 (citing *Koyo*, 403 F. Supp. 2d at 1307). The Government, however, further argues that the *Koyo* court ruled contrary to the plain meaning of 19 U.S.C. § 1504(d), and incorrectly assessed the remedies available to importers. *See id.* at 29–30.

The Government concludes by arguing that it is entitled to recover payment on a refund erroneously paid to Shinyei on Entry No. 032–0153132–8. *See id.* at 31. Due to a protest filed by Shinyei, Customs reliquidated the 032 Entries and paid Shinyei a refund of $676.75, and interest of $827.50. *See id.* at 31. The Government argues that as the 032 Entries were deemed liquidated by operation of law at the amount of duty deposited by Shinyei at the time of entry, no refund was thus necessary, and Customs therefore erred in granting the refund. *See id.* at 31–32.

III. Analysis

The CAFC remanded the case at bar, ruling that the CIT did have jurisdiction to determine whether Shinyei is entitled to relief based on the merits of Shinyei's case. *See Shinyei CAFC*, 355 F.3d at 1312. The CAFC stated:

> The question for the [CIT] is whether Commerce's instructions with regard to Fujino and Nankai were not in accordance with

> the Amended [Final] Results (as required by sections 1675(a)(2)), or whether the error was in Customs' liquidation of the subject entries despite correct instructions. If it is the later, despite both parties' arguments to the contrary, Shinyei's appropriate avenue for relief would be under 19 U.S.C. § 1514.

Shinyei CAFC, 355 F.3d at 1302 n.2.

The CAFC found that the manufacturers in question were indisputably within the scope of the Amended Final Results. *See Shinyei CAFC* 355 F.3d at 1302. Additionally, the CAFC reconfirms that "both parties agree that section 1514 is inapplicable because the alleged agency error was on the part of Commerce, not Customs." *Shinyei CAFC*, 355 F.3d at 1311.

A. Deemed Liquidation

The CAFC has already ruled that this Court has subject matter jurisdiction over the case at bar under 28 U.S.C. § 1581(i)(4)and through Shinyei's filing of an APA cause of action. *See Shinyei CAFC*, 355 F.3d at 1304–05. The introduction to the APA states: [t]his chapter applies, according to the provisions thereof, except to the extent that- 1) statutes preclude judicial review; or 2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Thus, a cause of action under the APA can be terminated if a statute preclude[s] judicial review.

The CAFC has already stated that as "the parties concede that the [S]ubject [E]ntries were actually liquidated, [the CAFC] do[es] not address Shinyei's arguments concerning the effect of deemed liquidation on the [CIT's] subject matter jurisdiction, an issue the trial court did not decide."[2] *Shinyei CAFC*, 355 F.3d at 1308 n.5. As both parties have raised the issue of deemed liquidation in their briefs to this Court, and as this Court recognizes that APA review can be statutorily precluded, the issue of deemed liquidation is of primary concern in the case at bar. *See* 5 U.S.C. § 701(a).[3] 19 U.S.C. § 1504(d) the statutory provision related to deemed liquidation, states:

> [W]hen a suspension required by a statute or court order is removed, [Customs] shall liquidate the entry within 6 months after receiving notice of the removal from [Commerce], other

---

[2] Though the CAFC references "*Shinyei's* arguments concerning the effect of deemed liquidation on the [CIT's] subject matter jurisdiction" this Court shall reference both Shinyei's and the Government's arguments as they relate to deemed liquidation and the motions filed. *Shinyei CAFC*, 355 F.3d at 1308 n.5.

[3] Shinyei additionally argues that this Court should reject the Government's deemed liquidation argument based on the principles of judicial estoppel. See Pl.'s Reply at 31–33. The CAFC, however, never decided the deemed liquidation issue. *See Shinyei CAFC*, 355 F.3d at 1308 n.5.. As such, the deemed liquidation issue is before this Court for decision and there is no judicial estoppel.

> agency or a court with jurisdiction over the entry. Any entry not liquidated by [Customs] 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.

19 U.S.C. § 1504(d) (1988 as amended 1993).[4]

In order for entries to be deemed liquidated, three conditions must be satisfied: "(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." *Koyo Corp. of U.S.A. v. United States*, 29 CIT ___, ___, 403 F. Supp. 2d 1305, 1308 (2005) (citing *Fujitsu v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002)).

The suspension of liquidation on the disputed entries was removed once the judgment in *Torrington Co. v. United States*, 127 F.3d 1077 (Fed.Cir 1997) became final on January 13, 1998.[5] Though the CAFC issued its decision on *Torrington Co.* on October 15, 1997, the judgment did not become final until the 90–day period to petition the United States Supreme Court for a *writ of certiorari* expired. *See Torrington Co.*, 127 F.3d 1077; Sup.Ct. R. 13.

On February 23, 1998, Customs received notice of the suspension's removal, when Commerce published the Amended Final Results of the 1990–91 administrative review and notice of final court decision in the Federal Register. *See Fujitsu Gen. America, Inc. v. United States*, 283 F.3d at 1381–82; *Amended Final Results*, 63 Fed. Reg. 8908. Commerce therein stated that it would issue appraisement instructions to Customs. *See Amended Final Results*, 63 Fed. Reg. at 8909.

In the six months following February 23, 1998, Customs did not liquidate the disputed entries. Def. Statement of Material Facts Not in Dispute at 2. As such, the disputed entries became deemed liquidated on August 23, 1998. *See* 19 U.S.C. § 1504(d). As the disputed entries were deemed liquidated by operation of law, the final duty asserted by Shinyei was the rate and amount of duty deposited at the time of entry or withdrawal from warehouse, *not* the rate of duty determined by the administrative review. See *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1123–24 (Fed. Cir. 1998). When courts have determined that entries were deemed liquidated under 19

---

[4] Though 19 U.S.C. § 1504(d) was amended in 1994, the amendment does not apply to administrative reviews commenced before January 1, 1995. See *NEC Solutions (Am.). Inc. v. United States*, 27 CIT 1459, 277 F. Supp. 1340 n.11 (2003), *aff'd*, 411 F.3d 1340 (Fed.Cir 2005).

[5] *Torrington Co.* reviewed the challenges to the Disputed Entries and to the Final Results published in the Federal Register. *See Torrington Co.*, 127 F.3d 1077; Final Results, 57 Fed. Reg. 28,360 (IA June 24, 1992).

U.S.C. 1504(d), they have previously set aside Customs' actual liquidation and have treated the deemed liquidation as being final. *See Cherry Hill*, 112 F.3d at 1560; *NEC Solutions (Am.), Inc.*, 411 F.3d at 1343–46; *Int'l Trading Co.*, 281 F.3d at 1270–71, 1276–77; *American Int'l Chem., Inc.*, 29 CIT ___ , ___ , 387 F.Supp 2d at 1269–70.

B. Notification and Timing of Shinyei's Possible Remedies

Though courts, as stated *supra*, have viewed deemed liquidation as being final in nature, this Court is particularly troubled by Shinyei's delay in seeking relief. Though not given notice by Custom's directly on the deemed liquidation, Shinyei was given notice, and Shinyei should have been aware of the inevitability of deemed liquidation under the conditions set forth in 19 U.S.C. § 1504(d). Publication in the Federal Register "is sufficient to give notice . . . to a person subject to or affected by it." 44 U.S.C. § 1507 (1994). 44 U.S.C. § 1501 defines "person" as "an individual, partnership, association, or corporation[.]" 44 U.S.C. § 1501 (1994); *See International Trading Co. v. United States*, 412 F.3d 1303, 1309–10 (Fed.Cir. 2005). Shinyei is a "person" that would be "affected" by the notice published in the Federal Register.[6] Accordingly, publication in the Federal Register provided Shinyei with notice.

Shinyei contends that Custom's regulations as set forth in 19 C.F.R. § 159.9(c)(2) and the recent *Norsk*[7] decision hold that Customs is required to give proper notice of liquidation regardless of whether the liquidation is actual or deemed and as such, the posting of the bulletin notice of liquidation is the actual trigger for deciding the start of the protest period. *See* Dec. Letter at 2; 19 C.F.R. § 159.9(c)(2). The purpose behind the deemed liquidation statute is to "increase certainty in the customs process[.]" *Int'l Trading*, 281 F.3d at 1272. In the instant matter, Customs was not aware of the Deemed Liquidation, and thereby could not post notice in the Bulletin. Certainty, therefore could never be guaranteed in a situation in which Customs was not aware of the deemed liquidation. As 19 U.S.C. § 1504 is meant to "bring finality to the duty assessment process," and as allowing the notification regulations set forth in 19 C.F.R. § 159.9(c)(2) to supercede such a finality would run counter to the statute, this Court rules that Customs is not bound by 19 C.F.R. § 159.9(c)(2) when it is not aware of the deemed liquidation at the time of its occurrence. *Cherry Hill*, 112 F.3d at 1559; *see* 19 U.S.C. § 1504.

Although the Disputed Entries were deemed liquidated, and Deemed Liquidation is final, Shinyei could have still taken action to

---

[6] Though Shinyei was not a party to the administrative review, it is nonetheless a person whose entries were affected by the notice published in the Federal Register.

