

**DEEMED LIQUIDATION: A CASE FOR THE STATUTORY  
AMENDMENTS OF U.S. CUSTOMS LAW GOVERNING  
THE COLLECTION OF ANTIDUMPING AND  
COUNTERVAILING DUTIES**

**by**

**Rikard Lundberg**

**Gregory S. McCue  
Steptoe & Johnson  
Washington, DC**

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RIKARD LUNDBERG<sup>†</sup>

ABSTRACT

*The U.S. scheme for the collection of antidumping and countervailing duties is flawed as administered. Imported goods subject to such duties may be deemed liquidated under 19 U.S.C. Section 1504(d). Deemed liquidation occurs by operation of law when Customs fails to affirmatively liquidate imported goods. The final duty rate is then “deemed” to be the same as the preliminary duty paid at the time of importation. The significance of deemed liquidation is that the preliminary duty rate and the final duty rate, which should have been collected, frequently are different, thereby causing importers to lose money when they have overpaid duties upon importation and causing the U.S. government to lose money when importers have underpaid duties. Practically, deemed liquidation occurs because the Commerce Department and Customs fail to take action required by statute or make mistakes in taking such action. The current statutory scheme does not create incentives for those administrative agencies to take timely action because delay may benefit the U.S. government. These delays may injure importers and threaten U.S. multi-lateral trade-relations. The U.S. scheme does not provide an administrative remedy to address the problem and judicial remedies are ineffective. Therefore, the U.S. trade and customs laws should be amended to (1) impose mandatory deadlines within which these U.S. agencies must act, (2) protect importers by imposing negative consequences to the U.S. government for failure to meet those deadlines, and (3) create an administrative remedy for importers to protest and undo deemed liquidation once it has occurred.*

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<sup>†</sup> The author is an associate with Brownstein Hyatt & Farber, P.C. in Denver, Colo. He is and has taught as a visiting assistant and adjunct professor of law at the Sturm College of Law at the University of Denver. The author has represented clients before the U.S. Department of Commerce and U.S. Bureau of Customs and Border Protection Customs in antidumping proceedings and the liquidation process. The author wishes to acknowledge the invaluable contributions made to this article by Professor Jay Brown at the Sturm College of Law, Gregory S. McCue of the law firm Steptoe & Johnson, Washington, D.C., and his research assistants: Kathryn Garner, Ryan Howell, Suzanne Meintzer, Pax Moultrie and Thomas Wagner.

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## INTRODUCTION

Goods imported into the United States are subject to import duties. For certain goods, the duty liability may include antidumping duties, a type of “unfair trade” duty.<sup>1</sup> Unfair trade duties are statutorily mandated, imposed by the Department of Commerce (“DOC”) and collected by the U.S. Bureau of Customs and Border Protection (“Customs”) through a process called “liquidation.”<sup>2</sup> Importers pay preliminary duties upon importation. The DOC subsequently determines the final duty liability, which may be higher than, lower than or the same as the preliminary duties paid. Customs must liquidate goods within six month of receiving notice from the DOC of the final duty liability.<sup>3</sup> If Customs does not do so, the goods are “deemed” liquidated at the preliminary duty rate paid upon importation. The DOC and Customs frequently delay in determining the final duty liability and liquidating, causing deemed liquidation to occur.

Deemed liquidation results in a windfall for the importer and a “loss” for the United States government if the final duty liability is higher than the preliminary duty paid upon entry. Conversely, deemed liquidation results in a loss for the importer and a windfall for the U.S. government if the final duty liability is lower than the preliminary duty paid upon entry. Deemed liquidation also affects representatives of U.S. industry in the sense that U.S. industry either gains more or less protection against unfairly traded foreign imports.

Customs Headquarters Ruling HQ 228249<sup>4</sup> illustrates how Customs’ failure to timely liquidate entries may injure an importer and benefit the government. In 1986, an importer imported bricks from Mexico and paid a preliminary unfair trade duty of 3.51 percent ad valorem.<sup>5</sup> The DOC subsequently revoked the unfair trade duty and, in May 1996, sent instructions to Customs to liquidate the importer’s entries of bricks at zero percent duty. Customs failed to do so and discovered in July 1998, approximately twenty-five months after receiving notice of the final duty liability, that the goods were deemed liquidated at the 3.51

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1. For purposes of this article, the processes for the collection of antidumping and countervailing duties are essentially the same. For simplicity’s sake, this article discusses collection of antidumping duties only.

