Protecting the Right to Judicial Review in Trade Remedy Cases: Preliminary Injunctions and the Impact of Recent Court Decisions

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I. INTRODUCTION

In an appeal of an antidumping (AD) or countervailing duty (CVD) determination, the issuance of a preliminary injunction is essential to

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ensure that the plaintiff is not deprived of a remedy with respect to the particular entries of foreign merchandise affected by its appeal and, more generally, its right to judicial review. Several recent decisions by the United States Court of International Trade (CIT) and the United States Court of Appeals for the Federal Circuit (Federal Circuit) have served to preserve and enhance the protection offered by preliminary injunctions in appeals from AD/CVD determinations. While these recent decisions have contributed to the ability of parties to preserve their rights to judicial review and effective relief from erroneous AD/CVD determinations, they do not by any means guarantee that parties' rights will be preserved in all cases. Thus, as at least one judge of the CIT has recognized, a carefully crafted legislative fix may be necessary to protect the rights of all parties challenging AD/CVD determinations and to ensure that such parties have their day in court.

II. THE IMPORTANCE OF PRELIMINARY INJUNCTIONS IN APPEALS OF ANTIDUMPING AND COUNTERVAILING DUTY DETERMINATIONS

Trade remedy proceedings in the United States are conducted by the United States Department of Commerce (DOC) and the United States International Trade Commission (ITC). In such proceedings, the agencies determine (1) whether AD/CVDs should be applied to imports of foreign merchandise into the United States and (2) if so, the proper amount of duties that should be applied.[1] If the DOC determines that the merchandise in question is being sold at "less than its fair value" (i.e., is being dumped) or has benefited from countervailable subsidies, and if the ITC finds that imports of such merchandise are injuring or threatening to injure a domestic industry, the DOC is required to issue an AD/CVD order imposing additional duties on the merchandise.[2] When the foreign merchandise is thereafter imported into the United States, the importer must deposit estimated AD/CVDs with United States Customs and Border Protection (CBP) for each entry of merchandise.[3] That deposit is made pending liquidation, which is the final computation or assessment of duties for a particular entry of merchandise.[4] Entries of

1. *See, e.g.*, Mukand Int'l, Ltd. v. United States (*Mukand II*) , 502 F.3d 1366, 1367 (Fed. Cir. 2007) (describing the system pursuant to which the U.S. trade remedy laws operate).

2. 19 U.S.C. §§ 1671, 1673 (2006). Imposition of an AD/CVD order may also be warranted where the ITC finds that the establishment of a domestic industry is being materially retarded by imports of foreign merchandise. *Id.*; *see, e.g., Mukand II*, 502 F.3d at 1367.

3. 19 U.S.C. §§ 1671d, 1671e, 1673d, 1673e; 19 C.F.R. § 141.101, .103 (2004); *see, e.g.*, *Mukand II*, 502 F.3d at 1367.

4. *See* 19 C.F.R. § 159.1.

merchandise are liquidated and final duties are paid at the AD/CVD rate set forth in liquidation instructions issued by the DOC to CBP.[5]

Parties to an AD/CVD proceeding have a statutory right to appeal a determination issued by the DOC or the ITC to the CIT.[6] If the CIT finds on appeal that the determination is not supported by substantial evidence or is not in accordance with law, it may remand the matter to the agency for disposition consistent with its findings.[7] In turn, this could result in a change to the AD/CVDs that are ultimately applied to the entries of foreign merchandise at issue in the appeal when such entries are liquidated. To prevent the entries of foreign merchandise from being prematurely liquidated while the appeal is still pending before the CIT, the statute authorizes the CIT to enjoin liquidation of the entries.[8]

The CIT rules specifically provide for parties to an appeal of an AD/CVD determination to file a motion for a preliminary injunction to enjoin liquidation of the entries subject to the appeal.[9] However, it is essential for a party challenging an AD/CVD determination to obtain such a preliminary injunction *before* the entries are liquidated. Once entries are liquidated, such liquidations become "final and conclusive upon all persons (including the United States and any officer thereof)."[10] In other words, once entries have been liquidated by CBP, they generally cannot be reliquidated at a different AD/CVD rate—even by order of the CIT.[11] Moreover, as the Federal Circuit has recognized, once the entries subject to an appeal have been liquidated, the CIT is deprived of jurisdiction to review the challenged AD/CVD determination, because any question relating to the amount of duties to be applied to those entries is rendered moot by the liquidation.[12] On the other hand, if the