[7] In *Norsk*, Customs was aware of the deemed liquidation, and thereby published notice. This differs significantly from the case at bar. *See Norsk*, 472 F.3d at 1353.

protest the higher rate imposed on the Disputed Entries by the deemed liquidation. Shinyei could have requested that Customs liquidate the entries prior to the August 23, 1998 deemed liquidation date, but it did not. Shinyei, however argues that it "had no mandamus remedy to compel Customs to actually liquidate the [Disputed Entries] before August 23, 1998." Pl.'s Reply at 37. Shinyei is incorrect. Indeed, Shinyei could have sought mandamus to compel liquidation of the Disputed Entries. *See Peer Chain Co. v. United States*, 28 CIT ___ , ___ ,; 316 F. Supp.2d 1357, 1368 (2004). For example, in *NSK Corp v. United States* ("*NSK*"), Court No. 05–00670, the importer sought a preliminary injunction that would restrain Customs from liquidating its entries by operation of law.[8]

C. Status of the Preliminary Injunction

Shinyei asserts that the injunction in Paragraph 3 of the Order issued in *Federal-Mogul* is not a preliminary injunction, and as it is still in place, it continues to prevent the deemed liquidation of the Disputed Entries. *See* Shinyei's Reply at 6–10; Trans. Oral Arg of October 26, 2006 at 45–49; Order, *Federal-Mogul Corp. v. United States*, Court No. 92–06–00422, July 14, 1992. The Order, however, is clearly introduced with the language, "[u]pon consideration of plaintiff's motion for a preliminary injunction . . . " and continues, "ORDERED that plaintiff's motion for a preliminary injunction . . . is granted." *See* Order, *Federal-Mogul Corp. v. United States*, Court No. 92–06–00422, July 14, 1992. As the language of the Order is viewed holistically, taking into consideration the actual introduction of the Order, as well as the language in paragraph 3 of the Order, this Court finds that paragraph 3 of the Order is merely qualifying the preliminary injunction in a manner that is usual in the issuance of such injunctions. *See* Order, *Federal-Mogul Corp. v. United States*, Court No. 92–06–00422, July 14, 1992. The Order restrained the Government from liquidating the Disputed Entries "during the pendency of this litigation." *Id.* This Court entered its final judgment in *Federal-Mogul Corp. v. United States*, Court No. 92–06–00422, on October 25, 1996. *See* 20 CIT 1274 (October 25, 1996). The judgment contained no continued injunctive provisions. *See id.* Preliminary injunctions dissolve when a case becomes final. *See Cypress Barn, Inc. v. Wester Elec. Co.*, 812 F.2d 1363, 1364 (11th Cir. 1987); *Volume Footwear Retailers of America*, 10 CIT 12,14 (1986). The preliminary injunction from the Order therefore dissolved on

---

[8] In *NSK*, the plaintiff imported antifriction bearings between May 1994 and February 1995 that were subject to an antidumping order. Though the plaintiff attempted to gain mandamus relief, the case was dismissed as a result of Customs' actual liquidation of the plaintiff's entries prior to the mandatory deemed liquidation date. *See* Order, *NSK Corp. v. United States*, Court No. 05–00670, December 28, 2005.

October 25, 1996. As such, deemed liquidation was not suspended, and the Disputed Entries were liquidated by operation of law.

D. Defendant's Counterclaim

The Government filed an answer and counterclaim in the 01–00707 case on February 26, 2003, "in which it sought repayment of a refund erroneously paid to Shinyei on Entry No. 032–0153132–8." Def's Brief at 31. As mentioned *supra*, the 01–00707 case has been consolidated into the case at bar.

The 032 Entries are included within the Disputed Entries that were deemed liquidated on August 23, 1998. *See* Decl'n of Edward N. Maurer ("Maurer Dec.") at ¶¶ 7–8; Entry Summary for Entry No. 032–0153132–8 (Oct. 30, 1990). On October 13, 2000, Customs "actually" liquidated the 032 Entries as a "no change" liquidation, though it had already been deemed liquidated on August 23, 1998. *See* Maurer Dec. at ¶ 8. Shinyei filed a protest on November 1, 2000, which was allowed in part on June 22, 2001. *See id*. As a result, Customs reliquidated the entry and paid a refund of $676.75, plus interest of $827.50 on July 6, 2001. *See id*. As the 032 Entries had already been liquidated by operation of law, and at the duty rate deposited at the time of entry, over two years before Customs had mistakenly "actually" liquidated the 032 Entries on October 13, 2000, Customs had erred in granting the refund to Shinyei. As such, the Government is entitled to recover the $676.75 erroneously refunded to Shinyei, as well as the $827.50 paid in interest, for a total of $1,504.25. Additional interest, if any, shall be added to the total.

IV. Conclusion

Based on the foregoing, the Disputed Entries were deemed liquidated on August 23, 1998. Shinyei failed to seek mandamus relief prior to the deemed liquidation of the Disputed Entries. As such, the deemed liquidation of the Disputed Entries is final. Furthermore, the CAFC did not consider the effects of deemed liquidation when they reversed and remanded this Court's previous decision. Accordingly, Shinyei's motion for partial summary judgement is denied and the Government's motion for summary judgement is granted. Judgment will be entered accordingly.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

SHINYEI CORPORATION OF AMERICA, Plaintiff, v. UNITED STATES, Defendant.

Consolidated
Court No. 00–00130

JUDGMENT

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in accordance with said decision, it is hereby

ORDERED that Plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that Defendant's cross-motion for summary judgment is granted; and it is further

ORDERED that Shinyei Corporation of America return the erroneously refunded $676.75, as well as the $827.50 paid in interest, along with any additional interest, if any; and it is further

ORDERED that this case is dismissed.

Slip Op. 07–60

MITTAL STEEL POINT LISAS LTD., Plaintiff, v. UNITED STATES Defendant, GERDAU AMERISTEEL CORP. AND KEYSTONE CONSOLIDATED INDUSTRIES, INC. Defendant-Intervenors.

BEFORE: Pogue, Judge
Court No. 05–00681
Public Version

[Commerce's determination **affirmed-in-part** and **remanded-in-part** and Plaintiff's Motion for Judgment on the Agency Record **denied**]

Decided: April 24, 2007

Steptoe & Johnson LLP (*Eric C. Emerson, Evangeline D. Keenan, Michael A. Pass*) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*, Trial Attorney) for Defendant.

Kelley Drye Collier Shannon (*Paul C. Rosenthal, Mary T. Staley*) for Defendant-Intervenors.

OPINION

Pogue, Judge: In this action, Plaintiff Mittal Steel Point Lisas Ltd. ("Mittal" or "Plaintiff") seeks review of the final results of the

second administrative review of the antidumping duty order on Carbon and Certain Alloy Steel Wire Rod from Trinidad & Tobago and the antidumping duty rate thereby imposed by the Department of Commerce ("Commerce"). Specifically, Plaintiff challenges (1) Commerce's decision to treat certain wire rod as non-prime merchandise, thereby excluding the foreign sales thereof from its calculation of fair or normal value ("NV") in Mittal's home market, and (2) Commerce's calculation of Mittal's constructed export price (CEP) for Mittal's U.S. sales, particularly the deduction of credit expenses for the time period between shipment from the port in Trinidad & Tobago and the date payment was received.

Pending before the court is Plaintiff's USCIT R. 56.2 motion for judgment on the agency record. For the reasons stated herein, Commerce's determination regarding prime versus non-prime merchandise is affirmed, Commerce's Consent Motion for Partial Voluntary Remand is granted so that Commerce may make further findings regarding Mittal's CEP consistent with this opinion, and Plaintiff's Motion for Judgment on the Agency Record is denied.

Background

Mittal manufactures steel wire rod in Trinidad & Tobago, and sells such steel wire rod in its home market. Together with its North American affiliate and importer, Mittal Steel North America ("MSNA"),[1] Mittal also sells steel wire rod for export to the United States.

Following an investigation of Mittal's sales, Commerce published an antidumping duty order on steel wire rod from Trinidad & Tobago in 2002. *See Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad & Tobago, and Ukraine*, 67 Fed. Reg. 65,945 (Dep't Commerce Oct. 29, 2002)(notice of antidumping duty orders).[2]

In due course, on November 16, 2005, Commerce published the final results of Mittal's second administrative review,[3] which Mittal

---

[1] Mittal was formerly known as Caribbean Ispat Ltd.; MSNA was formerly known as Ispat North America Inc.

[2] To calculate dumping margins, Commerce "compares the 'U.S. Price' to the 'normal value' of the subject merchandise and imposes anti-dumping duties if, and to the extent, the former is lower than the latter." *AK Steel Corp. v. United States*, 226 F.3d 1361, 1364 (Fed. Cir. 2000).

[3] "[T]he United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported." 19 C.F.R. § 351.212(a)(2005); *see also Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT ____, ____, 374 F. Supp. 2d 1333, 1339 (2005). When the investigation is complete, Commerce issues a final determination and, where appropriate, an antidumping duty order. *See Decca Hospitality Furnishings, LLC v. United States*, 30 CIT ____, ____, 427 F. Supp. 2d 1249, 1251 (2006); *see also Am. Signature, Inc. v. United States*, 31 CIT ____, Slip. Op. 07–20 at 2–3 (Feb. 14, 2007).

challenges in this case, *see Carbon and Certain Alloy Steel Wire Rod from Trinidad & Tobago*, 70 Fed. Red. 69,512 (Dep't Commerce Nov. 16, 2005)(notice of final results of antidumping duty administrative review)("*Final Results*"). These final results adopt and incorporate Commerce's Issues and Decision Memorandum. Memorandum to Joseph A. Spetrini from Stephen J. Claeys, *Issues and Decisions for the Final Results of the Second Administrative Review of the Antidumping Duty Order on Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, (Dep't Commerce Nov. 16, 2005), P.R. Doc. 62, *available at* http://ia.ita.doc.gov/frn/summary/trinidad/E5–6331–1.pdf ("*Decisions Mem.*").[4]

1. *Production of prime wire rod*

In its products' price lists for customers in both Trinidad & Tobago and the United States, Mittal designates certain steel wire rod as "prime." At the same time, Mittal also sells another steel wire rod product exclusively in Trinidad & Tobago that it designates in its price lists as "composite wire." *See, e.g.*, Letter from Eric C. Emerson to the Hon. Carlos Gutierrez *Administrative Review of Antidumping Duty Order on Carbon and Certain Alloy Steel Wire Rod from Trinidad & Tobago: Caribbean Ispat Limited Response to Section A, B, C, and D Questionnaires* (Jan. 31, 2005), P.R. Doc. 16, C.R. Doc. 5 at 270, 283, Attachs. A.13, A.14 ("*Questionnaire Response*").

Commerce classifies Mittal's composite wire as non-prime merchandise, a decision Mittal challenges in this action. At the same time, the description of the production process for composite wire is not contested here. That process, however, and its differences from the production process for "prime"[5] wire rod, and the resultant price difference between the two types of merchandise, are relevant to a review of Commerce's decision to treat composite wire as non-prime merchandise. In sum, the production process for composite wire produces a physical, though not chemical, difference in the resultant wire rod, and the physical difference provides a basis for the difference in price between prime wire rod and composite wire rod.[6]

Generally, the actual liability faced by the importers is established through the process of an "administrative review". *See* 19 C.F.R. § 351.213(a)(2005)("Although duty liability may be determined in the context of other types of reviews, the most frequently used procedure for determining final duty liability is administrative review procedure under section 751(a)(1) of the Act."); *see also Mukand Int'l, Ltd. v. United States*, Appeal No. 06–1259 at 2–3 (Fed. Cir. Feb. 6, 2007); *see also Am. Signature, Inc.*, 31 CIT ____, Slip. Op. 07–20 at 3–6.