2. See, e.g., 19 U.S.C. §§ 1671, 1673 (2000); 19 C.F.R. § 159.1 (2005).

3. 19 U.S.C. § 1504(d) (2000).

4. U.S. Customs Headquarters Ruling Letter HQ 228249 (Aug. 23, 1999), available at HQ 228249 (Westlaw) [hereinafter Cust. HQ 228249].

5. Many of the facts involved in Customs transactions are confidential. Therefore, it is frequently impossible to find out the monetary value at stake in a given situation. In Cust. HQ 228249, the importer paid a preliminary unfair trade duty of 3.51 percent ad valorem. *Id.* Assume that the importer imported bricks worth \$10 million. The importer would then have paid \$351,000 in unfair trade duties. Because the DOC subsequently revoked the unfair trade duty, the importer should have received a \$351,000 refund. Instead, deemed liquidation occurred and prevented the refund. Consequently, the importer would have lost \$351,000.

percent duty paid upon entry. Despite the fact that Customs' own delay in liquidating the entries caused the negative outcome for the importer, Customs rejected the importer's argument that it was entitled to a refund of the 3.51 percent duty paid upon entry. As a result, the U.S. government benefited from its own failure to liquidate in a timely manner because it was not forced to refund the overpaid duties while the importer lost money it was entitled to have refunded.

This article argues that the current liquidation scheme is flawed as administered. The problems associated with the scheme stem from the failure of administrative agencies to act in a timely manner, the lack of consequences in the statutory scheme for such failure to act, and the lack of an administrative remedy for interested parties to undo deemed liquidation once it has occurred. As a result, unfairly traded goods are arbitrarily exposed to over- and under-enforcement of U.S. unfair trade laws.

This exposure has considerable implications for the business community, both domestically and internationally, and potentially jeopardizes U.S. relations with multi-lateral trading partners.<sup>6</sup> U.S. trade and customs laws reflect benefits and obligations that the United States has carefully bargained for in multilateral trade negotiations. Administrative failure in implementing these international obligations may negate benefits resulting from years of negotiations between a large number of countries. At stake are substantial amounts of money<sup>7</sup> and importers' and

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6. Prior to 1978, there was no time limit within which liquidation had to occur. S. REP. NO. 95-778, at 31 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2211, 2242 [hereinafter S. REP.]. Congress imposed such a time limit, partly motivated by requests from U.S. trading partners.

The committee notes that several of the countries participating in the multilateral Trade Negotiations have requested that the United States establish a time limit within which liquidation must occur. The committee has approved the limitations on liquidation with these requests in mind and expects appropriate compensation in the MTN for this action by the United States.

*Id.* at 32. Similarly today, recent focus on the liquidation process in courts and before Customs and the substantial amounts of unliquidated entries in high-profile U.S. antidumping and countervailing duty proceedings make it likely that U.S. trading partners will pay close attention to the U.S. liquidation process in the future. Problems arising may be subject to discussion in trade negotiations or before international dispute settlement tribunals.

7. The monetary significance of problems in the liquidation process is evident. In 2004, goods worth approximately \$1,400 billion were imported into the United States. Press Release, U.S. Dept. of Com., U.S. International Trade in Goods and Services: Aug. 2005 (Oct. 13, 2005), at 6, [http://www.census.gov/foreign-trade/Press-Release/current\\_press\\_release/ft900.pdf](http://www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf). All of those goods must be liquidated at some point in time. Of course, errors in the liquidation process play the most significant role for entries of goods subject to unfair trade duties. Only a certain percentage of total imports is subject to unfair trade duties. The author has been unable to obtain relevant statistics on the liquidation process despite attempts under the Freedom of Information Act, 5 U.S.C. § 552 (2000). One approximation for the amount of goods subject to unfair trade duties are the distributions of collected unfair trade duties made to U.S. industry under the Continued Dumping and Subsidy Offset Act (CDSOA) of 2000, Pub. L. 106-387, 114 Stat. 1549 (codified at 19 U.S.C. § 1675c (2000)) ("Byrd Amendment"). Customs distributed \$231 million in 2001, \$330 million in 2002 and \$293 million in 2003. Letter from Douglas Holtz-Eakin, Director, Cong. Budget Off., to Hon. Bill Thomas, Chairman, Committee on Ways and Means (Mar. 2, 2004), <http://www.cbo.gov/showdoc.cfm?index=5130&sequence=0> [hereinafter *Eakin Letter*]. The distributions for 2004 are projected to be \$300 million. *Id.* at 4. In addition, the value of unliquidated goods far exceeds the amounts distributed. For example, goods subject to the most recent U.S. trade case against softwood lumber from Canada were imported in the amount of \$6 billion in 2001. Softwood Lumber from Canada, USITC Pub. 3509, Invs. Nos. 701-TA-414 & 731-TA-928 (Final),

