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Emerging Customs Issues for Petitioners in Antidumping and Countervailing Duty Cases

MICHAEL P. MABILE AND JEFFREY M. TELEP*

I. Introduction

By necessity, most interaction between the private sector and the Bureau of Customs and Border Protection (CBP)¹ of the U.S. Department of Homeland Security involves U.S. companies engaged in importing and exporting merchandise. This will surely remain the case in the future because most issues that arise in the customs context, such as the classification and valuation of goods and the assessment of duties, directly involve only those companies. U.S. manufacturers and producers that compete with imported goods in the U.S. market, including petitioners in antidumping and countervailing duty (AD/CVD) investigations, generally have little reason to interact with CBP on a regular basis.

Even where the customs law explicitly envisions a role for the domestic industry, the law is infrequently used. For example, domestic producers may petition CBP under section 516 of the Tariff Act of 1930² to determine whether the appraised value, classification, or rate of duty of imported merchandise is correct.³ Such petitions, however, comprise only a very small part of CBP's activities. In particular, there is infrequently any reason in the AD/CVD context for domestic producers to file such a petition.

The focus of domestic producers with respect to AD/CVD proceedings is normally, and understandably, on achieving the best result before the International Trade Administration of the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC). These agencies are responsible for conducting AD/CVD investigations and

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1. CBP was formerly the U.S. Customs Service, part of the U.S. Department of the Treasury. It was moved to the new Department of Homeland Security by the Homeland Security Act of 2002. Homeland Security Act, Pub. L. 107-296, 116 Stat. 2135 (2002).

2. 19 U.S.C. § 1516 (2002).

3. Section 516 requires Customs, upon written request by a domestic interested party, to "furnish the classification and the rate of duty imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by such interested party." If it believes that the appraised value, classification, or rate of duty is incorrect, the interested party may file a petition seeking a determination to that effect by Customs. The denial of a petition may be appealed to the U.S. Court of International Trade. 28 U.S.C. § 1581(b) (2002); 28 U.S.C. § 2631(b) (2002).

reviews of outstanding AD/CVD orders.⁴ CBP's role with respect to such cases is far more limited—essentially carrying out Commerce's instructions for the suspension of liquidation⁵ of entries subject to investigation, collecting cash deposits of estimated AD/CVD duties, and assessing such duties upon liquidation.⁶

Indeed, from the domestic petitioner's viewpoint, much of CBP's role in the AD/CVD process traditionally has been a mystery because information related to the collection of cash deposits and the assessment of duties has been treated as business proprietary information of the importer and, therefore, confidential. Although petitioners' counsel normally have access under administrative protective orders to business proprietary information submitted to Commerce and the ITC by foreign exporters and U.S. importers in an AD/CVD investigation or administrative review,⁷ they have no similar access to confidential information in the hands of CBP with respect to the liquidation of entries and assessment of duties. Even information on the timing and nature of CBP's actions is difficult for petitioners to obtain. This makes it exceptionally difficult to monitor whether CBP is complying with Commerce's instructions and will in fact collect all the duties that are owed.

Recently, however, domestic industry interaction with CBP for the purpose of ensuring the proper application and enforcement of AD/CVD duties has been increasing. The principal catalyst for this change is the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA),⁸ which is commonly known as the "Byrd Amendment." Under the CDSOA, domestic petitioners and other domestic producers that supported AD/CVD petitions receive annual distributions of duties assessed under AD/CVD orders.⁹ CBP's regulations implementing the CDSOA require it to periodically publish information regarding the amounts assessed under each AD/CVD order.¹⁰

4. The authority and responsibilities of Commerce and the ITC in carrying out AD/CVD investigations are set forth in 19 U.S.C. §§ 1671–1677n.

5. "Liquidation means the final computation or ascertainment of the duties . . . accruing on an entry." 19 C.F.R. § 159.1. *See also* *American Permac, Inc. v. United States*, 642 F. Supp. 1187, 1190 (Ct. Int'l Trade 1986) (liquidation refers to the "the final computation by the Customs Service of all duties, including any antidumping or countervailing duties, accruing on that entry"). The U.S. Court of Appeals for the Federal Circuit has noted that "Customs merely follows Commerce's instructions in assessing and collecting duties." *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994).

6. *See* 19 U.S.C. §§ 1671b(d)(2) (2002); 1671d(c) (2002); 1671e (2002); 1673b(d)(2) (2002); 1673d(c) (2002); 1673e (2002).

7. *See* 19 U.S.C. § 1677f(c) (2002); 19 C.F.R. §§ 207.7 (2002) (ITC), 351.305 (2002) (Commerce).

8. Continued Dumping and Subsidy Offset Act (Byrd Amendment) of 2000, 19 U.S.C. § 1675c (2002) (enacted on Oct. 28, 2000, as part of the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act). Reports issued by a World Trade Organization (WTO) dispute settlement panel and the WTO Appellate Body have found that the CDSOA is inconsistent with U.S. obligations under the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, the WTO Agreement on Subsidies and Countervailing Measures, and the General Agreement on Tariffs and Trade 1994. *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/R (Sept. 16, 2002); *United States—Continued Dumping and Subsidy Offset Act of 2000*, AB-2002-7 (Jan. 16, 2003). As of this writing, the United States has not determined what actions, if any, it will take to implement these reports.

9. Prior to the CDSOA, duties collected under AD/CVD orders were deposited into the U.S. Treasury to be used for general purposes. *See* *Huaiyin Foreign Trade Corp. v. U.S. Dept. of Commerce*, 201 F. Supp. 2d 1351, 1362 (Ct. Int'l Trade 2002). As discussed in *Huaiyin*, the purpose of the CDSOA, as set forth in the Congressional findings, is to strengthen the remedial purpose of the AD/CVD law by addressing the continued dumping or subsidization of imported products after the imposition of an AD/CVD order that prevents market prices from returning to fair levels. *Id.* at 1365.

10. *See* 19 C.F.R. §§ 159.62(b)(1) (2002) (requiring Customs to publish notice of its intention to distribute assessed duties under the CDSOA annually, including publication of the dollar amount available for distribution

Because it administers distributions of duties under the CDSOA, CBP is necessarily the initial forum for nearly all issues raised by domestic producers regarding interpretation and application of the CDSOA. As discussed below, CBP's decision making under the CDSOA is subject to judicial review in the U.S. Court of International Trade (CIT).

In addition, because the amount of duties available to domestic producers under the CDSOA depends on the duties assessed under a given AD/CVD order, the CDSOA has given domestic producers a direct financial incentive to pay attention to whether CBP has done its job properly in assessing AD/CVD duties, in particular whether CBP has assessed the full amount of duties owed by the importer. In turn, domestic producers' requests for information regarding CBP's liquidation of duties have caused CBP to ease its policy of strict confidentiality. Nevertheless, the information that domestic producers are able to obtain with respect to the liquidation of entries and assessment of duties subject to AD/CVD orders remains both limited and after-the-fact. Thus, in part as a result of the CDSOA, domestic producers are taking increasing interest in whether CBP has properly carried out its responsibilities in AD/CVD cases and are raising previously untested legal issues with respect to the legality of CBP's actions and the ability of domestic producers to obtain judicial review of such actions.

II. The Continued Dumping and Subsidy Offset Act of 2000

A. WHAT THE ACT PROVIDES

The CDSOA, which was enacted in 2000, provides for the annual distribution to "affected domestic producers" of duties assessed pursuant to an AD or CVD order.¹¹ The term "affected domestic producer" is defined as a "manufacturer, producer, farmer, rancher, or worker representative" that was a petitioner or interested party in support of a petition with respect to which an AD or CVD order has been entered and that remains in operation.¹² A company cannot be an affected domestic producer if it has ceased the production of the product covered by the order or has been acquired by a company or business that is related to a company that opposed the AD or CVD investigation.¹³

The CDSOA requires the ITC to provide CBP a list of the affected domestic producers with respect to each outstanding order by identifying the names of petitioners and other persons that supported the petition by letter or questionnaire response.¹⁴ Based on the ITC's list, CBP distributes the duties assessed during each fiscal year under a given AD/CVD order to affected domestic producers that file certifications seeking a distribution.

The duties are distributed to the affected domestic producers on a pro rata basis based on the "qualifying expenditures" each has incurred since the issuance of the AD or CVD order.¹⁵ Such expenditures are defined as those incurred in the following categories:

as of June 1 of the subject fiscal year with respect to each AD/CVD order); § 159.64(g)(2)(i) (2002) (requiring Customs' annual report on disbursements under the CDSOA to include information regarding the amount in the clearing account for each AD/CVD order at the beginning of each fiscal year that is potentially available for distribution under the CDSOA).

11. 19 U.S.C. § 1675c(a) (2002).

12. 19 U.S.C. § 1675c(b)(1) (2002).

13. *Id.*

14. 19 U.S.C. § 1675c(d)(1) (2002).

15. 19 U.S.C. § 1675c(d)(3) (2002).

manufacturing facilities; equipment; research and development; personnel training; acquisition of technology; health care benefits to employees paid for by the employer; pension benefits to employees paid for by the employer; environmental equipment; training or technology; acquisition of raw materials and other inputs; and working capital or other funds needed to maintain production.¹⁶

B. ISSUES ARISING UNDER THE CDSOA

The CDSOA contains a number of terms, such as “affected domestic producer” and “qualifying expenditure,” that have no counterparts elsewhere in the AD/CVD and customs laws. It also does not expressly address many of the varied factual situations that have arisen in the administration of the law. The CDSOA was enacted as a result of an amendment during the House-Senate Conference Committee on the fiscal year 2001 Agricultural Appropriations Act.¹⁷ Consequently, it has no explanatory committee reports and little other legislative history to guide agency or judicial interpretation of the statutory language.