[4] The explanation of Commerce's analysis of Mittal's steel wire rod sales can be found in the Issues and Decision memorandum.

[5] Though the court uses the term "prime" in referring to wire rod, it does not presuppose Commerce's decision to treat that merchandise as "prime merchandise" to be correct. The nomenclature is meant to distinguish "prime" wire rod from "composite" wire rod, regardless of the category of merchandise into which it should fall.

[6] [ ]

In its investigation of Mittal's sales, Commerce determined that composite wire was not prime merchandise, and therefore Commerce excluded sales of composite wire in calculating the normal value of subject merchandise in the home country. In so doing, Commerce relied on Mittal's price list, which distinguished between "Prime Wire Rods and Rebars" and "Composite (Wire Rods)." *See Decisions Mem.* at 9 (Cmt. 4) ("we did not use the wire rod which was not identified as prime on [Mittal's] price list for matching purposes"); *see also Questionnaire Response* P.R. Doc. 16, C.R. Doc. 5 at 270, 283, attachs. A.13, A.14.

2. *Calculation of Constructed Export Price*

During the administrative review at issue here, Mittal reported its sales of wire rod to unaffiliated U.S. customers through MSNA. Both Commerce and Mittal considered these sales to qualify as constructed export price ("CEP") sales under section 772(b) of the Act.[7] *See See Decisions Mem.* Mittal made these CEP sales to U.S. customers and shipped the merchandise to MSNA, which unloaded it and arranged for its delivery to the U.S. customers. *Id.* at 23–24, 245, attach. A.8. During the investigation, Mittal reported its expenses associated with making these sales, as well as those expenses associated with making sales in Trinidad & Tobago, for the purposes of adjusting CEP and NV. *See Id.* at 785–86, attach. B.14.[8] Specifically, in response to questionnaires, Mittal reported foreign inventory carrying costs, U.S. inventory carrying costs, and imputed credit expenses asinformation which provided a basis for price adjustments. *Id.*; *see also* Br. Supp. Pl.'s Mot. J. Agency. R. at 15 ("*Pl.'s Br.*").

In reporting its imputed credit expenses for sales in the U.S., Mittal calculated the credit expense for a period commencing on the date Mittal invoiced the goods to the U.S. customer and ending on the date Mittal received payment. *Pl.'s Br.* 15. Commerce recalculated Mittal's reported direct credit expenses and inventory carrying costs, considering the reported expenses to be inaccurate. *Decisions Mem.* at 4 (Cmt. 2). Commerce determined that Mittal's goods had not been warehoused in a bonded warehouse in the United States, and thus set to zero the U.S. inventory carrying costs reported by Mittal, reasoning that in the absence of warehousing in the United

---

[7] When an arm's-length transaction takes place between a foreign producer and an independent importer, U.S. price is calculated using the statutory Export Price (EP) provision; CEP is used when the foreign producer and the importer are affiliated. *See, e.g., Smith-Corona Group v. United States*, 713 F.2d 1568, 1572 (Fed. Cir. 1983)("Where the importer is an unrelated, independent party, purchase price is used. . . . Where the importer is related, an arm's length transaction does not occur until the goods are resold to a retailer or to the public."); *see also PQ Corp. v. United States*, 11 CIT 53, 58–59, 652 F. Supp. 724,730 (1987). Exceptions to this rule are detailed in *AK Steel Corp.*, 226 F.3d at 1365.

[8] The statute provides for certain adjustments to CEP and NV so that an "apples-to-apples" comparison can be made. *See infra* p. 14.

States, MSNA did not incur such inventory carrying costs. Commerce also recalculated credit expenses to begin accruing on the date of shipment from the foreign port. In so doing, Commerce stated that "[c]redit expense is the interest expense incurred . . . between date of shipment of merchandise to a customer and date of receipt of payment from the customer." *Id*.

Jurisdiction and Standard of Review

This action is brought under 19 U.S.C. § 1516a.[9] Section 1677(9) grants Plaintiff standing to bring the action as an interested party that participated in the administrative proceedings below. 19 U.S.C. § 1677(9). The court has jurisdiction over the action pursuant to 28 U.S.C. § 1581(b).

The court's review is to determine whether Commerce's determinations, findings, or conclusions are supported by substantial evidence on the record, and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

Analysis

1. *Treatment of composite wire rod as non-prime merchandise*

To identify the appropriate foreign like product for the purpose of determining NV of the subject merchandise, the Statute dictates that Commerce may first use data about "[t]he subject merchandise and other merchandise which is *identical* in physical characteristics with, and was produced in the same country by the same person as, that merchandise." 19 U.S.C. § 1677(16)(A)(emphasis added).[10] Where non-prime merchandise is sold in the United States, Commerce matches it to non-prime merchandise sold abroad. *Corus Staal BV v. United States Dep't of Commerce*, 27 CIT 388, 405, 259 F. Supp. 2d 1253, 1268 (2003); *see also Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 71 Fed. Reg. 7,513 (Dep't Commerce Feb. 13, 2006)(notice of final results of the eleventh administrative review), Mem. to David M. Spooner, Assistant Secretary, Import Administration from Stephen J. Claeys, Re: *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea* (Issues and Decisions for the Final Results of the 11th Admin. Review) at 23 (Cmt. 13), *available at* http://ia.ita.doc.gov/frn/summary/korea-south/E6–1984–1.pdf (excluding home market sales of non-prime merchandise from calculations where there were no sales of non-prime merchandise in the United States).

---

[9] All references to the United States Code are to the 2000 edition.

[10] This section also permits the use of other categories of data for this determination. Because the parties do not contest that data in this first category of "identical" merchandise are available, the court does not discuss the remainder of the provision.

In this case, Commerce has interpreted the ambiguous term "identical" in making its determination. Specifically, Commerce has determined that rod labeled "composite wire rod" is not identical to "prime wire rod." The Court of Appeals for the Federal Circuit has held that in section 1677(16)(A), Congress meant for "identical" to mean "closely alike or equivalent, rather than 'being the same' or 'exactly equal and alike.'" *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1383 (Fed. Cir. 2001). The Federal Circuit found the term "identical" ambiguous, and, reviewing Commerce's interpretation, found it to be a reasonable interpretation, where "Commerce [ ] concluded that merchandise should be considered to be identical despite the existence of minor differences in physical characteristics, if those minor differences are not commercially significant." *Id.* at 1384; *see also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984)(agency's interpretation of an ambiguous term in statute reviewed for reasonableness). Thus, slight physical differences need not preclude merchandise from being considered prime merchandise. In *Pesquera Mares*, however, the differences "were not commercially significant." *Pesquera Mares*, 266 F.3d at 1384.

Faced with this legal landscape, Mittal argues that Commerce's treatment of composite wire rod as non-prime is inconsistent with prior agency practice. *Pl.'s Br.* 10. Mittal points to a previous Commerce determination treating as prime merchandise rolls of film that had a minor, physical difference from other "prime" merchandise. *Certain Polyethylene Terephthalate Film, Sheet and Strip from India*, 70 Fed. Reg. 8072 (Dep't Commerce Feb. 17, 2005) (final results of antidumping duty administrative review)("*PET Film*"). In *PET Film*, Commerce stated that the "sole reason for considering shorter rolls of PET film to be non-prime merchandise is that these rolls cannot be used by customers in normal production runs; hence, buyers consider shorter rolls of PET film to be less valuable than full rolls of PET film." *PET Film*, Mem. to Joseph A. Spetrini, Acting Assistant Secretary, Import Administration from Barbara E. Tillman Re: *Certain Polyethylene Terephthalate Film, Sheet and Strip from India* (Issues and Decision Memorandum for the 2001–2003 Administrative Review), at 21–22 (Cmt. 5) *available at* http://ia.ita.doc.gov/frn/summary/india/E5–658–1.pdf. Yet, Commerce treated the shorter rolls as prime merchandise. *Id.* Thus, Mittal argues, where there is only one, minor physical difference[11] between prime wire rod and composite wire rod, composite wire rod should be considered prime merchandise.

Mittal fails to take into account the next sentence in Commerce's *PET Film* decision, i.e., Commerce found "no evidence on the

---

[11] [ ]

record . . . that Jindal America consistently sold shorter rolls of PET film *at prices lower than that charged for full rolls of identical PET film*. . . ." *Id*. (emphasis added). In other words, in *PET Film*, the physical difference was slight enough that the merchandise could be considered identical because that difference did not result in a price difference. Presumably, such a price difference would distort the comparison of NV and CEP. *See, e.g.*, *Certain Polyethylene Terephthalate Film, Sheet and Strip from India*, 71 Fed. Reg. 47,485 (Dep't Commerce Aug. 17, 2006)(final results of antidumping duty administrative review), Mem. to David M. Spooner, Assistant Secretary, Import Administration from Stephen J. Claeys Re: *Certain Polyethylene Terephthalate Film, Sheet and Strip from India* (Issues & Decision Mem. for the Final Results of the Administrative Review of the Antidumping Duty Order) at 5 (Cmt. 4) *available at* http://ia.ita.doc.gov/frn/summary/india/E6–13592–1.pdf ("[g]iven the difference in the physical characteristics between prime and non-prime merchandise . . . and the potential distortion resulting from comparing sales of prime merchandise in the U.S. market to sales of non-prime merchandise sold in India, we continue to find that it was appropriate for [Commerce] to distinguish between [ ] sales of prime and non-prime merchandise."). A distinction based on both the degree of physical difference and price difference follows the logic set forth in *Pesquera Mares* as well, that "identical" need not mean "exactly equal and alike" in cases where the differences are not commercially significant. *Pesquera Mares*, 266 F.3d at 1384; *see also Stainless Steel Wire Rod from Korea* 63 Fed. Reg. 40,404, 40,414 (Gen'l Cmt. 7)(Dep't Commerce July 29, 1998)(notice of final determination of sales at less than fair value)(finding that both "prime 1" and "prime 2" products should be considered as prime because "[Commerce] found no physical differences between the two prime products that would lead [it] to believe that prime 1 and prime 2 products are not comparable in price or cost.")