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5. *See, e.g.*, *Mukand II*, 502 F.3d at 1367.
6. 19 U.S.C. § 1516a(a).
7. *Id.* § 1516a(c)(3).
8. *Id.* § 1516a(c)(2).
9. CT. OF INT'L TRADE R. 56.2.
10. 19 U.S.C. § 1514(a).
11. *Id.*; SKF USA, Inc. v. United States (*SKF I*), 512 F.3d 1326, 1328 (Fed. Cir. 2008) ("Under our case law, once liquidation occurs the trial court is powerless to order the assessment of duties at any different rate."). There are some limited exceptions to the rule against reliquidation of entries. For example, in *Shinyei Corp. of America v. United States*, the Federal Circuit held that in an action challenging liquidation instructions under 28 U.S.C. § 1581(i) (2000), the CIT could, under certain circumstances, use its equitable powers to compel reliquidation of entries if a preliminary injunction has been sought and denied. 355 F.3d 1297, 1305, 1312 (Fed. Cir. 2004).
12. Zenith Radio Corp. v. United States, 710 F.2d 806, 809-10 (Fed. Cir. 1983); *see also* Shandong Huarong Mach. Co. v. United States, No. 06-00345, 2008 WL 5159774, at *5-6 (Ct. Int'l Trade Dec. 10, 2008) (dismissing appeal because the subject entries had been liquidated);

CIT does issue an injunction enjoining liquidation of the subject entries prior to their actually being liquidated, liquidation generally may only be at the rate that is ultimately approved by the court.[13] As the CIT has stated, "[t]o 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."[14] Thus, if a party aggrieved by an erroneous AD/CVD determination wants to receive the benefit of a favorable court decision in its appeal, it is essential that the party obtain a preliminary injunction before liquidation takes place.

Significantly, it is equally important for both U.S. producers (i.e., petitioners) and the producers, exporters, and importers of foreign merchandise (i.e., respondents) in trade remedy cases to obtain preliminary injunctions in a timely manner. From the respondent's perspective, a preliminary injunction is a respondent's only assurance that it will receive any refunds of the deposits of AD/CVDs it has made if the CIT rules in its favor.[15] From the petitioner's perspective, it is important to ensure that entries of foreign merchandise are liquidated in accordance with the final decision of the CIT, as only the correct assessment of AD/CVDs ensures a level playing field for U.S. producers competing with dumped and subsidized imports.[16]

III. Recent Court Decisions Have Preserved and Enhanced the Protection Offered by Preliminary Injunctions

In several recent cases, the CIT and Federal Circuit were faced with issues that threatened to undermine the ability of parties challenging AD/CVD determinations to protect their rights to judicial review and effective relief through the issuance of a preliminary injunction. In their decisions in these cases, the CIT and Federal Circuit have recognized the fundamental need to protect parties' rights and have acted to do so.

Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States, 29 Ct. Int'l Trade 643, 645-47 (2005) (same).

13. *See, e.g.*, LG Elecs. U.S.A., Inc. v. United States, 21 Ct. Int'l Trade 1421, 1428 (1997).

14. *Id.* at 1428-29.

15. *See* Stuart M. Rosen, Jennifer J. Rhodes & W. Andrew Ryu, *Preliminary Injunctions: A Respondent's Perspective*, 39 J. MARSHALL L. REV. 29, 29 (2005).

16. *See* Jeffrey M. Telep, *Injunctions Against Liquidation in Trade Remedy Cases: A Petitioners' View*, 39 J. MARSHALL L. REV. 45, 45 (2005).

A. Five-Day Grace Period and Requirement of Personal Service

Preliminary injunctions in AD/CVD cases at the CIT normally contain two special provisions not found in injunctions issued in other types of cases: (1) a requirement that the preliminary injunction be personally served on certain DOC and CBP officials and (2) a provision stating that the preliminary injunction will only take effect five days after it has been personally served on the relevant officials. In recent decisions, the CIT and Federal Circuit have rejected efforts by the government to rely on these provisions as a basis for the dismissal of AD/CVD appeals where the entries of foreign merchandise at issue in the appeals had been liquidated.

1. The Five-Day Grace Period

One such decision is the decision in *Agro Dutch Industries Ltd. v. United States*.[17] The issue in *Agro Dutch* was the meaning and effect to be given to the provision in a preliminary injunction stating that the injunction would only take effect five days after it was personally served on certain DOC and CBP officials.[18] As is its practice, the government had requested that this five-day grace period be included as a condition of its consenting to the entry of a preliminary injunction so that it would avoid "an inadvertent violation" of the injunction.[19] The plaintiff, a respondent in the underlying AD proceeding, served the preliminary injunction on the appropriate government officials three days after it was issued by the CIT.[20] However, CBP liquidated nearly all of the entries that were subject to the appeal on the very same day that the respondent served the injunction.[21] After extensive additional proceedings, the CIT remanded the matter to the DOC for a redetermination of the AD duty rate calculated for the respondent, and the DOC issued a redetermination on remand that significantly lowered that rate.[22] The respondent then moved to have the CIT amend the effective date of the preliminary injunction to the date that it was issued and direct that the relevant entries be reliquidated at the lower duty rate calculated by the DOC in the remand redetermination.[23] The government, on the other hand, argued

17. 589 F.3d 1187 (Fed. Cir. 2009).
18. *Id.* at 1189.
19. *Id.* (quotation marks omitted).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

that the CIT lacked jurisdiction to entertain the respondent's appeal regarding the entries that had been liquidated.[24] To ensure that its decision on the merits of the case had effect, the CIT granted the respondent's motion.[25]