For example, the categories of “qualifying expenditures” listed in the CDSOA are described both broadly and vaguely, providing ample room for differing interpretations as to the kinds of expenditures covered by each category. For example, do expenses for the “acquisition of raw materials and other inputs”¹⁸ include such “inputs” as labor and energy costs? Is the phrase “other funds needed to maintain production”¹⁹ intended as a broad “catch-all” to incorporate types of expenses not explicitly covered by the other categories? The answers to these and similar questions have important consequences. Because affected domestic producers receive distributions on a pro rata basis, the amount of duties a company will receive from CBP will depend in part on how broadly or conservatively the producer chooses to define the expenses falling within a category of qualifying expenditures.

Even more critical questions of statutory interpretation have arisen with respect to the eligibility of companies as “affected domestic producers.” An issue that arose as soon as the ITC and CBP began to administer the CDSOA was whether a domestic producer is eligible to receive a distribution of duties when it was not a petitioner or supporter of the petition, but is instead a successor to such a petitioner or supporter. Given the considerable length of time some AD/CVD orders have been in effect, this was a crucial issue because many companies that supported the original investigations had in the meantime been acquired by or merged into another entity or had sold the assets that were involved in producing the product that competed with imports subject to an AD/CVD order.

The ITC interpreted the CDSOA as only giving it authority to determine the identities of the entities that were petitioners or supporters of the petition at the time of the original AD/CVD investigation.²⁰ It therefore declined to consider putting successor companies on the list of affected domestic producers that it forwarded to CBP.²¹ CBP, however, deter-

16. 19 U.S.C. § 1675c(b)(4) (2002).

17. 19 U.S.C. § 1675c (2002) (enacted on Oct. 28, 2000, as part of the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act).

18. 19 U.S.C. § 1675c(b)(4)(I).

19. 19 U.S.C. § 1675c(b)(4)(J).

20. See, e.g., Letter from Stephen A. Koplan, ITC Chairman, to Joseph W. Dorn, King & Spalding (May 22, 2001), available at <http://dockets.usitc.gov/eol/public>.

21. *Id.* (denying request to substitute North Texas Cement Company for Gifford-Hill Cement Company on the ITC's list of affected domestic producers on the ground that the “significance of events subsequent to

mined that it was appropriate for it to make distributions to a "successor company," that is, "a company that has succeeded to the operations of" an affected domestic producer appearing on the ITC's list.²²

CBP's reasonable position that it was appropriate to make distributions of AD/CVD duties to successor companies, however, raised a new set of questions. Under what circumstances is a company considered the successor to a previously eligible company, that is, when does it "succeed to the operations of"²³ that company?

The potential factual variations are nearly endless. Consider the example of a company that sells its operations covered by the AD/CVD order to more than one company. Can a single affected domestic producer have more than one "successor"? What if the original petitioner or supporter of the petition continues to make the product in question, even though it sold part of its operations to another company that also produces the product? Can there be a "successor" to an affected domestic producer that still exists?

Some factual situations are complex and raise more than one potential issue. Consider the hypothetical example of two companies, both of which are domestic producers of the product subject to an AD/CVD order. Company A was a petitioner, while Company B filed a questionnaire response with the ITC indicating that it neither supported nor opposed the petition. Under the ITC's interpretation of the CDSOA, only Company A is an affected domestic producer, because Company B did not affirmatively support the petition in its questionnaire response.²⁴

Several years after the issuance of the AD/CVD order, Company B acquires Company A. Can Company B, which was previously ineligible, become eligible as the successor to Company A? Would it make a difference if Company B originally opposed the petition, rather than taking no position? What qualifying expenditures may Company B claim as the successor to Company A? May it claim only the expenditures relating to the operations it acquired from Company A, or may it claim its own expenditures as well? May it claim all the expenditures of Company A, including those incurred prior to the acquisition? If it can claim its own expenditures, may it include its expenditures prior to its acquisition of

the Commission's original investigation appears to be governed by section 754(d)(2) & (3) of the Tariff Act of 1930, which provides that the Customs Service shall request certifications from potentially eligible affected domestic producers before distributing funds.").

22. 19 C.F.R. § 159.61(b)(1)(i) (2002). See also *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546, 48,547 (Sept. 21, 2001). On November 28, 2003, despite its regulation providing for the distribution of duties under the CDSOA to successor companies to affected domestic producers, CBP notified companies claiming successor status that it was withholding CDSOA payments to such companies for fiscal year 2003. See Letter from Myles Harmon, Director, Commercial Rulings Division, to claimants (Nov. 28, 2003). CBP stated that the CIT "held in *Candle Corp. of America v. United States*, that although 19 C.F.R. § 159.61(b)(1)(i) provides that a successor company may file a certification to claim an offset as an affected domestic producer on behalf of a predecessor company, 'eligibility for certification under the regulation is subject to the limitations imposed by 19 U.S.C. § 1675c, which requires that a claimant (1) have supported the petition, and (2) remain in operation.'" *Id.* (quoting *Candle Corp.*). CBP is withholding payments to claimed successors "pending the U.S. Court of Appeals for the Federal Circuit's decision" in *Candle Corp. Id.* CBP's interpretation of the CIT's holding in *Candle Corp.* appears overly broad, because that case did not raise any question with respect to the validity of CBP's successorship regulation, and as a result the issue may not be settled by the Federal Circuit's decision on appeal.

23. 19 C.F.R. § 159.61(b)(1) (2002).

24. See Letter from Deanna Tanner Okun, Chairman, U.S. International Trade Commission, to Joseph W. Dorn, King & Spalding (July 9, 2002).

Company A? Obviously, the answers to such questions will affect not only a company's eligibility, but also the share of duties it will receive under the CDSOA relative to other members of the domestic industry.

Challenges have been raised with respect to CBP's and the ITC's interpretation of the CDSOA, which should ultimately provide answers to some of the foregoing questions. In *Candle Corp. of America v. United States International Trade Commission*,²⁵ the CIT affirmed the ITC's finding that the plaintiff was not an affected domestic producer because it did not indicate support for the petition in its response to the ITC's questionnaire in the original investigation. In one questionnaire response, plaintiff did not mark either the "Yes" or "No" box when asked to indicate whether it supported the petition. It went on to provide comments that could be read as indicating lack of support for the petition. In the second questionnaire response, plaintiff marked the "No" box and repeated the comments it made in the first response. Under these circumstances, the CIT found that the evidence clearly supported the ITC's finding that the plaintiff did not qualify as an affected domestic producer.²⁶

The plaintiff in *Candle Corp.* also claimed that, even if it was not eligible as an affected domestic producer in its own right, it became eligible as a successor to two companies it acquired that had supported the petition in the original investigation. The CIT, however, affirmed CBP's conclusion that the plaintiff remained ineligible as a successor company despite these acquisitions because of its own failure to support the petition.²⁷ The court reasoned:

[E]ligibility for certification under the regulation is subject to the limitations imposed by 19 U.S.C. § 1675(c), which requires that a claimant (1) have supported the petition, and (2) remain in operation. 19 U.S.C. § 1675c(a)-(b). . . . CCA cannot qualify to receive offset distributions under the statute, because the company did not support the petition. . . . The agency regulation cannot remove the statutory requirements of support for the petition and continued operation. Consequently, Customs interprets its regulation to bar claims by successor companies that cannot qualify under the statute. We cannot conclude that this interpretation of the successor regulation is inconsistent with the statute or otherwise unpersuasive.²⁸

Another case before the CIT, *PS Chez Sidney, L.L.C. v. United States International Trade Commission*,²⁹ challenges the ITC's finding that the plaintiff did not affirmatively support the original petition. In that case, plaintiff submitted responses to the ITC's questionnaires in both the preliminary and final phases of the investigation. The first questionnaire response indicated plaintiff's support for the petition, but the second indicated that plaintiff took no position. According to plaintiff, its indication of support in the initial questionnaire response is sufficient to make it an affected domestic producer. Plaintiff also alleges that the CDSOA's limitation on distributions to companies that "indicate support of the petition by letter or through questionnaire response" is contrary to Amendment I to the U.S. Constitution because it conditions the allocation of government benefits on the basis of the content of speech.

25. *Candle Corp. of Am. v. United States Int'l Trade Comm'n*, Slip Op. 03-40 (Ct. Int'l Trade Apr. 8, 2003), appeal docketed, No. 03-1348 (Fed. Cir. Apr. 28, 2003).

26. *Id.* at 13.

27. *Id.* at 15.

28. *Id.* at 15-16.

29. Complaint, U.S. Ct. Int'l Trade No. 02-00635.

Other legal issues have arisen from the statutory definition of "affected domestic producer." In one case, a U.S. producer asked CBP to determine that another company is not eligible as a successor company on the ground that its predecessor had already ceased production of the relevant merchandise at the time of its acquisition and thus was not capable of passing on its status as an affected domestic producer to the company claiming to be its successor.³⁰ CBP agreed, finding that the challenged company did not succeed to the operations of its predecessor within the meaning of 19 C.F.R. § 159.61(b)(1) and thus was "not a legitimate successor."³¹

Another case pending before CBP involves interpretation of the CDSOA's exclusion from eligibility of any company that has "been acquired by a company or business that is related to a company that opposed the investigation."³² At the time of the petition, one of the petitioners was also an affiliate of a foreign producer that opposed the investigation.³³ Among other issues, the challenge involves the legal question whether a company is ineligible regardless of when the acquisition occurred, or only if the acquisition occurred subsequent to the AD/CVD investigation or order.³⁴

C. JUDICIAL REVIEW OF AGENCY DECISIONS UNDER THE CDSOA

Where disputes arise over CBP's (or the ITC's) interpretation and application of the CDSOA, the next question is whether a domestic producer has a right to judicial review. The CIT almost certainly has jurisdiction over such challenges under its statutory grant of "residual" jurisdiction over trade issues that are not covered by other jurisdictional provisions.³⁵

The CIT's jurisdiction is established by 28 U.S.C. § 1581.³⁶ Subsections (a)-(h) of section 1581 give the court exclusive jurisdiction over civil actions dealing with a broad variety of trade matters.³⁷ The CIT's residual jurisdiction provision, found in subsection (i), gives it exclusive jurisdiction of, among other things, "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 . . . administration and enforcement with respect to the matters referred to in . . . subsections (a)-(h) of" section 1581.³⁸ The matters encompassed by subsections (a)-(h) of section 1581 include AD/CVD proceedings. Subsection (c) of section 1581 grants the CIT jurisdiction "of any civil action commenced under section 516A of the Tariff Act of 1930,"³⁹ which in turn provides interested parties a right to judicial review of AD/CVD determinations by Commerce and the ITC.