Here, there is evidence on the record that the physical difference between prime and composite wire was commercially significant. Namely, as Mittal reports, there was a price difference between prime wire rod and composite wire rod. *Pl.'s Br.* 8–9. This price difference, according to Mittal, was due to composite rod having a physical difference from prime wire rod, which is "the only physical distinction between composite rod and other prime rod". *Id*. at 9.

This evidence, which is attested to by Mittal, is adequate to support the conclusion that composite wire rod is not "identical" to prime wire rod, and should therefore not be considered prime merchandise. Nor has Commerce applied the term inconsistently, because, in *PET Film*, the slight physical difference was not commercially significant. The court therefore affirms Commerce's decision to treat composite wire rod as non-prime merchandise.

2. *Calculation of Inventory Carrying Costs and Credit Expenses*

In cases where goods are sold in the U.S. through an affiliated company, the "U.S. Price" is constructed using the first sale to an unaffiliated entity. *See U.S. Steel Group v. United States*, 22 CIT 670, 15 F. Supp. 2d 892 (1998)(analyzing situations in which U.S. affiliate has sufficient involvement in a sale that use of CEP, rather than EP, is appropriate), rev'd and remanded on other grounds in *U.S. Steel Group v. United States*, 225 F.3d 1284 (Fed. Cir. 2000). Adjustments are made to NV and EP or CEP so that an "apples-to-apples" comparison can be made, at a "specific, 'common' point in the chain of commerce, so that value can be fairly compared on an equivalent basis." *Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1303, 1313 (Fed. Cir. 2001)(citing *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1568 (Fed. Cir. 1994)).[12] However, "[i]f the sale is classified as a CEP sale, additional deductions are taken from the sales price to arrive at the U.S. Price." *AK Steel Corp.*, 226 F.3d at 1364. This is because affiliated companies could manipulate their books to escape a determination of dumping:

> [t]he risk is that an artificially low price may be charged to the affiliated distributor in the home market and an artificially high price charged to the affiliated distributor in the United States market. The consequence in each case is that a lower countervailing duty (or no duty at all) would be payable.

Micron Technology, 243 F.3d at 1303.

The additional deductions from CEP are set out in 19 U.S.C. § 1677a(d), and include costs of sale, such as "expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties." 19 U.S.C. § 1677a(d)(1)(B).[13] The purpose of these additional adjustments to the CEP is "to prevent foreign producers from competing unfairly in the United States

---

[12] Adjustments to NV are detailed in 19 U.S.C. § 1677b(a)(6); adjustments to EP and CEP are detailed in 19 U.S.C. § 1677a(c).

[13] The full text of the provision is:

Additional adjustments to constructed export price For purposes of this section, the price used to establish constructed export price shall also be reduced by—

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—

(A) commissions for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, *such as credit expenses*, guarantees and warranties;

(C) any selling expenses that the seller pays on behalf of the purchaser; and

(D) any selling expenses not deducted under subparagraph (A), (B), or (C);

(2) the cost of any further manufacture or assembly(including additional material and labor), except in circumstances described in subsection (e) of this section; and

(3) the profit allocated to the expenses described in paragraphs (1) and (2). 19 U.S.C. § 1677a(d). (emphasis added).

market by inflating the U.S. price with amounts spent by the U.S. affiliate on marketing and selling the products in the United States." *AK Steel Corp.*, 226 F.3d at 1367.

The deductions at issue in this case include both inventory carrying costs, which represent the cost of keeping a product in inventory until it is sold, and credit expenses, which represent the opportunity cost of money owed to the producer between the date of sale and the date payment is received.

The date that merchandise is considered to be shipped to the customer is significant in determining how long the carrying costs were borne by the seller, while the date of sale is significant in determining the starting point of the period for which credit expenses are calculated. As discussed further, below, the date the merchandise is shipped to the customer is sometimes taken as the date of sale. A later date of sale results in smaller deductions from the CEP for credit expenses, although it can increase the period during which carrying costs are incurred.

Whether goods are shipped to the unaffiliated customers directly from the foreign port or whether they are warehoused in the United States is important to the determination of when credit expenses begin accruing, and whether there are U.S. carrying costs. If goods are warehoused in the U.S., the date of sale will not occur until after the merchandise is in the United States, *Brake Drums and Brake Rotors from the People's Republic of China*, 61 Fed. Reg. 53,190, 53,195 (Dep't Commerce Oct. 10, 1996)(notice of preliminary determinations of sales at less than fair value and postponement of final determinations), and thus the clock for credit expenses won't start running until then.

A. *Credit Expenses*

As noted above, credit expenses are the costs associated with money being owed to the seller after it has sold its merchandise to the customer but has not been paid. Determining the date of sale of the merchandise is therefore critical to calculating this cost. In its regulations, Commerce states that:

> [i]n identifying the date of sale . . . the Secretary normally will use the date of invoice. . . . However,the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

19 C.F.R. § 351.401(i)(2005). The use of a uniform date of sale (namely, the date of invoice) is to achieve both efficiency and predictability. Preamble to the Dept.'s Final Regs. at 19 C.F.R. parts 351, 353 and 355, 62 Fed. Reg. 27,296, 27,348 (Dep't Commerce May 19, 1997)(final rule)("*Preamble*"). Also in this Preamble to Commerce's regulations, in rejecting suggestions that it use the date of shipment

rather than the date of invoice as the date of sale, Commerce gave the following reasons:

> First, date of shipment is not among the possible dates of sale specified in note 8 of the AD Agreement. Second, based on the Department's experience, date of shipment rarely represents the date on which the material terms of sale are established. Third, unlike invoices, which can usually be tied to a company's books and records, firms rarely use shipment documents as the basis for preparation of financial reports. Thus, reliance on date of shipment would make verification more difficult.

Id. at 27,349. Commerce thereby states that the date of shipment should not normally be used as the date of sale, and that the date of sale determination depends on the date when material terms of sale are established. Nevertheless, it is Commerce's practice to use the date of shipment as the date of sale when the date of invoice is after the date of shipment. *See, e.g., Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 64 Fed. Reg. 38,756, 38,768 (Dep't Commerce July 19, 1999)(notice of final determination of sales at less than fair value)("The Department does not consider dates subsequent to the date of shipment from the factory as appropriate for date of sale.")(emphasis in original)("*Steel Products from Brazil*"); *see also Stainless Steel Bar from Japan* 65 Fed. Reg. 13,717 (Dep't Commerce Mar. 14, 2000)(final results of antidumping administrative review), Mem. to Robert S. LaRussa, Assistant Secretary, Import Administration from Richard W. Moreland Re: *Issues and Decisions Mem. For the Administrative Review of Stainless Steel Bar from Japan* (Cmt. 1) *available at* http://ia.ita.doc.gov/frn/summary/japan/00–6264–1.txt ("In keeping with the Department's practice, the date of sale cannot occur after the date of shipment"). In *Steel Products from Brazil*, Commerce explained that "[t]he Department considers the date of sale to be the date on which all substantive terms of sale are agreed upon by the parties." *Steel Products from Brazil*, 64 Fed. Reg. at 38,768. The reason for Commerce's practice regarding the use of date of shipment is that when a party ships its product to a customer, it is reasonable to assume that the material terms of the sale have been established. *Id*. Thus, Commerce has adopted a practice of calculating the date of sale to be the date of invoice, unless the date of shipment is earlier. This is in contradiction to Commerce's statement in the preamble that "date of shipment rarely represents the date on which the material terms of sale are established." *Preamble*, 62 Fed. Reg. at 27,349. Nonetheless, using the date of shipment when that date is before the invoice date is a practice the Department has adhered to in other investigations, and which has been implicitly approved by the courts. *See AIMCOR v. United States.*, 141 F.3d 1098, 1104–05 (Fed. Cir. 1998)(citing *AIMCOR v. United States*, 19 CIT 966, 972 (1995) ("Commerce's es-

tablished practice is to calculate credit expenses from the date of shipment to the date payment is received from the customer.")). Commerce's reasoning therefore seems to be that shipment to the customer does not occur before the material terms of sale have been determined, so that when invoicing is subsequent to shipment, the date of shipment is generally an appropriate date of sale, although depending on the facts of specific review, Commerce may find another date more appropriate.

It is also the case that in instances where a U.S. affiliate warehouses merchandise in the United States and sells from inventory, Commerce only starts the credit expense 'clock' running from the date merchandise is shipped from the U.S. warehouse. *Stainless Steel Butt-Weld Pipe Fittings from Taiwan*, 63 Fed. Reg. 67,855, 67,856 (Dep't Commerce Dec. 9, 1998)(final results of antidumping duty administrative review). In such cases, the sale does not occur before merchandise enters the country. Here, on the other hand, Commerce has determined that this is not an instance where merchandise was shipped into the United States before sales were made, and then stored at a warehouse here until they were sold. Rather, it is more like *Brake Drums and Brake Rotors from the People's Republic of China* and *Stainless Steel Sheet and Strip in Coils from Germany*, 64 Fed. Reg. 30,710, 30,733 (Cmt. 12)(Dep't Commerce June 8, 1999)(final determination of sales at less than fair value)(finding that because no warehouses were maintained in the United States and goods were directly shipped to unaffiliated customers, credit expenses, rather than inventory carrying costs for time on the water, were appropriate measure of sales costs during overseas transit).

Here, as in those cases, Commerce chose to use the date of shipment for the date on which credit expenses would begin to run. But for other calculations in this review, Mittal points out, and Commerce agrees, "Commerce used the invoice date as the date of sale for all of [Mittal's] constructed export price [ ] sales, even though [Mittal's] merchandise was shipped from Trinidad before [Mittal] issued its invoice." Pl.'s Resp. Ct.'s Feb. 14 Letter 1–2; *see* D.'s Resp. Ct.'s Letter Feb. 14 & Consent Mot. Partial Voluntary Remand 2 ("*D.'s Resp. Ct.'s Letter*"). For those other calculations, the government explains that it used the invoice date for date of sale because "the terms of sale . . . often changed from the order date to the invoice date." D.'s Resp. Ct.'s Letter at 2 (quoting Mem. From Magd Zalok to Gary Taverman, *CEP Verification of the Sales Resp. In the Antidumping Investigation of Carbon and certain Alloy Steel Wire Rod from Trinidad & Tobago* (June 12, 2000)).[14] Commerce chose to

---

[14] This is contrary to the government's earlier arguments regarding credit expenses in its response brief to Plaintiff's motion for judgment on the agency record. There, the government at least implied that the date of sale should be considered to be the date merchandise is shipped to the customer, stating that as of the date of shipment of merchandise, all mate-

use the later date of invoice because it found that in this case, the material terms of sale were not set before the invoice date, despite the fact that goods were shipped and en route to customers before invoices were issued. The finding as to date of sale was not challenged by Mittal, nor does the court find it unreasonable. However, it seems inconsistent for Commerce to then calculate credit expenses beginning on the date of shipment.