The government appealed the CIT's decision, arguing that the CIT lacked jurisdiction over the liquidated entries and was therefore powerless to amend the injunction or order reliquidation.[26] The Federal Circuit, however, affirmed the CIT's decision.[27] It found that the purpose of the preliminary injunction and the understanding and intent of all the parties was to suspend liquidation pending a decision on the merits of the plaintiff's challenge.[28] Moreover, it found that the purpose of adding the five-day grace period to the injunction was "to ensure against subjecting [CBP] officials to contempt sanctions for an inadvertent liquidation. It was not intended to give the government free rein to liquidate the subject entries before the injunction took effect."[29] The Federal Circuit also rejected the government's argument that the interest in the finality of AD duties imposed by the government mandated that the CIT's decision be overturned.[30] It found that "[w]hile finality is an important goal, the interest in finality must give way in the face of a more compelling interest in this case: namely, effecting the intent of the parties and the court to prevent a premature liquidation while judicial review is ongoing."[31]

2. The Personal Service Requirement

Subsequently, in *Clearon Corp. v. United States*, the CIT extended the Federal Circuit's holding in *Agro Dutch* to language in a preliminary injunction that required the injunction to be personally served on certain DOC and CBP officials.[32] In *Clearon*, the DOC published the final results of an AD administrative review, which resulted in the lifting of the statutory suspension of liquidation that had been in effect during the course of the administrative review.[33] This lifting of the suspension of

24. *Id.* at 1190.
25. *Id.*
26. *Id.*
27. *Id.* at 1194.
28. *Id.* at 1192.
29. *Id.* at 1193.
30. *Id.* at 1193-94.
31. *Id.*
32. Clearon Corp. v. United States, 717 F. Supp. 2d 1366, 1373 (Ct. Int'l Trade 2010).
33. *Id.* at 1368.

liquidation also started the six-month period for so-called "deemed liquidation."[34] Specifically, pursuant to the statute, when the suspension of liquidation of entries is removed, CBP must liquidate the entries within six months after receiving notice of the removal.[35] Any entry not liquidated by CBP within six months after receiving such notice is deemed liquidated by operation of law at the rate of duty asserted at the time of entry by the importer of record.[36]

The U.S. producers challenged the DOC's final results before the CIT and, with the consent of the government, sought a preliminary injunction against liquidation.[37] The CIT granted the injunction, which included language stating that the injunction would take effect five days after it was personally served by the U.S. producers' counsel on certain individuals at the DOC and CBP.[38] The case then proceeded "in the usual fashion" until, over a year after the CIT had granted the injunction, the government filed a motion to dismiss on the basis that the CIT no longer had jurisdiction over the appeal.[39] According to the government, the U.S. producers had failed to serve the injunction on the relevant DOC and CBP officials personally, and, as a result, the injunction had failed to prevent a deemed liquidation of the entries of merchandise subject to the appeal.[40]

The CIT denied the government's motion to dismiss.[41] As an initial matter, it recognized that in ordinary litigation it is the duty of the lawyer for the party being enjoined—and not the lawyer for the party seeking an injunction—to inform those who might violate the injunction of its existence.[42] It further recognized that although it had become common in the CIT for a consent injunction to contain language requiring the party that obtained the injunction to serve it personally on certain officials at the DOC and CBP, the purpose of this language was simply "to reduce the chance of these entities' taking action to liquidate the subject

34. *Id.* at 1367.
35. 19 U.S.C. § 1504(d) (2006).
36. *Id.*
37. *Clearon*, 717 F. Supp. 2d at 1368.
38. *Id.*
39. *Id.*
40. *Id.* at 1369.
41. *Id.* at 1367.
42. *Id.* at 1371; *see also* Anthony Marano Co. v. MS-Grand Bridgeview, Inc., No. 08 C 4244, 2009 WL 1904403, at *3 (N.D. Ill. July 1, 2009) (holding that the enjoined party, whose employees violated a preliminary injunction, could not claim that the "notice of the injunction 'was not fully transmitted' to all of [its employees]" when its counsel has been notified of the injunction).

merchandise."[43] Given this purpose of the service requirement, the CIT found that the Federal Circuit's holding in *Agro Dutch* required that it "give meaning to the parties' primary intention that no liquidation should take place."[44] Accordingly, the CIT used its equitable powers to disregard the service requirement in the preliminary injunction and to order that the entries were not to be deemed liquidated.[45]

It should be noted that the holding in *Clearon* is in conflict with another recent decision by the CIT—*Ames True Temper v. United States*.[46] In *Ames True Temper*, the CIT dismissed an appeal for lack of jurisdiction because the respondent had failed to serve the preliminary injunction on the appropriate DOC and CBP officials and the entries subject to the appeal had been deemed liquidated.[47] The respondent in that case had filed a consent motion for a preliminary injunction to enjoin the liquidation of entries that were the subject of its appeal of an administrative review of an AD order.[48] The CIT issued the injunction which (as usual) included language stating that it would only take effect after it was personally served on certain DOC and CBP officials.[49] The respondents did not serve the injunction until eight months after the final results of the administrative review had been published (and thus two months after the expiration of the six-month period for deemed liquidation).[50] The CIT dismissed the action for lack of subject matter jurisdiction on the basis that the preliminary injunction was ineffective in preventing deemed liquidation because it was not properly served.[51]