30. See Letter from Stephen A. Jones, King & Spalding, on behalf of Regal Ware, Inc., to Jeffrey J. Laxague, U.S. Customs Service (Apr. 15, 2003) (challenging eligibility of Newell Rubbermaid Inc. under the CDSOA).

31. CBP Ruling Letter HQ 229924 (July 24, 2003).

32. 19 U.S.C. § 1675c(b)(1)(B) (2002).

33. See Letter from Michael P. Mabile, King & Spalding, on behalf of Southern Tier Cement Committee, to Michael Schmitz, Assistant Commissioner, U.S. Customs Service (July 15, 2002) (challenging eligibility of Ideal Basic Industries, Inc./Holnam, Inc. as an affected domestic producer under the CDSOA).

34. *Id.*

35. In some instances, judicial review may be precluded by statute. Statutory preclusion of judicial review is discussed more fully below.

36. Decisions of the CIT may be further appealed to the U.S. Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(5) (2002).

37. *Id.*

38. *Id.*

39. 19 U.S.C. § 1516(a) (2002).

The CDSOA is plainly a law providing for the "administration and enforcement" of matters related to AD/CVD determinations. Consequently, the CIT should have jurisdiction to review Commerce's interpretation and application of the CDSOA.⁴⁰ As noted by the U.S. Court of Appeals for the Federal Circuit, section 1581(i) "was intended to give the Court of International Trade broad residual authority over" cases involving issues arising out of U.S. statutes governing import transactions and "is straightforward and comprehensive."⁴¹

Jurisdiction under section 1581(i) applies only when the other jurisdictional provisions of section 1581 are "manifestly inadequate."⁴² This threshold requirement for section 1581(i) jurisdiction is not expressed in the statute, but has been imposed by the Federal Circuit⁴³ to ensure that jurisdiction under section 1581(i) is properly treated as "residual" and is not invoked so as to circumvent the express restrictions on the CIT's jurisdiction imposed by other subsections of section 1581.⁴⁴

It appears that section 1581(i) grants the CIT jurisdiction to review agency decisions with respect to the CDSOA. To date, at least two actions—*Candle Corp.* and *PS Chez Sidney*—have been brought before the CIT to challenge CBP and ITC decisions under the CDSOA. In both cases, the plaintiff invoked the court's residual jurisdiction. In neither instance has the defendant, the United States, contested jurisdiction under section 1581(i). At least in the absence of any dispute, the CIT accepted jurisdiction under section 1581(i) in *Candle Corp.*, but ruled against plaintiff on the merits.⁴⁵

The CIT's scope of review in such cases, however, is limited. In reviewing claims brought under section 1581(i), the court's standard of review is the same as that provided in the

40. See *Mitsubishi Elecs. Am.*, 44 F.3d at 977. The Federal Circuit Court of Appeals held that the CIT had jurisdiction under section 1581(i) over an action challenging Customs' assessment of duties at the rate determined by Commerce. *Id.* The court reasoned that the action involved the "administration and enforcement" of statutes providing for duties for reasons other than the raising of revenue (such as AD duties). *Id.* Similarly, in *Conoco, Inc. v. United States*, the Federal Circuit found CIT jurisdiction under section 1581(i) for an action challenging certain conditions placed upon a grant of foreign trade subzone status. *Conoco, Inc. v. United States*, 18 F.3d 1581, 1588 (Fed. Cir. 1994). The court reasoned that the reference to "revenue from imports or tonnage" in section 1581(i) "would seem easily to embrace the matters appellants raise here. The foreign-trade zones arise under laws designed to deal with revenue from imports, and they provide a special mechanism for determining revenue from materials imported into these zones." *Id.* The court also relied upon the reference to "administration and enforcement" in section 1581(i)(4), noting that "a straightforward reading of the statutory language indicates that the kinds of administrative conditions placed on the grant to appellants falls comfortably within the scope of that language." *Id.* See also *Corus Group PLC v. Bush*, 217 F. Supp. 2d 1347, 1350–51 (Ct. Int'l Trade 2002). The CIT rejected the ITC's motion to dismiss two counts of the complaint for lack of subject matter jurisdiction. *Id.* at 1350. Those counts challenged duties imposed as a result of a safeguard action under 19 U.S.C. § 2252 on the ground that one of the Commissioners of the ITC had not been legally appointed to his seat. *Id.* at 1351. The court reasoned that the claim that the "safeguards are invalid because of an improperly seated Commissioner clearly raise[d] issues regarding whether the ITC properly carried out the laws providing for tariffs, duties, fees, or other taxes on the importation of merchandise" as provided in section 1581(i). *Id.*

41. *Conoco*, 18 F.3d at 1588.

42. *Id.* at 1584; *Nat'l Corn Growers Assn. v. Baker*, 840 F.2d 1547, 1556–58 (Fed. Cir. 1998); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987).

43. See *Conoco*, 18 F.3d at 1584 n.8 (cases cited therein).

44. *Id.*

45. *Candle Corp.*, 259 F. Supp. 2d at 1353.

Administrative Procedure Act.⁴⁶ In turn, the Administrative Procedure Act provides, among other things, that the court can only “hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁴⁷

III. Liquidation of Entries and Assessment of Antidumping and Countervailing Duties

A. THE PROCESS OF LIQUIDATION OF ENTRIES

Another area in which domestic producers are increasingly coming into contact with CBP relates to the liquidation of import entries and assessment of duties subject to AD/CVD orders. In the usual case not involving entries subject to an AD/CVD order, CBP is required to liquidate an entry within one year, after which time the entry “shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record.”⁴⁸ Where liquidation has been suspended by statute or court order and the suspension of liquidation is removed, CBP must liquidate entries within six months after receiving notice of the removal of suspension.⁴⁹ Under 19 U.S.C. § 1504(d), if liquidation does not occur within the six-month period, the entries are deemed liquidated at the rate of duty, value, quantity, and amount of duty claimed by the importer at the time of entry.⁵⁰

The system of liquidation of entries and assessment of duties differs, however, where imports subject to AD/CVD orders are concerned. The U.S. system for assessing AD/CVD duties is retrospective in nature.⁵¹ If Commerce and the ITC make the requisite determinations of dumping or subsidization and material injury or threat of material injury,⁵² Commerce imposes an AD/CVD order that establishes the *ad valorem* rate of cash deposits of estimated duties that U.S. importers of merchandise covered by the order must pay upon entry of the goods.⁵³

The AD/CVD duties actually owed by an importer to CBP on entries of merchandise covered by an order are determined in a subsequent administrative review in which Commerce calculates a dumping margin or subsidy rate that governs the assessment of duties for the prior period covered by the review.⁵⁴ Commerce conducts an administrative review

46. See 28 U.S.C. § 2640(e) (“In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5.”). See also *Candle Corp.*, 259 F. Supp. 2d at 1353.

47. 5 U.S.C. § 706(2)(A) (2003). *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (discussing the scope of the standard of review). See also *Candle Corp.*, 259 F. Supp. 2d at 1353–54.

48. 19 U.S.C. § 1504(a) (2002). This one-year period may be extended or suspended under certain circumstances. 19 U.S.C. § 1504(b)–(c) (2002).

49. 19 U.S.C. § 1504(d) (2002).

50. *Id.*

51. See 19 C.F.R. § 351.212(a) (2002).

52. See 19 U.S.C. §§ 1671(a), 1673 (2002) (authorizing the imposition of countervailing or antidumping duties if Commerce finds subsidies or dumping and the ITC finds material injury or threat of material injury to the domestic industry or material retardation of the establishment of an industry).

53. See 19 U.S.C. §§ 1671e(a)(3), 1673e(c)(3) (2002).

54. 19 U.S.C. § 1675(a) (2002). Except in the initial administrative review, the period covered by an AD administrative review is normally the twelve months immediately preceding the most recent anniversary month of the order. In a CVD administrative review, the period is usually the most recently completed calendar year. 19 U.S.C. § 1675(a)(1) (2002); 19 C.F.R. § 351.213(e) (2002).

annually if requested by any interested party.⁵⁵ The dumping margin or subsidy rate calculated in an administrative review also establishes the cash deposit rate for future entries until a new rate is established in the next administrative review.⁵⁶ If no party requests an administrative review in any given year, the antidumping duties are automatically assessed at the cash deposit rate previously determined, and that cash deposit rate continues to apply to future entries.⁵⁷

Under 19 U.S.C. § 1516(a), unless a party seeks judicial review in the CIT and the court enjoins liquidation, entries for the period covered by an administrative review are liquidated in accordance with Commerce's final results of the review (i.e., duties are assessed at the rate determined by Commerce in the administrative review).⁵⁸ In the event of an appeal, the CIT has the authority to enjoin liquidation of entries covered by an order pending the final court decision.⁵⁹

Thereafter, if the CIT or the U.S. Court of Appeals for the Federal Circuit issues a decision "not in harmony with" Commerce's final results of the administrative review, section 1516(a) requires that the entries "shall be liquidated in accordance with the final court decision in the action."⁶⁰ Commerce must publish notice of the court decision within ten days of the decision.⁶¹

Upon completion of all agency and judicial proceedings with respect to an administrative review, Commerce issues liquidation instructions to CBP to assess duties at the rate determined in the administrative review, or if no review was requested, at the cash deposit rate.⁶² Under 19 U.S.C. § 1675, liquidation "shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued."⁶³

55. 19 U.S.C. § 1675(a)(1) (2002); 19 C.F.R. § 351.213(b) (2002).