Recognizing this, Commerce moves for a voluntary remand, with Mittal's consent. *D.'s Resp. Ct.'s Letter*. In its motion, the government recognizes that "Mittal may not have begun to extend credit at the date of shipment (given its selling practice of invoicing its unaffiliated customers after shipping the merchandise from the foreign port, but not maintaining inventory in the United States)." Id. at 3. In response to Commerce's request, the court grants Commerce's motion for remand. On remand, Commerce may determine the date on which credit expenses should begin to run, keeping in mind its previous determination in this review that the material terms of sale are not set until Mittal issues an invoice.

B. *Carrying Costs*

Where the export price is constructed, as here, there are both indirect costs of sale (costs associated with a sale between the two affiliated entities) and direct costs (those costs associated with a sale to an unaffiliated customer). Commerce "ordinarily do[es] not deduct [from CEP] indirect expenses incurred in selling to the affiliated U.S. importer." *Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 63 Fed. Reg. at 67,856 (Cmt. 2); *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan*, 62 Fed. Reg. 11,825, 11,834 (Dep't Commerce March 13, 1997)(final results of antidumping duty administrative reviews and termination in part); *see also Gray Portland Cement and Clinker From Mexico*, 62 Fed. Reg. 17,148, 17,168 (Dep't Commerce, April 9, 1997)(final results of antidumping duty administrative review). Thus, when the affiliated U.S. company receives merchandise shipped from abroad and warehouses it in the United States prior to selling it, the inventory carrying costs for the time in transit from the foreign country to the United States is considered to be an indirect cost, and is not deducted from CEP. *Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 63 Fed. Reg. at 67,856 (Cmt. 2). Commerce defines inventory carrying costs as "interest expenses incurred . . . between the time the merchandise leaves the production line at the factory to the time the goods are

---

rial terms of a contract are set, and thus the sale has occurred. Def.'s Resp. Pl.'s Mot. J. Agency R. 30–36.

shipped to the first unaffiliated customer." *Decisions Mem*. at 4 (Cmt. 2).

Here, Mittal reported that merchandise was shipped from Trinidad & Tobago, and upon arrival in the United States, MSNA unloaded the merchandise and arranged for its delivery to unaffiliated customers. *Questionnaire Response*, P.R. Doc. 16, C.R. Doc. 5 at 24–28. Nonetheless, MSNA reported inventory carrying costs in the United States. *See* Letter to the Honorable Carlos M. Gutierrez, Secretary of Commerce from Eric Emerson Re: *Carbon and Alloy Steel Wire Rod from Trinidad & Tobago: Submission of Case Brief*, P.R. Doc. 53, C.R. Doc. 23, 9–10. As noted above, Commerce disagreed and did not permit a reduction of CEP for inventory carrying costs in the United States. Commerce reasoned that once the sale has occurred and the goods are shipped to an unaffiliated customer, credit expenses are the appropriate variable for costs related to sale. This is logical because the merchandise is no longer in inventory. Therefore, Commerce's decision to assess inventory carrying costs only until the goods were shipped from Trinidad & Tobago appears reasonable. Commerce's decision, however, may be affected by its determination of appropriate credit expenses, given its treatment of invoice date as date of sale in this review. On remand, therefore, Commerce may reassess its decision regarding inventory carrying costs in light of its reconsideration of credit expenses.

Conclusion

For the foregoing reasons, the court **affirms in part and remands in part** Commerce's determinations, and **denies** Plaintiff's Motion for Judgment on the Agency Record.

Remand results are due by June 25, 2007. Comments are due by July 16, 2007. Reply comments are due by July 26, 2007. SO ORDERED.

Slip Op. 07–61

CANADIAN WHEAT BOARD, Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 07–00058

OPINION AND ORDER

[Plaintiff's motion for preliminary injunction granted.]

Dated: April 24, 2007

Steptoe & Johnson, LLP (*Mark Astley Moran, Jamie Benjamin Beaber* and *Matthew S. Yeo*), for plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Scott McBride*), of counsel, for defendant.

Eaton, Judge: This matter is before the court on the Canadian Wheat Board's ("CWB") motion for a preliminary injunction pursuant to USCIT Rule 65(a). By its motion, plaintiff seeks an order enjoining the United States, the United States Department of Commerce ("Commerce" or the "Department") and the Bureau of Customs and Border Protection ("Customs") from liquidating or causing or permitting to be liquidated all entries of Canadian hard red spring ("HRS") wheat that were: "(1) entered, or withdrawn from warehouse, for consumption prior to January 2, 2006; (2) imported into the United States by or on behalf of the CWB; and (3) subject to the antidumping . . . and countervailing duty . . . orders on HRS wheat from Canada. . . ." Pl.'s Mem. P. & A. Supp. Mot. TRO & Prelim. Inj. 1 ("Pl.'s Mem.");[1] *see also* HRS Wheat from Canada, 68 Fed. Reg. 60,641 (Dep't of Commerce Oct. 23, 2003) (notice) (antidumping duty order); HRS Wheat from Canada, 68 Fed. Reg. 60,642 (Dep't of Commerce Oct. 23, 2003) (notice) (countervailing duty order) (collectively, the "AD/CVD Orders").

Plaintiff's substantive challenge is to a legal conclusion contained in Commerce's notice of revocation of the AD/CVD Orders, which was published following a negative injury determination of the

[1] Pursuant to this Court's entry of a temporary restraining order on February 28, 2007, and the subsequent extension of that order for 60 days on March 14, 2007, plaintiff's merchandise is not presently at risk of being liquidated. *See Can. Wheat Bd. v. United States*, Ct. No. 07–00058 (CIT Feb. 28, 2007) (order granting plaintiff's motion for TRO) (Ridgway, J.); *Can. Wheat Bd. v. United States*, Ct. No. 07–00058 (CIT Mar. 14, 2007) (order extending TRO for 60 days) (Eaton, J.).

United States International Trade Commission ("ITC" or the "Commission"). *See* HRS Wheat from Canada, Notice of Panel Decision, Revocation of Countervailing and Antidumping Duty Orders and Termination of Suspension of Liquidation, 71 Fed. Reg. 8275 (Dep't of Commerce Feb. 16, 2006) (notice) ("Notice of Revocation"). The ITC made its negative determination following remand from a binational panel assembled pursuant to article 1904 of the North American Free Trade Agreement ("NAFTA"). Specifically, plaintiff takes issue with Commerce's statement in the Notice of Revocation that it would instruct Customs to liquidate, without duties, only those imports that "entered the United States on or after January 2, 2006." *Id*. For plaintiff, Commerce committed legal error by not making the Notice of Revocation applicable to all entries, the liquidation of which had been suspended, made while the now invalid AD/CVD Orders were in place. Plaintiff claims that its position is supported by this Court's decision in *Tembec, Inc. v. United States*, 30 CIT ___ , 461 F. Supp. 2d 1355 (2006) ("*Tembec II*"), *judgment vacated by Tembec, Inc. v. United States*, 31 CIT ___ , Slip Op. 07–28 (Feb. 28, 2007) ("*Tembec III*").[2] *See id*. at ___ , 461 F. Supp. 2d at 1367 ("Congress did not set up a system to retain duties that are not owed.").

The CWB asserts 28 U.S.C. § 1581(i)(4) (2000)[3] as the jurisdictional basis for its suit. By its opposition to plaintiff's motion, the United States, on behalf of Commerce, argues that the Court lacks jurisdiction over this matter. *See* Def.'s Opp'n Pl.'s Mot. Prelim. Inj. 4–10 ("Def.'s Opp'n"). For the reasons that follow, the court finds that jurisdiction lies pursuant to 28 U.S.C. § 1581(i)(4). In addition, the court grants plaintiff's motion for a preliminary injunction.

BACKGROUND

The CWB is an exporter of Canadian HRS wheat. In September 2002, the domestic wheat industry petitioned both Commerce and the ITC seeking investigations into possible dumping and subsidization of Canadian HRS wheat, and the effects of Canadian wheat imports on the U.S. market. Thereafter, the Department published its findings that Canadian HRS wheat was both subsidized and being sold in the United States at less than fair value. *See* Certain Durum Wheat and HRS Wheat from Canada, 68 Fed. Reg. 52,747 (Dep't of Commerce Sept. 5, 2003) (final affirmative countervailing duty de-

---

[2] The *Tembec III* Court vacated as moot its prior judgment in *Tembec II*, but, having found "that the issues in *Tembec II* were decided within the context of a live controversy," kept the *Tembec II* decision in place. *Tembec III*, 31 CIT at ____ , Slip Op. 07–28 at 15.

[3] Section 1581(i)(4) grants this Court exclusive jurisdiction to entertain "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section." 28 U.S.C. § 1581(i)(4).

termination); Certain Durum Wheat and HRS Wheat from Canada, 68 Fed. Reg. 52,741 (Dep't of Commerce Sept. 5, 2003) (final affirmative sales at less than fair value determination).

In October 2003, after conducting its own investigation, the ITC determined that imports of Canadian HRS wheat were materially injuring the domestic industry. *See* Durum and HRS Wheat from Canada, USITC Pub. 3639, Inv. Nos. 701–TA–430A and 430B and 731–TA–1019A and 1019B (Oct. 2003) (Final). Thereafter, on October 23, 2003, Commerce published the AD/CVD Orders.

Plaintiff challenged the ITC's affirmative determination before a NAFTA panel. On June 7, 2005, the NAFTA panel found unsupported by substantial evidence the ITC's affirmative material injury determination and remanded the matter to the Commission for further consideration. *See* HRS Wheat from Canada, USA–CDA–2003–1904–06 (panel decision) at 64 (June 7, 2005), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua03060e.pdf (last visited Apr. 24, 2007). On remand, the ITC reversed its original affirmative determination and concluded "that an industry in the United States is not materially injured, or threatened with material injury, by reason of imports of [HRS] wheat from Canada found to be subsidized and sold in the United States at less than fair value." HRS Wheat from Canada, USITC Pub. 3806, Inv. Nos. 701–TA–430B and 731–TA–1019B (Oct. 2005) (Remand).