Significantly, the rate at which the entries were deemed liquidated in *Ames True Temper* was lower than the rate the respondent had received in the final results of the administrative review that was being appealed.[52] Thus, it was the U.S. producer, rather than the respondent, that was harmed by the deemed liquidation. The U.S. producer subsequently filed a separate appeal before the CIT seeking reliquidation of the entries in question in accordance with the final results issued by

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43. *Clearon*, 717 F. Supp. 2d at 1372.
44. *Id.* at 1373.
45. *Id.* at 1373-74.
46. 700 F. Supp. 2d 1352 (Ct. Int'l Trade 2010).
47. *Id.* at 1354-55.
48. *Id.* at 1355.
49. *Id.*
50. *Id.*
51. *Id.* (citing Shandong Huarong Mach. Co. v. United States, No. 06-00345, 2008 WL 5159774, at *5-6 (Ct. Int'l Trade Dec. 10, 2008)).
52. *Id.* at 1356.

the DOC.[53] The U.S. producer argued that under *Agro Dutch*, the CIT was required to give effect to the preliminary injunction even though it had not been personally served on the appropriate DOC and CBP officials.[54] However, the CIT dismissed the U.S. producer's appeal for lack of subject matter jurisdiction.[55] In so doing, it found that the Federal Circuit's decision in *Agro Dutch* was distinguishable from the U.S. producer's challenge, even though both cases involved the special service requirements for preliminary injunctions in AD/CVD appeals.[56] It explained that *Agro Dutch* involved CBP affirmatively liquidating the subject entries the day the preliminary injunction was served, whereas the appeal in *Ames True Temper* involved the deemed liquidation of entries months after the issuance of the injunction.[57] In other words, the CIT found that while *Agro Dutch* may require the court to disregard the service requirement where entries are actually liquidated after the CIT has issued an injunction, *Agro Dutch* did not require the court to disregard the service requirement where the entries were deemed liquidated after the CIT had issued an injunction.[58]

B. Fifteen-Day Policy

The CIT has also recently addressed a policy imposed by the DOC that presents perhaps the most significant obstacle to parties' ability to secure preliminary injunctions prior to the liquidation of entries and thereby preserve their rights to judicial review and effective relief from erroneous AD/CVD determinations. The policy in question is the DOC's fifteen-day policy.

In the fifteen-day policy originally established by the DOC in August 2002, the DOC stated that it would issue liquidation instructions to CBP within fifteen days of the publication of the final results in an administrative review of an AD/CVD order.[59] The DOC subsequently

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53. *Id.* at 1355-56.
54. *Id.* at 1357.
55. *Id.* at 1360.
56. *Id.* at 1358.
57. *Id.*
58. *Id.*
59. *See, e.g.*, Mittal Steel Galati S.A. v. United States (*Mittal II*), 31 Ct. Int'l Trade 1121, 1141-42 (2007). The DOC announced its fifteen-day policy by publishing the policy on its Web site. The announcement on Commerce's Web site stated:

> The Department of Commerce announces that, effective immediately, it intends to issue liquidation instructions pursuant to administrative reviews conducted under section 751 of the Tariff Act of 1930, as amended, to the U.S. Customs Service within 15 days of publication of the final results of review in the *Federal Register* or any

revised the fifteen-day policy to state that it would issue liquidation instructions fifteen days after publication of its final results in an administrative review.[60]

Under either formulation, the DOC's fifteen-day policy wreaks havoc with the scheme that has been established for appealing AD/CVD determinations and seeking preliminary injunctions in such appeals. Pursuant to the statute, an interested party may challenge a final AD/CVD determination by filing a summons within thirty days of the date of publication of the final results in the Federal Register and by filing a complaint within thirty days thereafter.[61] Moreover, pursuant to the rules of the CIT, parties have thirty days after service of the complaint to file a motion for a preliminary injunction to enjoin liquidation of the entries subject to appeal.[62] Thus, either version of the DOC's fifteen-day policy significantly increases the risk that entries will be liquidated before the deadline for parties to appeal and apply for a preliminary injunction.

In fact, there have been numerous instances where the DOC's application of its fifteen-day policy has resulted in the liquidation of entries prior to parties obtaining a preliminary injunction from the CIT, thus depriving the parties of a remedy with respect to the particular entries affected by their appeal and, more generally, depriving them of their right to judicial review. For example, in *Mukand International Ltd. v. United States* (*Mukand I*), the DOC issued liquidation instructions to CBP before the respondent had filed a complaint or a request for a preliminary injunction at the CIT.[63] The subject entries were liquidated seventy-five days after the AD/CVD determination had been published in the Federal Register, which was after the respondent had filed its complaint but before it filed a motion for a preliminary injunction.[64] Similarly, in *Mittal Steel Galati S.A. v. United States* (*Mittal II*), the DOC issued liquidation instructions before the respondent had even filed

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> amendments thereto. This announcement applies to reviews conducted under sections 751(a)(1) and (2) of the Tariff Act.