56. 19 U.S.C. § 1675(a)(2)(C) (2002). See *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342 (Fed. Cir. 2001) (stating that "Commerce uses the dumping margin to assess antidumping duties on merchandise imported during the review period and also to calculate 'cash deposits of estimated duties for future entries' of the subject merchandise.") [citing *Torrington Co. v. United States*, 44 F.3d 1572, 1575 (Fed. Cir. 1995)].

57. 19 C.F.R. § 351.212(c)(1) (2002).

58. 19 U.S.C. § 1516a(c)(1) (2002). Where review of the final results of an administrative review is before a binational panel convened under chapter 19 of the North American Free Trade Agreement, rather than the CIT, the liquidation process is governed by § 1516a(g)(5), and is generally similar to that established for CIT review under section 1516a(c). The principal difference is that, instead of seeking an injunction from the CIT, an interested party instead must request an order from Commerce continuing the suspension of liquidation of the relevant entries. 19 U.S.C. § 1516a(g)(5)(C)(i) (2002). If so requested, Commerce "shall" enter such an order. *Id.*

59. The CIT "may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2) (2002). Because a motion to enjoin liquidation under this section is a motion for a preliminary injunction, the party filing the motion must satisfy the familiar four-factor test for obtaining such an injunction, i.e., the movant must establish that (1) it is likely to succeed on the merits of the action; (2) it will suffer irreparable harm if preliminary relief is not granted; (3) the balance of the hardships favors granting the motion; and (4) a preliminary injunction would not be contrary to the public interest. See *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993).

60. 19 U.S.C. § 1516a(c)(1), (e) (2002).

61. *Id.* This is the so-called "*Timken* notice," which is named after a decision of the Federal Circuit interpreting the term "final court decision in the action" to mean the "conclusive" decision. Therefore, the ten-day period for Commerce's issuance of the notice begins to run only after the final court decision in the appeal process, and not when the CIT issues a decision that is subject to a further appeal. *Timken Co. v. United States*, 893 F.2d 337, 339 (Fed. Cir. 1990).

62. 19 C.F.R. § 351.212(b)(1)-(3) (2002).

63. 19 U.S.C. § 1675(a)(3)(B)-(C) (2002).

One unresolved issue involves the conflict between (a) the requirement of section 1504(d) that entries not liquidated within six months of the date that a suspension of liquidation was removed be deemed liquidated at the rate of duty claimed by the importer at the time of entry and (b) the requirement of section 1516a that entries subject to an AD/CVD administrative review be liquidated in accordance with Commerce's results of an administrative review, or in accordance with a later court decision not in harmony with Commerce's results. Despite this conflict and without explanation, the CIT in one case has ordered CBP to deem entries subject to an AD/CVD administrative review to be liquidated at the rate of duty claimed by the importer upon entry where they were not liquidated within the six-month period specified in section 1504(d).⁶⁴

In its 1994 amendment to section 1504(d), enacted as part of the Uruguay Round Agreements Act, Congress may have resolved this conflict in favor of requiring the liquidation of entries covered by AD/CVD administrative reviews in accordance with the final results of administrative review or final and conclusive court decision as required by section 1516a, notwithstanding the provisions of section 1504(d).⁶⁵ By its terms, the 1994 amendment to section 1504(d) applies "[e]xcept as provided in section 1675(a)(3)." As noted above, section 1675(a)(3)(B) requires CBP only to liquidate entries "promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued," and contains no instruction to deem entries to be liquidated if liquidation does not occur within the ninety-day period.⁶⁶

B. THE NEED FOR INCREASED ACCESS BY PETITIONERS TO INFORMATION ON THE LIQUIDATION OF ENTRIES COVERED BY AD/CVD ORDERS

For all practical purposes, the process described above for liquidating entries and assessing duties under an AD/CVD order has been a "black box" as far as domestic petitioners are concerned. Commerce does not routinely notify the parties when it sends liquidation instructions to CBP, and its regulations provide no deadline within which the instructions must be issued. Thus, the petitioner normally has no notice of the timing of the instructions to CBP. In addition, CBP provides no notice to the petitioner when it liquidates entries

64. See *NEC Solutions (America), Inc. v. United States*, 277 F. Supp. 2d 1340 (Ct. Int'l Trade 2003). Notably, however, the domestic petitioner was not a party in the matter, and the Government did not contest the action on the ground that deemed liquidation was not appropriate in the AD/CVD context. See also *CEMEX, S.A. v. United States*, 279 F. Supp. 2d 1357, 1362 n.7 (Ct. Int'l Trade 2003), in which the same CIT judge in *dicta* opined that "deemed liquidation defeats the direction of 19 U.S.C. § 1516a(e) (requiring liquidation in accordance with the final court decision), but that is the effect of the deemed liquidation provision." The holding in *NEC* and the *dicta* in *CEMEX* are inconsistent with the CIT's statement in *LG Electronics U.S.A., Inc. v. United States*, that "[w]here liquidation is enjoined by order of the court, liquidation may only be at the rate ultimately approved by the court. . . . See 19 U.S.C. § 1516a(c), (e) (1994). To permit liquidation at any other rate violates the clear mandate of the unfair trade laws, not to mention the final judgment of the court entered in the cases in which injunctions were issued." 991 F. Supp. 668, 675 (1997).

65. The 1994 amendment to section 1504(d) applies to administrative reviews commenced on or after January 1, 1995. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 291(a)(3), 108 Stat. 4809, 4931 (1994).

66. The United States has adopted this interpretation of the 1994 amendment to section 1504(d) in pleadings filed with the CIT. In its Reply Memorandum to Plaintiffs' Opposition Memorandum to Sunbelt Cement, Inc.'s Motion to Dismiss, the United States concedes that the 1994 enactment of 19 U.S.C. § 1675(a)(3)(B) and the 1994 amendment to 19 U.S.C. § 1504(d) completely remove entries covered by AD/CVD administrative reviews from the operation of the deemed liquidation statute. *Ad Hoc Committee v. United States*, 95 F. 3d 1164 (Fed. Cir. 1996).

covered by an AD/CVD administrative review. By contrast, the importer that made the entry is notified of liquidation either electronically (if it made an electronic entry) or by a liquidation bulletin posted at the port of entry.⁶⁷ CBP, in fact, has traditionally considered information related to the liquidation of duties to be the importer's proprietary information and has shielded such information from access by any party other than the importer.

This situation has improved somewhat since the enactment of the CDSOA, which has caused CBP to ease its confidentiality policy. The less-restrictive policy has occurred as a result of inquiries from domestic producers regarding apparent discrepancies in the assessed duties available for distribution under the CDSOA. CBP annually publishes the amount of AD/CVD duties assessed during the prior fiscal year and paid to affected domestic producers under the CDSOA with respect to each outstanding order.⁶⁸ CBP also publishes the amount under each order that has been assessed and is available for distribution under the CDSOA as of June 1 of the current fiscal year.⁶⁹

Comparisons of these amounts with the amounts that should have been liquidated during the fiscal year for which the distributions were made have occasionally pointed to problems with either the timing of CBP's liquidation of entries or the amount of assessed duties, or both. In some instances, duties have been available for distribution in years when there should have been no assessments because liquidation should have been completed years earlier. In other instances, the amount available to domestic producers has suggested an under-assessment of the duties that should have been paid.

Thus, a significant result of the CDSOA has been to raise the awareness of domestic producers with respect to whether CBP has properly liquidated entries subject to AD/CVD orders and has assessed the full amount of duties that are due. CBP has responded by making more information available, including posting Commerce's liquidation instructions on its website.⁷⁰ CBP has also changed its policy to allow the release of certain information regarding liquidation under the Freedom of Information Act,⁷¹ if the requestor can supply information (such as identification of the importer and the port or ports of entry) with sufficient clarity for CBP to locate the documents. Even so, the domestic producer's access is limited to information regarding the date of the entry, the date of liquidation, and whether the liquidation was made with "no change," (i.e., at the rate claimed by the importer at the time of importation). Although this information can be important in notifying a petitioner of irregularities regarding the timing of liquidation and the assessment rate, the information

67. CBP typically posts bulletin notices of liquidation at the port of entry for a period of time. 19 C.F.R. § 159.9 (2002). These bulletin notices of liquidation, however, do not provide meaningful notice to the domestic industry that liquidation has occurred because they do not identify the producer of the subject merchandise, the imported product, or the AD/CVD order in which the domestic industry has an interest. Moreover, unlike the importer, the petitioner does not normally know when or at which ports of entry imports subject to an AD/CVD order have entered the United States. Thus, it is usually not feasible for a domestic producer to check liquidation bulletins.

68. 19 C.F.R. § 159.64(g)(1) (2002). CBP's annual report on CDSOA disbursements is published on its Web site. CBP Annual Report, *available at* <http://www.customs.ustras.gov> (last visited Jan. 23, 2003).

69. 19 C.F.R. § 159.62(b)(1) (2002). Customs also publishes the amount contained in the "clearing account" established under the CDSOA for each AD/CVD order as of the beginning of each fiscal year. This is the total amount of outstanding AD/CVD cash deposits that have been made with respect to customs entries under each order that remain unliquidated. 19 C.F.R. § 159.64(g)(2)(i) (2002).

70. See Customs and Border Protection Electronic Bulletin Board, *at* http://www.cbp.gov/xp/cgov/import/add_cvd/ (last visited Jan. 23, 2003).