foreign countries' faith in the fundamental fairness of the U.S. international trade system. The United States also risks losing trade concessions in future multi-lateral trade negotiations or in World Trade Organization ("WTO") dispute settlement proceedings.<sup>8</sup> U.S. trade laws are perceived to be prejudiced against foreign imports and biased for U.S. industry. Therefore, errors in the administration of these laws leading to negative consequences for foreign imports inevitably lead to speculation about the good faith of Congress and U.S. administrative agencies in implementing U.S. international trade obligations. To remedy these problems, this article proposes that the U.S. statutes governing the determination and collection of unfair trade duties should be amended to prevent the negative consequences caused by arbitrary delay in the administrative process. Most importantly, the applicable statutes should be changed to prevent the government from benefiting from its own nonfeasance.

Part I of this article provides a description of the legal framework surrounding the entry of goods, antidumping proceedings and liquidation. Part II discusses the problems associated with the liquidation process in the context of goods subject to unfair trade duties, highlighting how the U.S. government stands to gain from its failure to follow statutorily mandated procedures. Part III analyzes the legislative history of the deemed liquidation provision and its interpretation by courts. This part argues that in order to fully implement congressional intent to protect importers, the negative consequences of deemed liquidation should only be applied against the U.S. government. Part IV provides an overview of the potentially available judicial remedies to correct errors in the liquidation process. The remedies include declaratory judgments, writs of mandamus, injunctions and court-orders compelling agency action under Section 706(1) of the Administrative Procedures Act ("APA").<sup>9</sup> This section asserts that these remedies are inadequate because: (1) they are unable to undo deemed liquidation once it has occurred, (2) they cause additional delay and (3) they are costly to implement. Because the U.S. government's delays are within its exclusive control, forcing importers to bear this additional burden is inconsistent with congressional concern

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IV-2, Table IV-1 (May 2002). The U.S. government has collected some \$3 billion in preliminary unfair trade duties on entries of softwood lumber from Canada since 2001. *Canadian Lumber Groups Discuss Resumption of Talks with U.S.*, INSIDE U.S. TRADE, Nov. 12, 2004 § 46; *see, e.g.*, Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products From Canada, 66 Fed. Reg. 56,062, 56,077 (Nov. 6, 2001); Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Certain Softwood Lumber Products From Canada, 66 Fed. Reg. 43,186, 43,215 (Aug. 17, 2001). None of these entries has been liquidated yet. The softwood lumber case illustrates the large amounts of money at risk of potential administrative failure. The softwood lumber case is but one example of the myriad of foreign products subject to unfair trade duties for which the U.S. government has collected preliminary unfair trade duties. Thus, the total amount of money involved is staggering.

8. The author intends to further develop any WTO aspects of deemed liquidation in a subsequent article.

9. 5 U.S.C. § 706(1) (2000).

with the protection of importers. Part V discusses the necessity for prompt administrative action in providing notice of the final duty liability. Currently, the statutory provisions are directory rather than mandatory.<sup>10</sup> This article argues that statutorily imposed deadlines with negative consequences for the U.S. government for failure to meet them are necessary because the delays are within the exclusive control of the government. Finally, Part VI argues that the U.S. trade laws should provide for a speedy administrative remedy to resolve the deemed liquidation problem. Currently, it appears that deemed liquidation cannot be protested before it has occurred and cannot be undone thereafter.<sup>11</sup> Instead, the statutes should be changed to allow importers a way to protest or reserve their rights before deemed liquidation occurs.