The domestic wheat industry then challenged the ITC's negative determination before the NAFTA panel. On December 12, 2005, the NAFTA panel sustained the ITC's negative determination and ordered the U.S. NAFTA Secretary to issue a Notice of Final Panel Action. *See* HRS Wheat from Canada, USA–CDA–2003–1904–06 (panel decision on remand determination) at 5, 21–22 (Dec. 12, 2005), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/ua03061e.pdf (last visited Apr. 24, 2007). That notice was issued on December 23, 2005.

On January 30, 2006, the U.S. NAFTA Secretary published in the Federal Register a Notice of Completion of Panel Review, which by its terms was effective as of January 24, 2006. *See* Article 1904 NAFTA Panel Reviews; Completion of Panel Review, 71 Fed. Reg. 4896 (Dep't of Commerce Jan. 30, 2006) (notice).

On January 31, 2006, pursuant to 19 U.S.C. § 1516a(g)(5)(B), Commerce published in the Federal Register notice that the NAFTA panel's final decision was not in harmony with the Commission's original affirmative injury determination. *See* HRS Wheat from Canada: NAFTA Panel Decision, 71 Fed. Reg. 5050 (Dep't of Commerce Jan. 31, 2006) ("*Timken Notice*"); *see also Timken Co. v. United States*, 893 F.2d 337, 340 (Fed. Cir. 1990). This notice had an effec-

tive date of January 2, 2006.[4] The notice stated that it "serve[d] to suspend liquidation of entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after January 2, 2006, i.e., 10 days from the issuance of the Notice of Final Panel Action, at the current cash deposit rate." *Timken* Notice, 71 Fed. Reg. at 5051. Thus, the notice preserved from liquidation those entries made on or after January 2, 2006, but did nothing to prevent liquidation of earlier entries made with unfair trade duties in place.

Commerce took this action even though it recognized that the ITC's negative determination removed the foundation for the AD/CVD Orders. That is, the ITC's October 2003 affirmative injury determination had been reversed. In keeping with this reversal, on February 16, 2006, the Department published the Notice of Revocation, which "revok[ed] the countervailing duty order and antidumping duty order on [HRS] wheat from Canada. . . ." Notice of Revocation, 71 Fed. Reg. at 8275. Nonetheless, Commerce explicitly stated that the Notice of Revocation "[did] not affect the liquidation of entries made prior to January 2, 2006." *Id.*

Plaintiff's entries were made in September 2004. At the time plaintiff entered its merchandise, the goods were subject to the duties imposed by the then-existing AD/CVD Orders. As a result, the CWB paid cash deposits based on the 5.29 percent net subsidy rate and 8.86 percent antidumping duty margin.[5] Liquidation of these entries was suspended on October 31, 2005, when the CWB filed a request for an administrative review of the AD/CVD Orders. *See* Pl.'s Mem. 6. On February 26, 2007, however, the CWB withdrew its request for an administrative review, thereby exposing its entries to liquidation under the terms of the Notice of Revocation. *See* Pl.'s Mem. 7.

On February 21, 2007, nearly one year after the publication of the Notice of Revocation, the CWB commenced this action. Plaintiff now asks the court to enjoin preliminarily the liquidation of its merchandise to allow it to litigate the merits of its case.

---

[4] In *Timken Co. v. United States*, 893 F.2d 337, 340 (Fed. Cir. 1990), the Court of Appeals for the Federal Circuit held that 19 U.S.C. § 1516a(c)(1) required Commerce to "publish notice of a . . . decision not in harmony [with the original determination] within 10 days of the issuance of the decision. . . ." This requirement is equally applicable to NAFTA panel decisions not in harmony with the original challenged determination. *See* 19 U.S.C. § 1516a(g)(5)(B). Thus, even though the *Timken* Notice was published later than 10 days after the NAFTA panel decision, it obtained legal effect on January 2, 2006, the last day the notice could lawfully be published.

[5] According to Customs's fiscal year 2004 annual report, as of October 1, 2004, $176,171.37 in cash deposits had been paid on entries of Canadian HRS wheat. *See* http://www.cbp.gov/linkhandler/cgov/import/add_cvd/cont_dump/cdsoa_04/fy2004_annual/clearing_account.ctt/clearing_account.pdf (last visited April 24, 2007). This amount includes any cash deposits paid by the CWB on its September 2004 entries.

DISCUSSION

The Courts have developed the familiar four-part test requiring a party seeking injunctive relief to establish that: (1) it is likely to succeed on the merits of its complaint; (2)absent an injunction, it will be irreparably harmed; (3) the balance of hardships on the parties favors the movant; and (4) the public interest would be better served by the issuance of the injunction. *See FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983).

In determining whether the movant has carried its burden and satisfied the four-part test, "[n]o one factor, taken individually is necessarily dispositive." *FMC Corp.*, 3 F.3d at 427. Indeed, "[a]s a basic proposition, the matter lies largely within the sound discretion of the [Court]." *Id.*

I. Likelihood of Success on the Merits

The court first addresses plaintiff's claim that it is likely to succeed on the merits of its case. Here, the most significant obstacle facing it is defendant's assertion that the Court lacks jurisdiction to grant the relief sought.

The Court of Appeals for the Federal Circuit has held that "[t]he question of jurisdiction closely affects the [movant]'s likelihood of success on its motion for a preliminary injunction." *U.S. Ass'n of Imps. of Textiles & Apparel v. U.S. Dep't of Commerce*, 413 F.3d 1344, 1348 (Fed. Cir. 2005). The importance of addressing the question of jurisdiction when deciding a motion for a preliminary injunction is amplified by the Federal Circuit's statement that failure to do so is legal error. *See id.* While this rule may be most applicable where a court grants rather than denies a motion seeking an injunction, *see Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1353 (Fed. Cir. 2000), here, a discussion of jurisdiction appears to be mandatory.

Plaintiff claims that the Court may hear this case under its residual provision of jurisdiction set forth in 28 U.S.C. § 1581(i). The important caveat to finding jurisdiction under this provision is that "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). Thus, as an initial matter, the court must address defendant's contention that plaintiff is precluded from litigating its action under 28 U.S.C. § 1581(i)(4) because jurisdiction was available under 28 U.S.C. § 1581(c).[6]

---

[6] Congress granted the Court "exclusive jurisdiction of any civil action commenced under [19 U.S.C. § 1516a]." 28 U.S.C. § 1581(c).

A. Notice of Revocation and Reviewability Pursuant to 19 U.S.C. § 1516a

The court first takes up the question of whether the Notice of Revocation constitutes a reviewable determination under 19 U.S.C. § 1516a and thus may be reviewed pursuant to 28 U.S.C. § 1581(c). Defendant insists that this is this case, while plaintiff claims that the Notice of Revocation is not a reviewable determination and thus lies outside the Court's 28 U.S.C. § 1581(c) jurisdiction.[7] While plaintiff acknowledges that the Notice of Revocation contains a legal conclusion resulting from Commerce's application of the unfair trade laws, it maintains that the notice did not announce a final determination within the meaning of 19 U.S.C. § 1516a. Rather, plaintiff argues that the Notice of Revocation merely implemented the ITC's negative injury determination. Further, plaintiff asserts that because the Notice of Revocation reflects Commerce's administration and enforcement of the antidumping and countervailing duty laws, it is reviewable by this Court pursuant to 28 U.S.C. § 1581(i)(4).

The Department's primary objection to plaintiff's assertion of jurisdiction is that the "CWB could have challenged the Notice of Revocation pursuant to 28 U.S.C. § 1581(c). . . ." Def.'s Opp'n 4. Underlying the Department's position is its contention that the Notice of Revocation is a reviewable determination under 19 U.S.C. § 1516a(a)(2)(B)(i), and therefore judicial review was available at the time of its issuance. *See* Def.'s Opp'n 5. Thus, the Department claims that because plaintiff could have obtained the same remedy it now seeks had it proceeded under 28 U.S.C. § 1581(c), the exercise of jurisdiction under 28 U.S.C. § 1581(i) is prohibited. *See* Def.'s Opp'n 4 (citing *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006); *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992)).

Specifically, the Department states that in issuing the Notice of Revocation:

> Commerce reapplied the antidumping duty statutes with respect to the issuance of antidumping duty orders and concluded that the orders should be revoked only prospectively. In essence, Commerce amended its determinations in the investiga-

---

[7] The dispute centers on whether the Notice of Revocation falls within the terms of 19 U.S.C. § 1516a(a)(2)(B)(i), which provides for judicial review of:

> [f]inal affirmative determinations by the administrating authority and by the Commission under section 1671d [final determinations regarding countervailable subsidies] or 1673d [final determinations regarding sales at less than fair value] of this title, including any negative part of such a determination (other than a part referred to in clause (ii)).

> tions, which pursuant to [*Freeport Minerals Co. v. United States*, 758 F.2d 629 (Fed. Cir. 1985)],[8] were reviewable pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).

Def.'s Opp'n 7.

In keeping with this argument, Commerce asserts that because it believes the Notice of Revocation was a final determination subject to review in this Court pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), plaintiff untimely commenced the instant action. According to Commerce:

> CWB is impermissibly attempting [to] bring a claim that it could have brought pursuant to 28 U.S.C. § 1581(c) more than a year ago, when the Notice of Revocation was issued. Such a claim is untimely pursuant to 19 U.S.C. § 1516a(a)(2)(A), and CWB may notcircumvent that statutory bar by attempting to invoke the Court's jurisdiction pursuant to section 1581(i).

Def.'s Opp'n 4–5.[9] Thus, because plaintiff waited more than a year from the publication of the Notice of Revocation to sue, defendant insists that its claim is barred by the 30-day statute of limitations applicable to determinations reviewable under 19 U.S.C. § 1516a. *See* 28 U.S.C. § 2636(c).