71. 5 U.S.C. § 552 (2002).

is received after the fact, giving the petitioner little ability to monitor the liquidation process before it is completed or to cure any irregularities. Nevertheless, a CIT decision suggests that domestic petitioners may have to undertake the effort to contact CBP and track liquidations before they occur in order to preserve the ability to correct errors in liquidation and assessment.⁷²

Petitioners have a major economic stake in the proper functioning of the liquidation and assessment process for entries covered by an AD/CVD order. As the courts have recognized, the AD/CVD laws are designed to remedy the unfair pricing of imports in the U.S. market:

The purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than "fair value," i.e., at prices below the prices the foreign manufacturers charge for the same products in their home markets . . . In other words, the statute's function is remedial in that its purpose is reducing or eliminating discrepancies in pricing between the U.S. and foreign markets.⁷³

Domestic producers are the intended beneficiaries of this remedial process for creating fair competition between imports and domestically produced merchandise.

Domestic producers need timely access to information regarding CBP's liquidation of entries and duty assessment in order to protect their interests in the enforcement of AD/CVD remedies. If the full amount of duties determined by Commerce to be due is not timely or properly assessed, the remedial benefits of the AD/CVD laws are correspondingly diminished. In particular, without sufficient information to track the liquidation process, domestic producers are prevented from taking action prior to liquidation to ensure that the duties collected are consistent with the results reached by Commerce in the administrative review.

Consequently, Commerce and CBP should reform their procedures for liquidation and assessment to guarantee timely access by petitioners to all documentation necessary to protect their interests. Among other things, Commerce should routinely notify all parties of the issuance of its liquidation instructions. CBP should then promptly provide all parties advance notification of its intention to liquidate entries and the intended rate of assessment,⁷⁴ which would permit counsel both to ensure that liquidation is timely and to raise any objections to liquidation or assessment. To permit such notification, Commerce's liquidation instructions to CBP should include counsel's name and address. In light of the potential impediments to domestic producers' challenges to CBP's liquidation of entries and assessment of duties after they have occurred,⁷⁵ these changes in procedure would make

72. See *CEMEX*, 279 F. Supp. 2d at 1362. The CIT faults the petitioner/plaintiff for not having "pursued whatever remedies it had" to ensure that liquidation was effected at the rate contained in Commerce's instructions to CBP.

73. *Tung Mung Devel. Co. v. Yieh United Steel Corp.*, 219 F. Supp. 2d 1333, 1338 (Ct. Int'l Trade 2002), quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995). See also *C.J. Tower & Sons v. United States*, 71 F.2d 438, 445 (C.C.P.A. 1934) (purpose of antidumping statute is "to impose not a penalty, but an amount of duty sufficient to equalize competitive conditions between the exporter and American industries affected").

74. There is no reason to assume that this process, which would apply only where imports are subject to an AD/CVD order, would create any substantial burden for either Commerce or Customs. To the extent the information disclosed would include data that is proprietary to the importer, it could be released to petitioners' counsel subject to administrative protective order, as Commerce routinely does in its administrative AD/CVD proceedings.

75. See notes 100-118 and accompanying text, *infra*.

it easier for domestic producers to protect their interests beforehand and render unnecessary any subsequent administrative or judicial challenges.

C. POTENTIAL REMEDIES AVAILABLE TO PETITIONERS FOR IMPROPER LIQUIDATION

1. *Jurisdiction*

If a domestic producer has evidence that CBP has made an erroneous liquidation or assessment, what remedies are available? This issue arises most frequently where CBP deems entries subject to an AD/CVD order to be liquidated at the rate of duty asserted by the importer at the time of entry, as provided in section 1504(d), rather than at the rate determined by Commerce. There is no explicit statutory route for a domestic producer to obtain judicial review of CBP's actions in liquidating entries and assessing duties under an AD/CVD order.⁷⁶ By contrast, the CIT has express authority under section 516A of the Tariff Act of 1930 to review a domestic producer's challenge to an AD/CVD determination by Commerce or the ITC.⁷⁷

In addition, unlike domestic producers, importers have an express statutory avenue for seeking judicial review of most CBP decisions. Section 514(a) of the Tariff Act of 1930 permits importers to file an administrative protest with CBP regarding a broad range of decisions, including the appraisement and classification of merchandise; charges or exactions within the jurisdiction of the Department of the Treasury; the denial of entry of merchandise or a request for redelivery; the liquidation or reliquidation of an entry, the refusal to pay a claim for duty drawback; and the refusal to reliquidate an entry.⁷⁸ If a protest is denied, the importer may appeal the denial to the CIT.⁷⁹

One potential means for a domestic producer to obtain judicial review of CBP's improper liquidation of entries or assessment of duties is available where the courts have already reviewed Commerce's final results of an administrative review, including the determination of the duty assessment rate, and entered judgment. A domestic producer can request the CIT to enforce the judgment by requiring CBP to correct the liquidation of entries or the assessment of duties to the extent it is inconsistent with the judgment. Domestic producers took this route in *CEMEX*,⁸⁰ where they sought relief from CBP's deemed liquidation of entries covered by an antidumping administrative review. The motion was premised upon the CIT's statutory authority to exercise "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."⁸¹ As noted by the Federal Circuit,

76. See *CEMEX*, 279 F. Supp. 2d at 1362. ("Domestic parties have no specific avenue of relief for improper liquidation.").

77. See 19 U.S.C. § 1516a (2002); 28 U.S.C. § 1581(c) (2002).

78. See 19 U.S.C. § 1514(a) (2002). The categories of appealable decisions listed in section 1514(a) are exclusive. Any matter that does not fall within one of the categories cannot be protested. See also *Playhouse Import & Export, Inc. v. United States*, 843 F. Supp. 716, 719 (Ct. Int'l Trade 1994). If a Customs decision is not protested, it becomes final. 19 U.S.C. § 1514(a) (2002). Section 1514(b) excepts Commerce's and the ITC's AD/CVD determinations from the protest requirement, thus making clear that the route of judicial review for such matters is under 19 U.S.C. § 1516a. 19 U.S.C. § 1514(b) (2002). See *Mitsubishi Elecs. Am.*, 44 F.3d at 976 ("[t]he 1979 Act amended 19 U.S.C. § 1514(a) and (b) to exclude antidumping determinations from the list of matters that parties may protest to Customs.").

79. 28 U.S.C. §§ 1581(a), 2631(a) (2002).

80. See *CEMEX*, 279 F. Supp. 2d at 1357.

81. 28 U.S.C. § 1585 (2002).

the CIT "has the inherent power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments."⁸² Although the domestic producers in *CEMEX* did not prevail before the CIT on the merits of their action, neither the Government nor the CIT questioned the appropriateness of their proceeding by way of a motion to enforce judgment.

Alternatively, a domestic producer can file a civil action under the CIT's "residual" jurisdiction seeking relief against CBP's improper liquidation and assessment of duties. As discussed above,⁸³ 28 U.S.C. § 1581(i) gives the CIT exclusive jurisdiction of "any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . administration and enforcement with respect to matters referred to in" the previous subsections of section 1581, including subsection (c), which deals with AD/CVD determinations.⁸⁴ Section 1581(i) also gives the CIT exclusive jurisdiction of civil actions involving a statute providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue."⁸⁵ Either of these provisions should be broad enough to cover a case involving liquidation of entries and assessment of duties under an AD/CVD order,⁸⁶ assuming that relief under another provision of section 1581 would be manifestly inadequate.⁸⁷

As yet, there is no judicial authority confirming that a domestic producer may rely on the CIT's residual jurisdiction to challenge CBP's actions in liquidating entries or assessing duties subject to an AD/CVD administrative review, and there are potential obstacles to such a challenge. In one case before the CIT, however, the Government did not challenge the CIT's jurisdiction to consider a domestic petitioner's challenge to CBP's deemed liquidation of entries covered by an AD administrative review.⁸⁸ The Government did not move to dismiss or otherwise argue that the CIT lacked jurisdiction under section 1581(i) to hear the case.

Judicial decisions involving importers' challenges to CBP's liquidation and assessment of duties support the existence of CIT jurisdiction under section 1581(i) to review similar challenges by the domestic industry. For example, in *LG Electronics*,⁸⁹ the CIT found jurisdiction under section 1581(i) where an importer challenged liquidations that were made at the rate of duty claimed upon entry even though court-ordered injunctions of liquidation remained in effect.⁹⁰ Three types of liquidations were at issue in that case: "no change" liquidations, "automatic" liquidations, and "deemed" liquidations.

82. *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996). The CIT relied upon its equitable powers in *AK Steel Corp. v. United States*, to remedy CBP's erroneous liquidation of entries in violation of the court's injunction against liquidation. 281 F. Supp. 2d 1318 (Ct. Int'l Trade 2003).

83. See notes 36-40 and accompanying text, *supra*.

84. 19 U.S.C. § 1581(i) (2002).

85. 19 U.S.C. § 1581(i)(2) (2002).

86. See *supra* note 41 (discussing judicial precedent confirming the existence of section 1581(i) jurisdiction in similar situations).

87. See notes 43-45 and accompanying text, *supra*.

88. *Ad Hoc Committee v. United States*, 95 F.3d 1164 (Fed. Cir. 1995). This is a companion case to *CEMEX*, in which the same domestic interested parties asked the CIT to enforce its judgment affirming Commerce's results of the administrative review and challenged CBP's liquidation of entries at the lower rate claimed by the importer at the time of entry, rather than the assessment rate determined by Commerce in the administrative review.

89. *LG Elecs. v. United States*, 991 F. Supp. 668 (Ct. Int'l Trade 1997).