## I. LEGAL BACKGROUND

### A. *Entry of Goods and Liquidation*

Importers bring goods into the United States through a process called “entry” of goods.<sup>12</sup> During the entry process, the importer<sup>13</sup> files certain documents with Customs containing information about the goods entered, such as value and classification.<sup>14</sup> The information about value and classification determines the duties assessed on the goods.<sup>15</sup> At the

10. See, e.g., *Am. Permac, Inc. v. United States*, 191 F.3d 1380, 1382 (Fed. Cir. 1999); *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989).

11. Courts have not made a definitive finding on the issue. In the majority of cases, courts and Customs have stated that deemed liquidation cannot be protested or undone. See, e.g., *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1122–23 (Fed. Cir. 1998); *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1558–59 (Fed. Cir. 1997); *Fujitsu Gen. Am., Inc. v. United States*, 110 F. Supp. 2d 1061, 1069 (Ct. Int’l Trade 2000), *aff’d*, 283 F.3d 1364 (Fed. Cir. 2002); U.S. Customs Headquarters Ruling Letter HQ 228929 (Sept. 27, 2002), *available at* HQ 228929 (Westlaw) [hereinafter Cust. HQ 228929]; U.S. Customs Headquarters Ruling Letter HQ 228712 (May 13, 2002), *available at* HQ 228712 (Westlaw) [hereinafter Cust. HQ 228712]. However, in two recent cases, the Court of International Trade (“CIT”) has indicated in dicta that deemed liquidation possibly could be protested under certain circumstances. See *Norsk Hydro Canada, Inc. v. United States*, 350 F. Supp. 2d 1172, 1178–79 (Ct. Int’l Trade 2004); *Cemex, S.A. v. United States*, 279 F. Supp. 2d 1357, 1362 (Ct. Int’l Trade 2003), *aff’d*, 384 F.3d 1314 (Fed. Cir. 2004). In *Norsk Hydro*, the Court of International Trade also indicated that under certain, limited circumstances there might be an administrative remedy available to importers to undo deemed liquidation once it had occurred. *Norsk Hydro*, 350 F. Supp. 2d at 1178–79.

12. For purposes of this article, an “entry” of goods refers to goods properly imported into the U.S. customs territory for consumption (i.e., for use or sale) under the “formal entry” procedure. 19 C.F.R. § 141.0a (2005). Customs defines “entry” not merely as the arrival of goods at the port, but as the process of presenting documentation for clearing goods through Customs. U.S. CUSTOMS AND BORDER PROTECTION, U.S. IMPORT REQUIREMENTS 3, <http://www.customs.gov/linkhandler/cgov/toolbox/publications/trade/usimportrequirements.ctt/usimportrequirements.doc> [hereinafter U.S. IMPORT REQUIREMENTS]; 19 C.F.R. § 141.0a (2005).

13. Frequently, importers hire customs brokers to work through the entry process. A “customs broker” is defined as “a person who is licensed . . . to transact customs business on behalf of others.” 19 C.F.R. § 111.1 (2005); see also 19 U.S.C. § 1641(a)(1) (2000) (defining a customs broker as a “person granted a customs broker’s license”).

14. 19 U.S.C. § 1484(a)(1) (2000); 19 C.F.R. § 141.90(b)-(c) (2005); 19 C.F.R. § 142.6(a)(3)-(4) (2005).

15. See, e.g., 19 U.S.C. § 1503 (2000). Goods are classified according to their characteristics into what is popularly referred to as “HTS numbers.” See U.S. CUSTOMS AND BORDER PROTECTION, IMPORTING INTO THE UNITED STATES 59 (2002) <http://www.cbp.gov/linkhandler/cgov/toolbox/publications/trade/ius.ctt/ius.doc> [hereinafter IMPORTING INTO THE UNITED STATES]. The HTS numbers are derived from the Harmonized Tariff Schedule of the United States (“USHTS”)

time of entry, the importer usually pays estimated duties based on the classification and value asserted in the entry documentation.<sup>16</sup> Customs later determines the final duty liability through a process called “liquidation.”<sup>17</sup> During liquidation, Customs reviews the information submitted in the entry documentation to determine the proper classification and value, and hence the duty liability, of a particular entry.<sup>18</sup> If Customs agrees with the information submitted in the entry documentation, it will liquidate the entry at the duty liability asserted in the entry documentation.<sup>19</sup> However, Customs may find that the preliminary duty liability asserted at the time of entry was either underestimated or overestimated. In those situations, Customs sends the importer a bill for the additional duties owed or a refund, as the case may be.<sup>20</sup> The importer has the opportunity to challenge Customs’ determination of its final duty liability by filing a protest with Customs.<sup>21</sup>