Commerce's arguments notwithstanding, the court finds that the Notice of Revocation is not a reviewable final determination under 19 U.S.C. § 1516a and, as a result, plaintiff had no remedy available

---

[8] As support for its position, Commerce relies on the Federal Circuit's decision in *Freeport Minerals Co. v. United States*, 758 F.2d 629 (Fed. Cir. 1985). The court finds this reliance misplaced. The controversy here involves a legal conclusion found in the Notice of Revocation. *Freeport Minerals* involved a challenge to a final determination made on remand. Such final determinations are indeed reviewable under 19 U.S.C. § 1516a. As in *Tembec, Inc. v. United States*, 30 CIT ____ , ____ , 441 F. Supp. 2d 1302, 1316 n.19 (2006) ("*Tembec I*"), defendant misstates the "matter" to be reviewed. Here, the matter is the validity of the administration and enforcement of a final determination, not the validity of the final determination itself. *See Tembec I*, 30 CIT at ____ , 441 F. Supp. 2d at 1318 ("Plaintiffs have brought a challenge to the administration and enforcement of a determination, not to the validity of the determination itself. Consequently, the availability of a remedy under § 1581(c) as to the underlying determination does not bar suit under § 1581(i)."). Thus, the teaching of *Freeport Minerals* does not apply.

[9] Pursuant to 19 U.S.C. § 1516a(a)(2)(A):

> Within thirty days after—
>
> (i) the date of publication in the Federal Register of . . .
>
> (II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B) . . .
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

19 U.S.C. § 1516a(a)(2)(A).

to it under 28 U.S.C. § 1581(c). While the agency may have had internal discussions regarding the contents of the Notice of Revocation, its legal conclusion that the revocation of the orders should be prospective only, was reached without notice, public hearings or briefing by the parties and was outside of the reviewable determinations found in 19 U.S.C. § 1516a. In other words, the Notice of Revocation "was *not* made during any proceeding that would culminate in a determination for which judicial review is provided under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c)." *Ceramica Regiomontana, S.A. v. United States*, 5 CIT 23, 26, 557 F. Supp. 596, 600 (1983) (emphasis in original); *see also Consol. Fibers, Inc. v. United States*, 30 CIT ___ , ___ , 465 F. Supp. 2d 1338, 1341 (2006) (finding no jurisdiction under 28 U.S.C. § 1581(c) to hear plaintiff's claim challenging ITC's denial of its request for reconsideration of ITC final determination and stating that "[h]ad the Commission commenced a reconsideration proceeding, then the resulting reconsideration determination would have been reviewable under 28 U.S.C. § 1581(c) . . . ").

In like manner, the court finds without merit the Department's contention that the Notice of Revocation, because it revoked the AD/CVD Orders for all entries made on or after January 2, 2006, and reaffirmed the orders' application to all other entries, is a reviewable determination as defined by 19 U.S.C. § 1516a(a)(2)(B)(i). *See* Def.'s Opp'n 5. This argument is merely a different iteration of Commerce's previous claim.

Under 19 U.S.C. § 1516a(a)(2)(B)(i), this Court may review final affirmative and negative determinations made by Commerce regarding countervailable subsidies or sales at less than fair value. The Department urges that the Notice of Revocation was a final affirmative determination in that it reasserted the legal effect of the affirmative determinations in the AD/CVD Orders with respect to entries made prior to January 2, 2006, and was a negative determination with respect to subject entries made after that date. In other words, the Department claims that the Notice of Revocation contains both a final affirmative and a final negative determination.

This contention is impossible to credit. In *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347 (Fed. Cir. 2006), the Federal Circuit instructed this Court to "look to the true nature of [an] action." *Id.* at 1355 (internal quotation marks & citation omitted). The true nature of plaintiff's case can be seen by examining what it is not. That is, it is not a case "contesting any factual findings or legal conclusions" contained in the final determinations of either the ITC or Commerce, following their investigations. 19 U.S.C. § 1516a(a)(1). Both Commerce's and the ITC's final determinations were published before the Notice of Revocation. The conclusion that the AD/CVD Orders should be revoked only prospectively was found in neither. Indeed, as the prevailing party, plaintiff had no dispute with the ITC's

final negative determination that resulted in the Notice of Revocation. That being the case, the teaching of *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003), is useful.

In *Consolidated Bearings*, an importer challenged Commerce's liquidation instructions to Customs, seeking to compel the application of the antidumping duty rates from the Department's final determination to its merchandise. The Federal Circuit confirmed jurisdiction under 28 U.S.C. § 1581(i) after finding that "Consolidated [did] not object to the final results. Rather Consolidated [sought] application of those final results to its entries. . . ." *Consol. Bearings*, 348 F.3d at 1002. The Federal Circuit based its finding on its conclusion that plaintiff's "case involve[d] a challenge to [Commerce's] 1998 instructions, which is not an action defined under [19 U.S.C. § 1516a]." *Id*. The Federal Circuit further found that "[b]ecause Consolidated [was] not challenging the final results, [28 U.S.C. § 1581(c)] is not and could not have been a source of jurisdiction for this case." *Id*. Finally, after concluding that jurisdiction did not lie pursuant to § 1581(c), the Federal Circuit found the case "squarely within the provisions of subsection (i)." *Id*. Specifically, the Federal Circuit observed that "Commerce's liquidation instructions direct Customs to implement the final results of administrative reviews. Consequently, an action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results." *Id*.

Likewise, the Federal Circuit found in *Shinyei Corp. of America v. United States*, 355 F.3d 1297 (Fed. Cir. 2004), that Commerce's liquidation instructions were reviewable under 28 U.S.C. § 1581(i)(4):

> As we have recently held, a challenge to Commerce instructions on the ground that they do not correctly implement the published, amended administrative review results, "is not an action defined under [19 U.S.C. § 1516a] of the Tariff Act." [19 U.S.C. § 1516a] is limited on its face to the judicial review of "determinations" in countervailing duty and antidumping duty proceedings.

Id. at 1309 (quoting *Consol. Bearings*, 348 F.3d at 1002).

The case law from the Federal Circuit, then, confirms that the Notice of Revocation is not a reviewable determination within the meaning of 19 U.S.C. § 1516a and thus plaintiff's challenge to its contents could not be heard by this Court pursuant to 28 U.S.C. § 1581(c). That is, if a legal conclusion, found in liquidation instructions based on Commerce's own final determination, is reviewable under 28 U.S.C. § 1581(i), then a legal conclusion found in the Notice of Revocation resulting from an ITC final determination is too.

The court finds that the Notice of Revocation implemented the ITC's final determination that domestic wheat producers were not injured or threatened with injury by imports of Canadian HRS

wheat. Thus, although containing a legal conclusion with respect to the prospective application of the revocation, the Notice of Revocation cannot be categorized as a final affirmative determination subject to judicial review under 19 U.S.C. § 1516a(a)(B)(i) and 28 U.S.C. § 1581(c).

B. Choice of Forum and Jurisdiction

The court now turns to the question of whether plaintiff's decision to challenge the original ITC affirmative injury determination before a NAFTA panel rather than in this Court precludes jurisdiction over its claim under 28 U.S.C. § 1581(i).

Commerce asserts that the "CWB could also have obtained an adequate remedy by challenging the ITC's original 2003 determination in this Court pursuant to section 1581(c) and, thus, section 1581(i) jurisdiction is unavailable. . . ." Def.'s Opp'n 7–8. Put another way, the Department maintains that by choosing to appeal the Commission's original affirmative injury determination to a NAFTA panel, the CWB is now "foreclosed from seeking relief from the Court, pursuant to 28 U.S.C. § 1581(i), to enforce the NAFTA panel decision or to obtain relief that it might have obtained had it elected to proceed in this Court in the first place." Def.'s Opp'n 8.

The Department recognizes that a similar line of argument was found wanting by this Court in *Tembec, Inc. v. United States*, 30 CIT ___, 441 F. Supp. 2d 1302 (2006) ("*Tembec I*").[10] *Tembec I* involved plaintiffs' appeal of an affirmative injury determination from the ITC to a NAFTA panel. The panel found the ITC determination unsupported by substantial evidence and remanded the matter to the Commission. On remand, the Commission issued a negative injury determination. Thereafter, Commerce revoked the unfair trade orders prospectively.

---

[10] In support of its contention that the *Tembec I* rationale with respect to jurisdiction no longer applies, Commerce cites the Federal Circuit's recent decision in *International Custom Products, Inc. v. United States*, 467 F.3d 1324 (Fed. Cir. 2006) ("*ICP*"). In Commerce's view, the *Tembec I* Court incorrectly focused on the nature of plaintiffs' claims instead of examining the remedies available under the other subsections of section 1581. Here, Commerce maintains that the Federal Circuit's holding in *ICP* precludes the exercise of jurisdiction under 28 U.S.C. § 1581(i) because "[r]elief was 'otherwise available,' but [plaintiff] simply elected not to pursue such relief." Def.'s Opp'n 8. Commerce further asserts that in this case, when determining the propriety of exercising jurisdiction under 28 U.S.C. § 1581(i), the Court must, in accordance with *ICP*, "focus upon the remedies available and upon the fact that CWB could have received the same remedy it seeks here, had it originally challenged the ITC's 2003 injury determination," in this Court. Def.'s Opp'n 10.

The court finds nothing in *ICP* requiring it to abandon the reasoning in *Tembec I* that a party's decision to challenge the substance of a final determination before a NAFTA panel does not preclude it from contesting the administration and enforcement of that final determination in this Court. Indeed, as has been previously noted, the CWB's challenge is to a legal conclusion found in a notice of revocation, which is not a final determination within the meaning of 19 U.S.C. § 1516a. Thus, plaintiff had no avenue to relief under 28 U.S.C. § 1581(c).

Unlike here, the plaintiff in *Tembec I* also instituted a parallel proceeding before the World Trade Organization ("WTO"). That proceeding resulted in an affirmative injury determination by the ITC and a direction by the United States Trade Representative ("USTR") to Commerce to amend the unfair trade orders to implement the determination. The plaintiffs in *Tembec I* filed a lawsuit in this Court challenging the action taken by the USTR directing the implementation of the determination. *See Tembec I*, 30 CIT at ___ , 441 F. Supp. 2d at 1306.