Int'l Trade Admin., *Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Administrative Reviews*, DEP'T OF COMMERCE (Aug. 9, 2002), http://ia.ita.doc.gov/download/liquidation-announcement.html.

60. SKF USA, Inc. v. United States (*SKF III*), 659 F. Supp. 2d 1338, 1341 (Ct. Int'l Trade 2009).

61. 19 U.S.C. § 1516a(a)(2)(A) (2006).

62. CT. INT'L TRADE R. 56.2.

63. 30 Ct. Int'l Trade 1309, 1310 (2006).

64. *Id.*

a complaint, and a number of the respondent's entries were liquidated while it was in the midst of negotiations with the government over a consent motion for a preliminary injunction.[65] In both of these cases, the CIT found that the statute does not explicitly state how or when the DOC should transmit liquidation instructions to CBP and that the DOC's fifteen-day policy was a reasonable method of filling this "statutory gap."[66] Accordingly, the CIT concluded in both *Mukand I* and *Mittal II* that the entries in question had been properly liquidated and that, as a result, the respondents' challenges to the DOC's AD/CVD determinations must be dismissed.[67]

The CIT also rejected a facial challenge to the DOC's fifteen-day policy in *Mittal Steel Galati S.A. v. United States* (*Mittal I*).[68] In so doing, the CIT once again determined that the fifteen-day policy reasonably filled "a gap in the statute that Congress left for [the DOC] to fill."[69]

In a departure from the holdings of *Mukand I*, *Mittal I*, and *Mittal II*, however, the CIT has recently issued a series of decisions holding that the DOC's fifteen-day policy is not in accordance with law.[70] First, in *SKF USA Inc. v. United States* (*SKF II*), the plaintiff sought a declaratory judgment that the DOC's original fifteen-day policy was unlawful on the ground that the statutory provisions governing the time for filing an appeal of an AD/CVD determination require the DOC to wait sixty days or more before issuing liquidation instructions to CBP.[71] The CIT disagreed with the plaintiff's specific argument, finding that the statute does not require the DOC to wait sixty days before issuing liquidation instructions.[72] Nevertheless, the CIT still held that the DOC's fifteen-day policy was not in accordance with law.[73]

In reaching this conclusion, the CIT first recognized that interested parties have a "statutory right to obtain meaningful judicial review"

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65. 31 Ct. Int'l Trade 1121, 1143 (2007).

66. *Mukand I*, 30 Ct. Int'l Trade at 1314; *Mittal II*, 31 Ct. Int'l Trade at 1145.

67. *Mukand I*, 30 Ct. Int'l Trade at 1315; *Mittal II*, 31 Ct. Int'l Trade at 1145-47.

68. Mittal Steel Galati S.A. v. United States (*Mittal I*), 31 Ct. Int'l Trade 730, 739 (2007) (following the CIT's reasoning in *Mukand I* to uphold Commerce's fifteen-day policy).

69. *Id.*

70. *See* SKF USA Inc. v. United States (*SKF II*), 611 F. Supp. 2d 1351, 1367 (Ct. Int'l Trade 2009); *SKF III*, 659 F. Supp. 2d 1338, 1340 (Ct. Int'l Trade 2009); SKF USA Inc. v. United States (*SKF IV*), 675 F. Supp. 2d 1264, 1285 (Ct. Int'l Trade 2009); SKF USA Inc. v. United States (*SKF V*), No. 09-00392, 2010 WL 1976884, at *4 (Ct. Int'l Trade May 17, 2010).

71. 611 F. Supp. 2d at 1361.

72. *Id.* at 1362-63.

73. *Id.*

which arises out of 19 U.S.C. § 1516a.[74] Section 1516a provides for interested parties in AD/CVD proceedings to invoke the jurisdiction of the CIT and for an injunction against liquidation in such cases.[75] The CIT found that this "statutory right implies, necessarily, some reasonable opportunity in which a plaintiff may seek to obtain the specific type of injunction described in § 1516a(c)(2)."[76] Having recognized this, the CIT concluded that the DOC's fifteen-day policy impermissibly burdened an interested party's right to meaningful judicial review:

> Consistent with its fifteen-day policy . . . , [the DOC] could issue liquidation instructions the first day after publication of the final results of a review, and [CBP] could liquidate the entries immediately. In that event, an interested party essentially would have no reasonable opportunity to obtain an injunction against liquidation or even a [temporary restraining order (TRO)]. To ensure that it will have the chance to obtain an injunction, such a plaintiff would need to file a summons, complaint, and a motion or application for a TRO (if a consented-to injunction is not obtainable), and actually obtain a TRO, all on the day following publication of the final results. The fifteen-day policy, as practiced by [the DOC], induces an absurd, and unnecessary, "race to the courthouse" that burdens impermissibly the right of a prospective plaintiff to seek the injunction that Congress contemplated in enacting § 1516a(c)(2) and frustrates the purpose of that provision.[77]