As discussed in the following part, certain goods are subject to unfair trade duties.<sup>22</sup> Unfair trade duties are imposed above and beyond that which is provided for in the U.S. Harmonized Tariff Schedule (“USHTS”).<sup>23</sup> The DOC determines the amount of the unfair trade duty after entry but before Customs’ liquidation. All goods are subject to liquidation regardless of whether they also are subject to unfair trade duties.

### *B. Basic Introduction to Antidumping and Countervailing Duty Proceedings*

The DOC is responsible for determining whether foreign goods are unfairly traded in the United States.<sup>24</sup> The two principal unfair trade actions are antidumping and countervailing duty proceedings. In antidumping proceedings, the DOC investigates whether a foreign company

which in turn is derived from the international Harmonized System. See 19 U.S.C. § 1202 (2000); Customs Regulations Amendments To Conform With Harmonized System of Tariff Classification, 53 Fed. Reg. 51244 (Dec. 21, 1988) (to be codified at 19 C.F.R. ch. I). The HTS number corresponds to a particular duty rate. For example, if you want to import a grand piano you will find that it appears to be classified under HTS number 9201.20.00 and that it is subject to a 4.7 percent duty rate. U.S. INT’L TRADE COMM’N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES § XVIII ch. 92, 2 (2004), <http://hotdocs.usitc.gov/docs/tata/hts/archive/2004/basic/bychapter/0400C92.pdf>.

16. 19 U.S.C. § 1505(a) (2000); 19 C.F.R. § 141.101 (2005); U.S. IMPORT REQUIREMENTS, *supra* note 12, at 5.

17. See 19 U.S.C. § 1500(c) (2000). Liquidation is defined as the “final computation or ascertainment of the duties or drawback accruing on an entry.” 19 C.F.R. § 159.1 (2005).

18. 19 U.S.C. § 1500 (2000); IMPORTING INTO THE UNITED STATES, *supra* note 15, at 59.

19. See *id.* at 59.

20. 19 U.S.C. § 1505(b) (2000); 19 C.F.R. § 159.6(c) (2005); see U.S. IMPORT REQUIREMENTS, *supra* note 12, at 6.

21. See 19 U.S.C. § 1514 (2000).

22. See, e.g., 19 U.S.C. §§ 1671(a), 1673 (2000).

23. See 19 U.S.C. §§ 1671e(a)(3), 1673e(a)(3) (2000).

24. The International Trade Commission (“ITC”) and the DOC are the two administrative agencies involved in the determination of whether unfair trade duties should be imposed. 19 U.S.C. §§ 1671, 1673, 1677(1)-(2) (2000). Unfair trade duties can only be imposed if the ITC concludes that the dumping or subsidization either injures a domestic industry or materially retards the establishment of one. 19 U.S.C. §§ 1671(a)(2), 1673(2) (2000).

is engaged in “dumping,” i.e. selling its products in the U.S. market for less than it sells them in its home (domestic) market.<sup>25</sup> In countervailing duty proceedings, the DOC investigates whether a foreign government is subsidizing the production of goods, thereby conferring a benefit on the foreign producers allowing them an unfair advantage over their U.S. competition.<sup>26</sup> If the DOC finds dumping or subsidization, it imposes an antidumping or countervailing duty on the foreign goods as they cross the U.S. border to make up the difference in price or cost.<sup>27</sup> For the sake of simplicity, this article discusses the trade action and liquidation processes for antidumping duties only, as the processes are similar for entries subject to antidumping and countervailing duty findings. This subsection also contains a hypothetical example of an antidumping proceeding with time-line.