90. The issue of CBP's liquidation of entries in violation of an injunction has also arisen in a case where the appeal of Commerce's results of the administrative review was still pending. See *AK Steel Corp.*,

Despite the importer's failure to protest these liquidations, the CIT found jurisdiction under section 1581(i) to review some of these liquidations and ordered CBP to liquidate the entries in accordance with the instructions issued by Commerce.⁹¹ The "automatic" liquidations were found to be the result of a computer programming error, rather than the result of an affirmative, protestable decision by Customs. The court held that liquidations in violation of the court's injunctions "had no legal effect, and need not have been protested" by the importer in order to preserve its right to judicial review.⁹² The CIT similarly found jurisdiction under section 1581(i) with respect to the importer's challenge to Customs' liquidation pursuant to computer-generated notices of deemed liquidation. In the court's view, no liquidation occurred. The court reasoned:

erroneous notice cannot create a deemed liquidation. Without the expiration of the statutory period [for deemed liquidation under section 1504], there is no date to be noticed. As the statutory period for protest never began to run, plaintiff may bring suit under 28 U.S.C. § 1581(i) to compel liquidation in accordance with the prior order of the court.⁹³

In *Fujitsu General America, Inc. v. United States*,⁹⁴ an importer challenged Customs' deemed liquidation of entries of Japanese television sets subject to an antidumping duty order. The CIT held that the protest and appeal procedures of sections 1514(a) and 1581(a) provided jurisdiction to review the liquidation.⁹⁵ In *dicta*, however, the court stated the opinion that section 1581(i) would be available to review an entry that was liquidated by operation of law:

Customs does not make a decision in order to effect a deemed liquidation. Rather, a deemed liquidation under 19 U.S.C. § 1504(d) occurs by operation of law. Therefore, where an importer believes its entries were deemed liquidated under § 1504(d), and Customs has not actively liquidated the entries anew, the importer's only remedy is to seek a declaratory judgment from the CIT confirming that there was a deemed liquidation under 28 U.S.C. § 1581(i).⁹⁶

281 F. Supp. 2d at 1323 (discussing how the CIT declared the illegal liquidations to be "null and void *ab initio*" and exercised its equitable powers to enjoin CBP from liquidating the entries until the court issued a final decision on the merits).

91. The court, however, found that the "no change" liquidations resulted "from Customs' employees entering liquidation codes in the [Automated Commercial System], thereby ordering liquidation and causing the system to generate notices of liquidation." *LG Elecs.*, 991 F. Supp. at 673-74. Because these liquidations involved affirmative decisions that the rate of duty imposed at the time of deposit was correct and that the entry should be liquidated at that rate, the "no change" liquidations were "more than merely ministerial" and were subject to protest. *Id.* In addition, Customs had provided notice of these liquidations. *Id.* at 674. Thus, the importer could not bypass the protest route and proceed under section 1581(i).

92. *Id.* at 674-75.

93. *Id.* at 676-77.

94. *Fujitsu Gen. Am., Inc. v. United States*, 110 F. Supp. 2d 1061 (Ct. Int'l Trade 2000), *aff'd*, 283 F.3d 1364 (Fed. Cir. 2002).

95. *Id.* at 1067-74. *Accord* *Int'l Trading Co. v. United States*, 110 F. Supp. 2d 977 (Ct. Int'l Trade 2000), *aff'd*, 281 F.3d 1268 (Fed. Cir. 2002) (holding that section 1581(a) provided jurisdiction to review Customs' failure to liquidate in accordance with the statutory provision calling for deemed liquidation).

96. *Fujitsu*, 110 F. Supp. 2d at 1069. The court noted that, where Customs actively liquidates the entries despite the importer's claim that the entries were deemed liquidated under section 1504(d), the importer is required to raise this claim by way of a protest of the liquidation of the entries. "Therefore, once Customs purportedly liquidated the subject entries, Fujitsu could no longer invoke the CIT's jurisdiction under 28 U.S.C. § 1581(i)." *Id.*

Although *LG Electronics* and *Fujitsu General* involve actions brought by importers, the CIT's reasoning supports the ability of a domestic producer to obtain judicial review of CBP's liquidations of entries subject to AD/CVD orders under similar circumstances. There does not appear to be any principled basis for allowing importers—but not domestic producers—to rely on the CIT's residual jurisdiction to challenge the liquidation of entries, particularly when domestic producers, unlike importers,⁹⁷ lack the alternative avenue under sections 1514(a) and 1581(a) of filing a protest and then seeking judicial review of CBP's denial of the protest.⁹⁸ Moreover, if liquidation and assessment are not properly carried out, a domestic producer is deprived of the intended remedial benefits of the law, that is, a return to fair pricing in the U.S. market.

2. Statutory Preclusion of Judicial Review

Even if the CIT has jurisdiction under section 1581(i) to review a domestic producer's challenge to deemed liquidation of entries covered by an AD/CVD administrative review, it may be argued that judicial review is barred by 19 U.S.C. § 1514(a)(5). This section provides that liquidation is "final and conclusive upon all persons" after ninety days unless a protest is filed and an appeal of a denial of the protest is pursued under 28 U.S.C. § 1581(a). The CIT so held in *CEMEX*, where it found that the domestic petitioner's claim was barred "because the liquidation became final as to 'all persons' after 90 days passed."⁹⁹ Thus, the petitioner "had to act within 90 days of the posting of notice of liquidation to avoid the effects of 19 U.S.C. § 1514(a)."¹⁰⁰

Contrary to *CEMEX*, the "final and conclusive" language in section 1514(a) should not bar an action by a domestic producer challenging the erroneous deemed liquidation of entries covered by an AD/CVD administrative review. Section 1514(a) only makes final and conclusive seven discrete categories of CBP "decisions," and the Federal Circuit has held that the liquidation of entries subject to an AD/CVD order does not involve any CBP decision. "Typically, 'decisions' of Customs [under section 1514(a)] are substantive determinations involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty."¹⁰¹ As the Federal Circuit concluded in a different case, "Customs has a merely ministerial role in liquidating antidumping duties under 19 U.S.C. § 1514(a)(5). . . . Customs' actions regarding dumping do not fall within

97. See *Int'l Trading*, 110 F. Supp. 2d at 979 (CIT exercised jurisdiction under 28 U.S.C. § 1581(a) in considering a challenge to CBP's liquidation of entries in accordance with the final administrative determination in an antidumping administrative review); *NEC Solutions, Inc. v. United States*, 277 F. Supp. 1340 (Ct. Int'l Trade 2003). CIT exercised jurisdiction under 28 U.S.C. § 1581(a) of importer's challenge to liquidation of entries covered by an administrative review that was suspended by court order on the ground that they were deemed liquidated under section 1504(d) six months after Commerce sent liquidation instructions to CBP.

98. See *CEMEX*, 279 F. Supp. 2d at 1362.

99. *CEMEX*, 279 F. Supp. 2d at 1362–63.

100. *Id.* at 1362–63. The decision in *CEMEX* that liquidation became final and conclusive, however, appears peculiar under the facts of that case. The CIT initially held that "proper deemed liquidation has not been established for any of the entries" at issue because Commerce had never issued effective notice of the lifting of suspension of liquidation to trigger the six-month period for deemed liquidation. *Id.* at 1360. Instead, the CIT simply assumed that CBP somehow effected liquidation under the general provisions of section 1500: "Customs made a decision to recognize deemed liquidations and to post them." *Id.* at 1362–63. The court, however, made no finding that CBP complied with any of the requirements for liquidation under section 1500. In the absence of actual liquidation under either section 1500 or section 1504(d), no finality could attach.

101. *U.S. Shoe Corp. v. United States*, 114 F.3d at 1569 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998).

19 U.S.C. § 1514(a).¹⁰² Thus, no finality attaches under section 1514(a) with respect to liquidation in the AD/CVD context.¹⁰³

In addition, section 1514(a) should not preclude judicial review of deemed liquidations, because such liquidations occur only by operation of law.¹⁰⁴ Liquidation under 19 U.S.C. § 1500, by contrast, requires CBP affirmatively to fix the final appraisement of the merchandise, classification and rate of duty, and amount of duty; to liquidate the entry and effect any reconciliation; and to transmit notice of such liquidation to the importer. CBP undertakes no such actions when an entry is deemed liquidated under section 1504(d), but instead relies on the "rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer."¹⁰⁵

Finally, 19 U.S.C. § 1514(b), rather than 1514(a), likely applies to the liquidation of entries covered by an administrative review. Section 1514(b) declares CBP determinations relating to an AD/CVD determination to be final and conclusive unless an appeal is taken to the CIT of the underlying AD/CVD determination under section 1516a. The CPB determinations referred to in section 1514(b) consist of actions implementing AD/CVD determinations.¹⁰⁶ Section 1514(b) determinations that implement an AD/CVD determi-

102. *Mitsubishi Elecs. America, Inc. v. United States*, 44 F.3d 973, 976-77 (Fed. Cir. 1994).

103. A recent decision of the Federal Circuit casts doubt on whether section 1514(a) ever can be used to preclude judicial review of an erroneous liquidation of an entry covered by an AD/CVD administrative review. In *Shinyeh Corporation of America v. United States*, Customs argued that 19 U.S.C. § 1514(a) prevented the CIT from ordering liquidation at the final assessment rate calculated during an administrative review of an AD order when the entries in question were liquidated in error. The Federal Circuit's decision rejected Customs' argument on the following grounds:

Moreover, to accept the government's argument would preclude enforcement of court orders as to duty determinations as soon as entries subject to those orders are liquidated, even where liquidation was under erroneous instructions that fail to reflect the amended administrative review results implementing the courts' determinations, as required by [19 U.S.C. §] 1675(a)(2)(C) [which requires that the results of an administrative review of an AD determination "shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties."]. We will not read such a prohibition into the statute in the complete absence of evidence of such congressional intent. Indeed, short of compelling legislative history or statutory evidence, we decline to find that the statute as a whole was intended to preclude judicial enforcement of court orders after liquidation. 355 F.3d 1297 (Fed. Cir. 2004).