The CIT also addressed the court's decisions with respect to the DOC's fifteen-day policy in *Mukand I* and *Mittal I*.[78] With respect to *Mukand I*, the CIT stated that the case was limited to its facts, which involved liquidation instructions that were issued thirty-five days after publication of the final results and actual liquidation occurring seventy-five days after publication.[79] Thus, the CIT in *SKF II* found that "*Mukand* does not state a broad holding that the fifteen-day policy . . . is invariably permissible."[80] The CIT also stated that *Mittal I* recognized "'the possibility [that the DOC and CBP] "may act so quickly" . . . as to practically foreclose interested parties from obtaining judicial review of subject entries pursuant to 19 U.S.C. § 1516a, and such a foreclosure

74. *Id.* at 1364 (citing 19 U.S.C. § 1516a (2006)).
75. *Id.*
76. *Id.*
77. *Id.* at 1364-65 (internal footnotes omitted).
78. *Id.* at 1366-67.
79. *Id.* at 1366.
80. *Id.*

would render Commerce's policy unreasonable.'"[81] Moreover, the CIT found that *Mittal I* "did not address explicitly the question of whether the fifteen-day policy, by allowing liquidation to occur almost immediately upon publication of final results, comports with [the statute]."[82]

Based on the fact that the DOC's original fifteen-day policy allowed liquidation to occur almost immediately upon publication of the DOC's final results, "rather than providing a minimally reasonable time during which a party may seek to obtain an injunction against liquidation," the CIT ruled against the fifteen-day policy.[83] It awarded the plaintiffs a declaratory judgment stating that the DOC's application of the fifteen-day policy in the case on appeal or in any future cases was contrary to law.[84]

The CIT's decision in *SKF II* was followed by a similar decision in *SKF USA Inc. v. United States* (*SKF III*), in which the CIT again held the DOC's fifteen-day policy to be unreasonable and not in accordance with law.[85] In *SKF III*, the CIT addressed the revised version of the DOC's fifteen-day policy, which the DOC had announced in the underlying final results that were being challenged on appeal.[86] The CIT continued to find that although the statute provides parties thirty days to file a summons and an additional thirty days to file a complaint when appealing an AD/CVD determination before the CIT, the statute does not specifically require that the DOC wait thirty days or any other amount of time after publication of the determination to issue liquidation instructions.[87] However, the CIT also continued to find that

> [t]he issue of how much time interested parties are afforded to [appeal an AD/CVD determination] and seek an injunction against liquidation

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81. *Id.* at 1367 (quoting *Mittal I*, 31 Ct. Int'l Trade 730, 738 (2007)).

82. *Id.* The CIT made a similar finding with respect to *Mittal II*. *See id.* at 1367 n.14 (noting that *Mittal II* "did not discuss specifically the issue of whether the fifteen-day policy complies with [the statute]").

83. *Id.* at 1367.

84. *Id.*

85. 659 F. Supp. 2d 1338, 1340 (Ct. Int'l Trade 2009).

86. *Id.* at 1347.

87. *Id.* at 1349. The CIT noted that in *Tianjin Machinery Import & Export Corp. v. United States*, the CIT had stated that the DOC's previous fifteen-day policy was not in accordance with law because it contravened the sixty-day time frame for filing a summons and complaint. *Id.* (citing Tianjin Mach. Imp. & Exp. Corp. v. United States, 353 F. Supp. 2d 1294 (Ct. Int'l Trade 2004), *aff'd mem.*, 146 F. App'x 493 (Fed. Cir. 2005) (per curiam)). However, the CIT found that this statement in *Tianjin* was dicta because it "was not effectuated in the judgment entered in the case." *Id.* Thus, the CIT concluded that *Tianjin* did not establish a precedent that was controlling in *SKF III*. *Id.* at 1349-50.

> unquestionably is important to the functioning of the statutory scheme under which parties may obtain meaningful judicial review of the final results of an administrative review of an antidumping duty order.[88]

The CIT concluded that in adopting its revised fifteen-day policy, the DOC failed to consider the factors that the governing statutory provisions make relevant to any policy on the timing of the issuance of liquidation instructions to CBP.[89] In particular, the CIT found that the DOC failed to consider "the importance of an orderly administration of the statutory scheme, under which affected parties may exercise freely their right to seek and obtain meaningful judicial review, and the need for [the DOC] to achieve its regulatory objectives without imposing unnecessary costs and burdens on affected parties."[90] In other words, whereas the CIT found in *SKF II* that the DOC's original fifteen-day policy was unlawful because it allowed liquidation to occur almost immediately upon publication rather than providing a minimally reasonable time during which a party may seek to obtain a preliminary injunction, the CIT found in *SKF III* that the DOC's revised fifteen-day policy was unlawful because the DOC had failed to consider the factors relevant to adopting any policy on the issuance of liquidation instructions.