The *Tembec I* Court found that plaintiffs' appeal of the final determination to a NAFTA panel did not preclude the exercise of jurisdiction by this Court to hear a separate challenge to the USTR's administration and enforcement of the determination. Thus, "the court [had] jurisdiction to review the administration and enforcement of that determination regardless of where the substance of the determination [was] being reviewed." *Tembec I*, 30 CIT at ___ , 441 F. Supp. 2d at 1316 n.19. In addition, the *Tembec I* Court acknowledged the general rule reiterated by the Federal Circuit in *International Custom Products, Inc. v. United States*, 467 F.3d 1324 (Fed. Cir. 2006), that "section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate," *Tembec I*, 30 CIT at ___ , 441 F. Supp. 2d at 1317 (internal quotation marks, citations & alteration omitted), but stated that "[t]his constraint does not mean, however, that Plaintiffs must forgo their right to NAFTA panel review of the substance of [a determination] in order to seek review of a completely separate action taken to administer and enforce [the determination]." *Id.* at ___ , 441 F. Supp. 2d at 1317.

Likewise, the CWB's challenge to the ITC's original affirmative injury determination before a NAFTA panel did not oust this Court of jurisdiction to entertain its challenge to Commerce's administration and enforcement of that determination. Therefore, because: (1) the legal conclusion found in the Notice of Revocation was not reviewable pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c); and (2) plaintiff's decision to contest the ITC's original affirmative injury determination before a NAFTA panel does not preclude the exercise of jurisdiction to hear plaintiff's challenge to the administration and enforcement of that determination, the court finds that it has jurisdiction over plaintiff's claim pursuant to 28 U.S.C. § 1581(i)(4).

C. Prospective Revocation of AD/CVD Orders

As plaintiff's asserted basis of jurisdiction has been found to be valid, the court now addresses the likelihood that plaintiff will succeed on the substantive merits of its case. While the applicable standard for determining whether a movant has satisfied the likelihood of success on the merits portion of the four-part test remains un-

settled by the Federal Circuit, it is apparent that the court must, at minimum, weigh plaintiff's arguments in favor of its position against those raised in opposition by defendant. *See U.S. Ass'n of Imps. of Textiles and Apparel* 413 F.3d at 1347 ("[T]he movant's evidence and arguments must actually be weighed against those of the non-movant to determine whether the movant's likelihood of success meets the applicable standard, whatever that standard may be.") (citations & footnote omitted).

The parties agree that plaintiff's case hinges on the interpretation and application of 19 U.S.C. § 1516a(g)(5)(B) and (C). Section 1516a(g)(5)(B) contains the general rule for the liquidation of pre-*Timken* notice entries and provides:

> In the case of a determination for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, entries of merchandise covered by such determination shall be liquidated in accordance with the determination of the administering authority or the Commission, if they are entered, or withdrawn from warehouse, for consumption, on or before the date of publication in the Federal Register by the administering authority of notice of a final decision of a binational panel, or of an extraordinary challenge committee, not in harmony with that determination. Such notice of a decision shall be published within 10 days of the date of the issuance of the panel or committee decision.

19 U.S.C. § 1516a(g)(5)(B).

There is, however, an exception to the general rule in 19 U.S.C. § 1516a(g)(5)(C), which is entitled "Suspension of liquidation" and states:

> Notwithstanding the provisions of subparagraph (B), in the case of a determination described in clause (iii) [administrative review] or (vi) [scope ruling] of subsection (a)(2)(B) of this section for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, the administering authority, upon request of an interested party who was a party to the proceeding in connection with which the matter arises and who is a participant in the binational panel review, shall order the continued suspension of liquidation of those entries of merchandise covered by the determination that are involved in the review pending the final disposition of the review.

19 U.S.C. § 1516a(g)(5)(C)(i).

For Commerce, the language of § 1516a(g)(5)(B) applies and all plaintiff's entries made prior to the publication of the *Timken* **Notice are to be liquidated in accordance with the original determination.** *See* Def.'s Opp'n 13. For plaintiff, the exception found

in § 1516a(g)(5)(C) applies and preserved its entries for liquidation with no duties following revocation of the AD/CVD Orders.

Plaintiff relies on *Tembec II* as support for its position that its entries, all of which were made prior to the *Timken* Notice, should be liquidated in accordance with the ITC's negative injury determination. In *Tembec II*, the Court found that the general rule of 19 U.S.C. § 1516a(g)(5)(B) did not apply to pre-*Timken* notice entries when liquidation of those entries had been suspended. In that case, the court found that 19 U.S.C. § 1516a(g)(5)(C) controlled. *See Tembec II*, 30 CIT at ___, 461 F. Supp. 2d at 1367 ("Entries, the liquidation of which has been suspended, cannot, then, be liquidated with AD/CV duties under these conditions. . . . Rather, Congress provided for a suspension of liquidation to keep entries available for liquidation in accordance with law."); *see also Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1577 (Fed. Cir. 1990) ("The flaw in the government's argument is that without a valid antidumping determination in the original order, there can be no valid determination in a later annual review."). Thus, the *Tembec II* Court ordered Commerce to instruct Customs to liquidate all of plaintiffs' subject entries, including those made prior to the *Timken* notice, without unfair trade duties.

The court cannot discern a substantial difference between the facts presented in this case and those faced by the Court in *Tembec II*. Therefore, this Court's decision in *Tembec II* indicates that plaintiff will likely succeed on the merits of its case and thus this part of the four-part test favors granting plaintiff's motion.

II. Irreparable Harm

The next part of the four-part test requires a movant to demonstrate that it will suffer irreparable harm in the absence of an injunction. Plaintiff asserts that it will be irreparably harmed if liquidation is not enjoined because "[i]f Customs is permitted to liquidate the CWB's entr[ies] at issue in this action prior to the completion of judicial review, the CWB may be denied its only remedy for Commerce's failure to revoke the AD/CVD Orders and liquidate its entr[ies] in accordance with law." Pl.'s Mem. 10. In other words, plaintiff contends that if liquidation is not enjoined, Customs may liquidate its pre- January 2, 2006, entries with the unfair trade duties in place and the CWB will lose its opportunity to reclaim its deposits with respect to those entries. The Department does not oppose plaintiff's assertion of irreparable harm. *See* Tr. Oral Argument 24:7–8 ("Likewise, turning to irreparable injury, we agree that . . . under [*Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983)] plaintiff[ ] would meet that prong.").

It has long been established that liquidation renders without meaning a movant's "statutory right to obtain judicial review" with respect to the liquidated entries and, thus, that the "consequences of

liquidation do constitute irreparable injury." *Zenith*, 710 F.2d at 810 ("The statutory scheme has no provision permitting reliquidation in this case or imposition of higher dumping duties after liquidation if [plaintiff] is successful on the merits. Once liquidation occurs, a subsequent decision by the trial court on the merits . . . can have no effect on the dumping duties assessed. . . ."). Here, plaintiff opened up its pre-January 2, 2006, entries to liquidation by withdrawing its request for an administrative review. If some or all of those entries are liquidated, plaintiff would lose its right to judicial review as to those entries, although other issues might remain to be litigated. Therefore, the court finds that plaintiff has demonstrated that as to any pre-January 2, 2006, entries that face liquidation, it will suffer irreparable harm absent a preliminary injunction. This factor, then, also favors granting plaintiff's motion.

III. Balance of Hardships

"In evaluating whether to grant a motion for injunctive relief, the court must 'determine which party will suffer the greatest adverse effects as a result of the grant or denial of the preliminary injunction.' " *Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Protection*, 30 CIT ___, ___, 465 F. Supp. 2d 1300, 1329 (2006) (quoting *Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1250, 121 F. Supp. 2d 684, 688 (2000)).

Plaintiff contends that the balance of hardships leans in its favor because only an injunction can "preserve fully the CWB's statutory right to challenge the failure of Commerce to act in accordance with law." Pl.'s Mem. 13. For plaintiff, this outweighs any harm the United States might endure because the government "already holds the CWB's antidumping and countervailing duty cash deposits for the relevant entr[ies], which ensures that its rights are fully protected." Pl.'s Mem. 13–14 (citing *Böhler-Uddeholm Corp. v. United States*, 23 CIT 801, 803 (1999) (not reported in the Federal Supplement)) (internal quotation marks omitted).

For its part, the Department states that "the balance of hardships . . . counsel[s] against issuance of an injunction concerning a question that could have been before the international body that is charged with making the same findings that plaintiff[ ] [is] asking the Court to make." Def.'s Opp'n 19. In other words, the Department relies on its jurisdictional arguments to support its assertion that the balance of hardships leans in its favor.

The court finds that defendant will suffer comparably less harm as the result of an injunction than would plaintiff in the absence of equitable relief. Here, the United States currently holds plaintiff's cash deposits. Therefore, "at most, the decision to grant an injunction . . . will only delay liquidation." *Fundicao Tupy S.A. v. United States*, 11 CIT 635, 638, 671 F. Supp. 27, 30 (1987). Plaintiff,

on the other hand, risks losing a portion of its deposits. Thus, the court concludes that the balance of hardships weighs in favor of granting plaintiff's motion.

IV. Public Interest

The final part of the four-part test requires the movant to demonstrate that the public interest would be better served by the issuance of an injunction. Plaintiff contends that this part favors granting its motion because "the public interest is best served by ensuring that duties are assessed under the trade statutes in accordance with law." Pl.'s Mem. 14. That is, because it maintains that Commerce acted unlawfully by limiting the effect of the Notice of Revocation to those entries made on or after January 2, 2006, plaintiff argues that final judicial resolution of the legality of Commerce's application of the unfair trade statute would, no matter the outcome, assure the public that Commerce was or would ultimately be complying with the law.

The Department urges that "the integrity of the NAFTA binational panel process and the public policy inherent in Congress'[s] clear separation between binational panels and the courts would suffer, both to the detriment of the Executive Branch and to public policy in general" were the injunction to be issued. Def.'s Opp'n 19–20.

"[T]he public interest is served by ensuring that [Commerce] complies with the law, and interprets and applies [the] international trade statutes uniformly and fairly." *Ugine-Savoie Imphy*, 24 CIT at 1252, 121 F. Supp. 2d at 690 (internal quotation marks & citations omitted) (third alteration in original). Plaintiff's complaint raises an important question concerning whether Commerce complied with the law when it issued the Notice of Revocation. Thus, because of the public's interest in ensuring that duties are assessed in accordance with law, this factor also favors granting plaintiff's motion.

CONCLUSION

Based on the foregoing, the court finds that plaintiff has demonstrated its entitlement to injunctive relief. Therefore, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is granted; and it is further

ORDERED that the parties consult and jointly submit to the court the form of the preliminary injunction on or before May 7, 2007. The parties' submission shall be made to Casey Ann Cheevers, Case Manager, United States Court of International Trade, One Federal Plaza, New York, New York, 10278.