104. *Fujitsu*, 110 F. Supp. 2d at 1069; *LG Elecs. U.S.A., Inc. v. United States*, 991 F. Supp. 668 (Ct. Int'l Trade 1997). But see *Int'l Trading*, 110 F. Supp. 2d at 989. The CIT stated that "[l]iquidation, including deemed liquidation, of a Customs entry is conclusive unless a timely protest is filed within 90 days of the date of liquidation." The statement in *International Trading* was merely *dicta*, however, because the liquidations at issue were made under 19 U.S.C. § 1500, not under section 1504(d), the deemed liquidation provision. *Id.*

105. *Pagoda Trading Corp. v. United States*, 804 F.2d 665, 667 (Fed. Cir. 1986). A case brought by a domestic industry challenging an erroneous deemed liquidation should be distinguished from cases in which CBP actively liquidates entries under section 1500, which triggers an obligation on the part of an importer to preserve its right to judicial review of liquidation by filing a protest under section 1514(a). See, e.g., *id.* at 667-69; *Fujitsu*, 110 F. Supp. 2d at 1074, n. 11; *Int'l Trading*, 110 F. Supp. 2d at 979.

106. See *Nichimen Am., Inc. v. United States*, 938 F.2d 1286, 1290-91 (Fed. Cir. 1991); *Sandvik Steel Co. v. United States*, 164 F.3d 596, 601 (Fed. Cir. 1998) (where importers failed to request a scope determination from Commerce, Customs' imposition of antidumping duties on certain entries was final and conclusive under section 1514(b)); *Timken Co. v. United States*, 777 F. Supp. 20 (Ct. Int'l Trade 1991) ("Customs' failure to collect interest from the importers would constitute just the type of act made final and conclusive under 19 U.S.C. § 1514(b)").

nation are not final and conclusive if an action is commenced challenging the underlying determinations. Thus, if a domestic petitioner were to challenge CBP's liquidation of an entry covered by an administrative review of an AD/CVD order, section 1514(b) would prevent that determination from becoming final and conclusive.¹⁰⁷

Nevertheless, unless it is overruled by the Federal Circuit, the CIT's decision in *CEMEX* that section 1514(a) bars a challenge to deemed liquidation of entries covered by an AD/CVD administrative review after the expiration of six months poses a problem for domestic petitioners. As discussed above,¹⁰⁸ a petitioner normally has no notice of when or where liquidation will occur or the basis on which it will be made. Even after liquidation has occurred, it is difficult for a petitioner to obtain information. *CEMEX* suggests that counsel for a domestic petitioner should, as a matter of course, contact CBP soon after Commerce's issuance of liquidation instructions to ensure that CBP properly liquidates entries in accordance with the instructions.

3. Other Potential Barriers to Judicial Review

Aside from the possible application of the finality provision, other impediments to a domestic petitioner's challenge to liquidation under section 1581(i) may also exist. For example, it could be argued that jurisdiction does not exist under section 1581(i), because section 1516¹⁰⁹ establishes the exclusive avenue for domestic producers to obtain judicial review of CBP's actions. As discussed above,¹¹⁰ a domestic producer may file a petition under section 1516 asserting an error in classification, appraisement, or rate of duty. If CBP makes a decision adverse to the domestic producer, it may seek judicial review under 28 U.S.C. § 1581(b). Section 1516 does not apply where a domestic producer seeks to challenge a completed liquidation. In addition, decisions under section 1516 may only have prospective effect with respect to future entries.

The Federal Circuit has ruled in *National Corn Growers Association v. Baker*¹¹¹ that, at least in the circumstances involved in that case, there was no section 1581(i) jurisdiction because section 1516 provided the exclusive remedy for actions by domestic producers. At least arguably, however, *National Corn Growers* is not an impediment to an action involving very different facts, such as those where CBP has erroneously deemed entries covered by an AD/CVD order to be liquidated. Unlike the situation in *National Corn Growers*, jurisdiction would appear to be directly provided for under section 1581(i) because the case would

107. But see *CEMEX*, 279 F. Supp. 2d at 1357 (noting "there are no pending [AD/CVD] proceedings and nothing in § 1514(b) indicates it prevents finality as to Customs' determinations after court proceedings are conclusively terminated. Otherwise, there would never be finality, which is clearly contrary to legislative intent.").

108. See note 68 and accompanying text, *supra*.

109. 19 U.S.C. § 1516 (2002).

110. See notes 2-3 and accompanying text, *supra*.

111. *National Corn Growers Assoc. v. Baker*, 840 F.2d 1547, 1551 (Fed. Cir. 1988). In *National Corn Growers*, the issue involved a temporary amendment to the tariff schedules imposing a \$0.60 per gallon duty on ethanol imports. Domestic ethanol producers objected to Customs' imposition of the duty only on imports of pure ethanol, not mixtures. Although Customs changed this policy, it applied the change only to future imports, waiving the duty for importers that relied on its previous interpretation. The Federal Circuit found no jurisdiction under section 1581(i) for the domestic producers' challenge to the exemption and request that the duty be imposed retroactively. The court found that the domestic producers could proceed only under section 1516 and could not rely upon section 1581(i) to circumvent the lack of authority to impose retroactive relief under section 1516.

involve the "administration and enforcement" of the AD/CVD laws.¹¹² In addition, any remedy available under section 1516 would be "manifestly inadequate," because that section provides no remedy whatsoever with respect to liquidation that has already occurred. If CBP has not liquidated entries subject to an AD/CVD order in accordance with Commerce's instructions, the domestic petitioner is deprived of the full benefits of AD/CVD relief contrary to the intent of the law. Moreover, not finding jurisdiction to exist where CBP appears to have undercollected duties would gratuitously reward importers with diminished AD/CVD liability contrary to 19 U.S.C. § 1516a simply because the agency failed to carry out its statutory responsibilities properly.¹¹³

Assuming that the CIT has jurisdiction under section 1581(i), a domestic industry plaintiff challenging CBP's action in liquidating entries subject to an AD/CVD order still must show that the United States has waived its sovereign immunity against being sued. It appears likely, however, that this requirement would be satisfied. In *Humane Society of the United States v. Clinton*,¹¹⁴ the Federal Circuit held that section 1581(i) is a waiver of sovereign immunity, as well as a grant of jurisdiction. In addition, the Administrative Procedure Act¹¹⁵ provides a waiver of sovereign immunity for parties that are "adversely affected or aggrieved by agency action within the meaning of a relevant statute."¹¹⁶

Finally, if the CIT finds jurisdiction under section 1581(i), there is precedent supporting its authority to issue an appropriate remedy under 28 U.S.C. § 1585 for CBP's improper liquidation of entries. In *Corus Group PLC v. Bush*,¹¹⁷ foreign producers sought to enjoin Customs from liquidating entries of tin mill products pending judicial review of their challenge to the imposition of additional duties under the President's Steel Products Proclamation issued pursuant to section 201 of the Trade Act of 1974. They alleged jurisdiction under 28 U.S.C. § 1581(i) and requested the injunction on the ground that the statute and Customs' regulations did not authorize liquidation. The CIT declined to issue the injunction, finding that it had the authority to afford relief in the event Customs began liquidating the entries. "[T]he parties have not explained why 28 U.S.C. § 1581(i) would not provide a post-liquidation remedy. The absence of a statutory refund process would not seem to be a bar to relief as the court may fashion equitable remedies."¹¹⁸

IV. Respondents' Understatement of Entered Value

An issue that has arisen in some AD/CVD cases, particularly those in which the foreign exporter of the subject merchandise and the U.S. importer are affiliated companies, involves

112. See *Mitsubishi Elecs. America, Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994).

113. There may also be a question whether the restrictive view of the CIT's section 1581(i) jurisdiction reflected in *National Corn Growers* is contrary to more recent decisions such as *Mitsubishi Elecs. America and Conoco*, where the Federal Circuit has seemingly taken a more liberal view.

114. *Humane Society v. Clinton*, 236 F.3d 1320, 1325-28 (Fed. Cir. 2001).

115. 5 U.S.C. § 551 (2003).

116. 5 U.S.C. § 702; 14A CHARLES ALLAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3659 (3d ed. 1998).

117. *Corus Group PLC v. Bush*, 217 F. Supp. 2d 1347 (Ct. Int'l Trade 2002).

118. *Id.* at 1356; see also *Borlem S.A. Empreendimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990) ("the legislative history of 28 U.S.C. § 1585 provides the Court of International Trade 'with all the necessary remedial powers in law and equity possessed by other federal courts established under Article III of the Constitution'"); *Nippon Miniature Bearing Corp. v. United States*, 230 F.3d 1131, 1138 (9th Cir. 2000) (section 1585 vests the CIT "with the authority to grant an aggrieved party properly before it any relief deemed necessary.").

the importer's understatement of entered customs values for the purpose of decreasing its liability for cash deposits of antidumping duties. Potentially, either Commerce or CBP could provide a remedy.

A. COMMERCE'S CALCULATION OF THE CASH DEPOSIT RATE AND ASSESSMENT RATE

As noted above, Commerce calculates a percent dumping margin based on the difference between the normal value (the adjusted price of the foreign like product in the home market) and either the export price or the constructed export price (the adjusted price of the imported subject merchandise in the United States). The dumping margin—(normal value – U.S. price) ÷ U.S. price—determines the cash deposit rate, that is, the rate of estimated antidumping duties that U.S. importers must pay upon entry of the merchandise.¹¹⁹ To determine the amount of cash deposits due, Commerce's normal practice is to calculate an *ad valorem* cash deposit rate that is applied to the entered customs value of the subject imports upon importation into the United States.

The actual antidumping duties owed by the importer to CBP are determined in a subsequent administrative review in which Commerce calculates a dumping margin that governs the rate of assessment of duties for the prior period covered by the review.¹²⁰ To obtain the assessment rate, Commerce usually "divid[es] the dumping margin found on the subject merchandise examined by the entered value of such merchandise . . .".¹²¹ The assessment rate is then applied against entered value to determine the actual amount of antidumping duties due upon liquidation.¹²² Thus, both the cash deposit rate and the assessment rate are applied against the entered customs value declared to CBP by the importer.