The CIT also addressed the DOC's revised fifteen-day policy in two subsequent decisions, *SKF USA Inc. v. United States* (*SKF IV*) and *SKF USA Inc. v. United States* (*SKF V*).[91] In each of these decisions, the CIT relied on its reasoning in *SKF III* to hold that the DOC's fifteen-day policy was unlawful.[92]

IV. IS LEGISLATION NECESSARY?

As discussed below, a legislative solution may be necessary to ensure that parties' rights to judicial review and effective relief from erroneous AD/CVD determinations are protected. Although the recent decisions issued by the CIT and the Federal Circuit are helpful in preserving and enhancing the protection of parties' rights, the effect of those decisions may be limited in future cases based on the particular facts presented, the limited precedential effect of CIT decisions on subsequent cases arising at the CIT, and the fact that conflicting decisions

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88. *Id.* at 1350.
89. *Id.*
90. *Id.* at 1350-51.
91. *SKF IV*, 675 F. Supp. 2d 1264 (Ct. Int'l Trade 2009); *SKF V*, No. 09-00392, 2010 WL 1976884 (Ct. Int'l Trade May 17, 2010).
92. *SKF IV*, 675 F. Supp. 2d at 1285; *SKF V*, 2010 WL 1976884, at *3-4.

already exist within the CIT's jurisprudence. In addition, despite the recent decisions finding the DOC's fifteen-day policy for issuing liquidation instructions to be unlawful, the DOC continues to apply it. Legislation may be the only means of preventing the premature liquidation of entries subject to a potential or actual appeal.

A legislative fix would address the problems posed by the DOC's fifteen-day policy for issuing liquidation instructions. The DOC's fifteen-day policy has been widely criticized and repeatedly challenged. Indeed, some of the most pointed criticism of the policy has been offered in decisions that have upheld the policy as lawful. In *Mukand I*, Judge Gordon took the extraordinary step of offering his "unsolicited advice" that to avoid parties being deprived of their statutory right to judicial review, the DOC should "issue instructions that direct [CBP] to liquidate no earlier than (1) the date that is 90 days after the *Federal Register* publication date, and no later than (2) the six-month anniversary of that publication date unless liquidation is enjoined pursuant to court order."[93] As Judge Gordon recognized, this practice "would provide much needed certainty to the liquidation process" and "afford interested parties ample time in which to contemplate suit, and if so inclined, to commence their actions and obtain the requisite injunction against liquidation."[94] In the event the DOC was unwilling to change its policy, Judge Gordon suggested "some form of legislative 'fix' by Congressional action—perhaps via an amendment . . . that suspends liquidation pending judicial review."[95] Similarly, Judge Pogue stated in *Mittal II* that "a longer period—for issuance of instructions and initiating liquidation by [CBP]—would be more indicative of [the DOC]'s consideration of all the factors and interests involved in the adoption of its 15 Day Policy."[96]

Notwithstanding these concerns and the four recent CIT decisions that have declared the DOC's fifteen-day policy to be unlawful, it appears quite certain that the DOC will continue to apply the policy in future cases. In *SKF V*, for example, the CIT noted that "despite the court's prior holding that the fifteen-day policy was contrary to law, [the DOC] has continued to apply its fifteen-day policy in multiple administrative reviews in 2010" and "has given no indication that it will modify that policy or otherwise remedy the continuing harm the court identified in

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93. 30 Ct. Int'l Trade 1309, 1314-15 (2006); *see also Mittal I*, 31 Ct. Int'l Trade 730, 739 (2007) (describing the "unsolicited advice" Judge Gordon offered in *Mukand I*).

94. *Mukand I*, 30 Ct. Int'l Trade at 1315.

95. *Id.* at 1314.

96. 31 Ct. Int'l Trade 1121, 1146 (2007).

SKF II."[97] Moreover, as recently as September 2010, the DOC made explicit in its final results for an administrative review of the AD order on *Ball Bearings and Parts Thereof* that it will continue to apply its fifteen-day policy.[98] In doing so, the DOC explained simply that "[o]ur policy is based upon administrative necessity, namely that we must provide [CBP] with sufficient time to liquidate all entries . . . before the entries are deemed liquidated."[99]

It is also clear that the government will continue to require as conditions of its consenting to the entry of a preliminary injunction in AD/CVD appeals (1) that the party seeking a preliminary injunction serve it on certain DOC and CBP officials personally and (2) that the injunction only take effect five days after it is served on the appropriate officials. This is evidenced by the fact that the government has continued to insist on these conditions in recent appeals of AD/CVD determinations before the CIT.[100]

The decisions recently issued by the CIT and the Federal Circuit in *Agro Dutch*, *Clearon*, and the *SKF* line of cases are significant steps forward, but they do not guarantee that parties' rights to judicial review and effective relief from erroneous AD/CVD determinations will be preserved in all cases. This is true for several reasons. First, the decisions may be limited to their particular facts. Moreover, the CIT decisions in *Clearon* and the *SKF* cases are not binding on other CIT judges. While the CIT will consider the holding and reasoning of a previous opinion by a different judge of the CIT for its persuasive power, such an opinion is not binding precedent.[101] Indeed, there is already conflicting authority within the CIT between *Clearon* and *Ames True*

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97. No. 09-00392, 2010 WL 1976884, at *4 (Ct. Int'l Trade May 17, 2010).

98. Issues and Decision Memorandum in Ball Bearings and Parts Thereof from Fr., Ger., It., Japan, and the U.K., 75 Fed. Reg. 53,661, 53,663 cmt. 8 (Dep't of Commerce Sept. 1, 2010) (final admin. review).

99. *Id.*

100. *See, e.g.*, Plaintiff's Consent Motion for Preliminary Injunction against Liquidation of Entries at 2, Dongguan Sunrise Furniture Co. v. United States, No. 10-00254 (Ct. Int'l Trade Sept. 7, 2010) (containing both the service requirement and the five-day grace period); Order at 1, Grobest & I-Mei Indus. (Viet.) Co. v. United States, No. 10-00238 (Ct. Int'l Trade Sept. 13, 2010) (same); Order at 5, Ad Hoc Shrimp Trade Action Comm. v. United States, No. 10-00237 (Ct. Int'l Trade Aug. 30, 2010) (same).

101. Nucor Corp. v. United States, 594 F. Supp. 2d 1320, 1381 n.47 (Ct. Int'l Trade 2008) ("Whenever this Court considers the holding and reasoning of a previous opinion rendered by a different Judge of the CIT, it regards such opinions as persuasive, of course, but not binding precedent."); E.I. DuPont de Nemours & Co. v. United States, 23 Ct. Int'l Trade 343, 348 (1999) ("[T]he precedential value of prior judicial determinations of this court is not clear in trade cases, even where the parties are the same and the operative facts do not differ in any significant way.").

Temper as to whether the personal service requirement included in preliminary injunctions for AD/CVD appeals may be disregarded so as to preserve a party's right to judicial review and relief.[102] There is also conflicting authority within the CIT regarding whether the DOC's fifteen-day policy is in accordance with law.[103]

The bottom line is that the only way to protect definitively against premature liquidations and to preserve parties' rights to judicial review and effective relief in AD/CVD appeals is to address the issue legislatively. In this regard, the Customs and International Trade Bar Association has proposed legislation that would prohibit the DOC from issuing liquidation instructions to CBP "until the time for appeal under [19 U.S.C. § 1516a] has elapsed."[104] This proposal represents one reasonable approach to the problem. A similar, and equally reasonable, approach would be to adopt Judge Gordon's suggestion of having legislation that suspends liquidation pending judicial review.[105]

V. CONCLUSION

Ensuring that parties are not deprived of their statutory rights to judicial review and effective relief in appeals from erroneous AD/CVD determinations is of critical importance. Although the recent decisions issued by the CIT and Federal Circuit are certainly helpful in this regard, they do not by any means solve the problem. Rather, the only true solution may be a legislative one.

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102. *Compare* Clearon Corp. v. United States, 717 F. Supp. 2d 1366, 1367 (Ct. Int'l Trade 2010) (disregarding language in a preliminary injunction that required the injunction to be personally served on certain DOC and CBP officials), *with* Ames True Temper v. United States, 700 F. Supp. 2d 1352, 1355 (Ct. Int'l Trade 2010) (dismissing an appeal for lack of jurisdiction because the respondent had failed to serve the preliminary injunction on certain DOC and CBP officials and the entries subject to appeal had been deemed liquidated).

103. *Compare SKF II*, 611 F. Supp. 2d 1351, 1353 (Ct. Int'l Trade 2009) (holding the DOC's fifteen-day policy to be unreasonable and not in accordance with law); *SKF III*, 659 F. Supp. 2d 1338, 1340 (Ct. Int'l Trade 2009) (same); *SKF IV*, 675 F. Supp. 2d 1264, 1285 (Ct. Int'l Trade 2009) (same); *SKF V*, No. 09-00392, 2010 WL 1976884, at *4 (Ct. Int'l Trade May 17, 2010) (same), *with Mukand I*, 30 Ct. Int'l Trade 1309, 1309 (Ct. Int'l Trade 2006) (upholding the DOC's fifteen-day policy as reasonable and in accordance with law); *Mittal II*, 31 Ct. Int'l Trade 1121, 1143 (2007) (same); *Mittal I*, 31 Ct. Int'l Trade 730, 730 (2007) (same).

104. *Proposed United States Court of International Trade Improvement Act*, CUSTOMS & INT'L TRADE BAR ASS'N, http://www.citba.org/documents/CITACT-June2009-Clean.pdf (last visited Feb. 3, 2011).

105. *Mukand I*, 30 Ct. Int'l Trade at 1314.