If the amount of duties assessed is greater than the amount of cash deposits of estimated duties already paid by the importer, then the importer is required to pay the difference with interest. If the amount assessed is less than the amount of the estimated duties already paid, CBP reimburses the difference to the importer with interest.¹²³

The requirement that importers pay cash deposits of estimated antidumping duties was incorporated into the U.S. antidumping law by the Trade Agreements Act of 1979.¹²⁴ The purpose was to provide an additional deterrent to dumping by immediately increasing the financial burden placed on exporters and importers upon entry of merchandise subject to an antidumping duty order. Before the 1979 Act, importers of such merchandise were allowed to post bonds upon entry to ensure their eventual payment of duties. Congress, however, determined that such bonds provided an insufficient financial incentive for exporters and importers to provide the information needed to complete the final assessment of antidumping duties.¹²⁵ Cash deposits, then, serve as security for monies that may be owed to CBP once entries of subject merchandise are liquidated.¹²⁶

In addition, the cash deposit requirement provides an immediate, interim remedy against

119. 19 U.S.C. § 1673e(c)(3) (2002).

120. 19 U.S.C. § 1675(a) (2002).

121. 19 C.F.R. § 351.212(b) (2002).

122. See 19 C.F.R. § 351.212(b)(1) (2002).

123. 19 U.S.C. § 1677g (2002); 19 C.F.R. § 351.212(e) (2002).

124. Trade Agreement Act of 1979, Pub. L. 96-39, 93 Stat. 144 (1979).

125. See H.R. Rep. No. 96-317, at 69 (1979).

126. 19 U.S.C. § 1673e(a)(3) (2002) (instructing that published antidumping duty orders must, *inter alia*, require "the deposit of estimated antidumping duties pending liquidation of entries of merchandise").

dumping.¹²⁷ The payment of cash deposits aids in removing, as much as possible, the unfair advantage to the foreign exporter and the U.S. importer of selling the subject merchandise in the United States at less than fair value. The payment of cash deposits by the importer normally tends to increase the price paid by the eventual purchaser in the United States for goods covered by the antidumping duty order and thereby reduces or eliminates the injury caused by dumping.

The Federal Circuit has indicated that, although Commerce's methodology for determining cash deposit rates does not have to yield a completely accurate estimate of the assessed duties that will eventually be collected, it should nevertheless result in a "reasonably correct" estimate.¹²⁸ In addition, Commerce is not restricted in its selection of a cash deposit rate to the *ad valorem* methodology it normally uses.¹²⁹ The statute "does not require the same method of calculation for assessment rates and cash deposit rates. Nor does it specify a particular divisor when calculating either assessment rates or cash deposit rates."¹³⁰

B. RESPONDENTS' MANIPULATION OF ENTERED VALUE TO DECREASE CASH DEPOSITS

The intended remedial purpose of requiring cash deposits upon entry of merchandise subject to an antidumping order can be thwarted by the importer's understatement of its entered customs value for the merchandise. This is because, as discussed above, Commerce determines the cash deposit rate (the dumping margin) using a different methodology than it uses for the antidumping duty assessment rate. The cash deposit rate is calculated as follows: $(\text{normal value} - \text{U.S. price}) \div \text{U.S. price}$. By contrast, Commerce calculates the assessment rate as $(\text{normal value} - \text{U.S. price}) \div \text{entered value}$. Both rates are applied to entered value. An antidumping respondent's entered value reported to CBP and its net U.S. price reported to Commerce should bear a close relationship to each other. If the importer grossly understates its entered values, however, the denominator in the calculation of the cash deposit rate and the denominator in the calculation of the assessment rate can vary tremendously, yielding a cash deposit rate that does not yield a "reasonably correct" estimate of the amount assessed.

If cash deposits significantly underestimate the antidumping duties that will ultimately be collected, they cannot provide the statutorily required security for the future payment of antidumping duties.¹³¹ Moreover, they diminish the remedial impact of the order by failing to provide the importer the appropriate inducement to raise its price for the subject merchandise in the U.S. market. Significantly under-collected cash deposits also effectively provide short-term loans to the U.S. importer, with the U.S. Treasury acting as lender. The importer retains the use of funds equal to the amount of the under-collection for the period between the payment of cash deposits and final liquidation.

The understatement of entered values by the U.S. importer is most likely to occur where the importer and the foreign producer or exporter are affiliated companies. In that situation, the entered values reported to CBP for the imported merchandise may reflect at best an

127. See *Koyo Seiko Co. v. United States*, 110 F. Supp. 2d 934, 938 (Ct. Int'l Trade 2000), *aff'd*, 258 F.3d 1340, 1346 (Fed. Cir. 2001) ("Cash deposit is a provisional remedy").

128. *Torrington Co. v. United States*, 44 F.3d 1572, 1578 (Fed. Cir. 1995).

129. *Id.*

130. *Id.*; see also *Koyo Seiko*, 258 F.3d at 1346.

131. 19 U.S.C. § 1673e(a)(3) (2002).

arbitrary transfer price, not the arm's length transaction price between unaffiliated buyers and sellers normally preferred under the customs law.¹³²

In theory, either CBP or Commerce could remedy the understatement of entered values. CBP could investigate whether the importer has correctly reported the entered value of the merchandise, but it is not a simple matter to get CBP to undertake such an investigation. Among other reasons, the evidence of the understatement of entered values available to the domestic industry—a discrepancy between the entered value of the imports and the importer's sales price in the United States—is usually obtained from the data supplied by the respondent to Commerce in an antidumping administrative review. Because this data is treated by Commerce as business proprietary information, it is only available to counsel for the domestic industry under administrative protective order and cannot be disclosed to CBP. Therefore, it is likely to be easiest for a domestic producer to convince CBP to investigate the understatement of an importer's entered values if it can provide publicly available evidence of the understatement.

Commerce has indicated a willingness, at least in egregious cases, to remedy respondents' understatement of entered values. It has done so by departing from its normal *ad valorem* methodology for calculating the cash deposit rate and instead using a different methodology that obtains a better estimate of the assessed duties. In an administrative review of the antidumping order on gray Portland cement from Mexico, Commerce used a methodology, suggested by the domestic petitioner, which yields a cash deposit value in dollars per metric ton of merchandise entered.¹³³

In that case, although the petitioner noted the existence of evidence that the respondents had understated their entered values, Commerce made no such finding. Instead, Commerce

132. 19 U.S.C. § 1401a (2002); 19 C.F.R. §§ 152.100 (2002) *et seq.* A transfer price between a related buyer and seller is acceptable only if, among other things, it "closely approximates" the transaction value for sales to unrelated buyers in the United States. 19 U.S.C. § 1401a(b)(2)(B) (2002).

133. Commerce had rejected this methodology in the two immediately preceding administrative reviews, reasoning that "any difference between the estimated duties paid and the actual duties we have calculated for assessment purposes will be collected or refunded with interest at the time of liquidation of duties." Gray Portland Cement and Clinker from Mexico, 67 Fed. Reg. 12,518 (2002) (Issues and Decision Memorandum, Comment 10); Gray Portland Cement and Clinker from Mexico, 68 Fed. Reg. 1816 (2003) (Issues and Decision Memorandum, Comment 9). *See also* Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France *et al.*, 61 Fed. Reg. 66,472, 66,478 (1996). This reasoning was flawed, however, because the statutory provision governing refunds of cash deposits and collections of additional duties, 19 U.S.C. § 1675(b) (2002), provides no remedy whatsoever for a grossly inaccurate estimate of antidumping duties resulting from the understatement of entered customs values. CBP's ability in the future to make up the difference between the cash deposits and the assessed amounts only guarantees that the revenue generated by the antidumping order will not be lost. It cannot make up for the loss of the intended remedial benefits of the cash deposits in the interim. Because of the normally lengthy time between Commerce's final results of an administrative review and the completion of judicial review, this loss of remedial benefits can extend over several years.

134. Gray Portland Cement and Clinker from Mexico, 68 Fed. Reg. 54,203 (2003) (Issues and Decision Memorandum, Comment 16). *See also* Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMs") from Taiwan, 64 Fed. Reg. 56,308 (1999) (using quantity-based cash deposit rate methodology); Freshwater Crawfish Tail Meat from the People's Republic of China, 68 Fed. Reg. 7976 (2003) (Preliminary New Shipper Review). Commerce also has used quantity-based methodologies for determining the antidumping duty assessment rate. *See* Gray Portland Cement and Clinker from Mexico, 65 Fed. Reg. 13,943 (2000); Freshwater Crawfish Tail Meat from the People's Republic of China, 67 Fed. Reg. 63,877, 63,886 (2002) (Preliminary); Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom, 66 Fed. Reg. 36,551, 36,554 (2001) (determining assessment rate for export price sales by dividing total dumping margins by the total number of units sold).

noted that it had “observed a pattern of significant differences between the weighted-average margins and the assessment rates” in recent administrative reviews.¹³⁴ It further observed that this “pattern of differences indicates that the collection of estimated antidumping duties using a rate based on net U.S. price results in the undercollection of estimated antidumping duties at the time of entry. Consequently, the undercollection of estimated antidumping duties does not serve the fundamental purpose of the statutory cash-deposit requirement of providing security for final assessment and immediate relief from dumped imports.”¹³⁵ Consequently, Commerce abandoned its normal *ad valorem* cash deposit rate methodology in favor of a per-ton methodology that it concluded “represents a more accurate reflection of the estimated antidumping duties.”¹³⁶

V. Conclusion

The effective representation of domestic producers in AD/CVD cases increasingly requires significant contact with CBP. Largely as a result of the CDSOA, petitioners have greater access to information regarding liquidation of entries and assessment of duties than ever before. Nevertheless, both CBP and Commerce need to increase the transparency of the liquidation process to enable domestic petitioners the ability to fully protect their substantial interests in the proper enforcement of AD/CVD orders. How far domestic producers may go in challenging the improper liquidation of entries and assessment of duties is being tested by actions currently before the courts. There is no apparent reason, however, why the law should be read so strictly as to deny domestic producers the same rights to contest CBP's actions and decisions that importers already enjoy.

135. Gray and Portland Cement and Clinker from Mexico, 68 Fed. Reg. 54,203 (2003).

136. *Id.*