### 1. Investigation Phase

The U.S. antidumping laws are retrospective in nature.<sup>28</sup> During an antidumping investigation, the DOC determines how much dumping occurred during a particular period of investigation (usually one year) prior to the initiation of the investigation.<sup>29</sup> The dumping which occurred during that period will be reflected in the cash deposits (equivalent to the dumping margin) required for any *future* entries of goods.<sup>30</sup> The U.S. antidumping statutes do not impose antidumping duties on goods entered during the period of investigation. Rather, the dumping found during the period of investigation determines the cash deposit rate to be collected on goods entered after the DOC’s affirmative preliminary determination.<sup>31</sup>

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25. See 19 U.S.C. §§ 1673, 1673e(a), 1677(34)-(35) (2000); see also U.S. INT’L TRADE COMM’N, ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK I-3 (10th ed. 2002), <http://www.usitc.gov/publications/webpubs.htm> (follow hyperlink to article) [hereinafter AD & CVD HANDBOOK].

26. See 19 U.S.C. §§ 1671(a), 1671e(a), 1677(5) (2000); see also AD & CVD HANDBOOK at I-3.

27. See 19 U.S.C. §§ 1671(a), 1671e(a), 1673e(a) (2000). For example, in an antidumping proceeding, if Foreign Corporation A sells widgets in its home market for 10 dollars (referred to as normal value) and sells the same widgets in the U.S. market for 5 dollars (referred to as export price), the dumping margin is 5 dollars (normal value minus export price) or 100 percent. 19 U.S.C. § 1673 (2000).

28. 19 C.F.R. § 351.212(a) (2005).

29. See 19 C.F.R. § 351.204(b) (2005).

30. 19 C.F.R. § 351.211(b)(1)-(2) (2005). Cash deposits are the equivalent of safety deposits: the DOC requires importers suspected of dumping to pay a deposit of preliminary duties upon importation to make sure that there is money from which to collect the final duty liability once the DOC makes the final determination, often several years after importation.

31. 19 C.F.R. §§ 351.205(a), 351.211(b)(1)-(2) (2005). An importer also may choose to post a bond to ensure payment of antidumping duties. 19 C.F.R. § 351.205(a) (2005). After the DOC issues an antidumping order (which occurs after a final, affirmative determination), an importer may not post a bond and must instead post cash deposits. 19 C.F.R. § 351.211(a) (2005). The difference between a bond and cash deposits is that a bond is similar to an insurance premium where the importer pays a third-party to insure against the potential increase in duties while the cash deposits consist of an ad valorem payment of estimated duties (i.e. X percent of the value of the imported goods).

Generally, the DOC initiates an antidumping investigation after receiving a petition for relief from unfairly traded imports from representatives of U.S. industry.<sup>32</sup> An antidumping investigation is divided into a preliminary and a final phase.<sup>33</sup> During the preliminary phase, the DOC relies on financial and market information submitted by the parties.<sup>34</sup> If the DOC finds dumping, it publishes its preliminary results in the Federal Register and instructs Customs to “suspend liquidation” and collect “cash deposits” on goods entered after the date of the preliminary determination.<sup>35</sup> The suspension of liquidation is necessary due to the retroactive nature of the U.S. antidumping laws because it prevents Customs from prematurely liquidating entries before the DOC has determined the actual duty liability during what is known as an “administrative review.”<sup>36</sup> The “cash deposit” is the amount of dumping duty found to have existed during the period of investigation.<sup>37</sup> The cash deposits collected on goods imported after the DOC’s affirmative, preliminary determination do not represent the amount by which those goods were actually dumped. Rather, the cash deposits represent the dumping which occurred for goods previously imported during the period of investigation as an approximation of the dumping expected to occur thereafter.

In the final phase of the investigation, the DOC verifies the information submitted by the parties during the preliminary phase and makes necessary revisions to the preliminary duty rate.<sup>38</sup> If the final determination is affirmative, the DOC publishes the final results (including the final dumping margin) in the Federal Register and issues instructions to Customs to continue the suspension of liquidation of past entries and to collect cash deposits on future entries in the amount of the final dumping margin.<sup>39</sup> An affirmative final determination results in an antidumping order.<sup>40</sup> An antidumping order remains in effect until revoked.<sup>41</sup> Liquidation remains suspended until the DOC completes an administrative review (or fails to initiate one).

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32. See 19 U.S.C. § 1673a(b) (2000). The DOC may also sua sponte initiate an antidumping investigation. 19 U.S.C. § 1673a(a) (2000).

33. See 19 U.S.C. §§ 1673b, 1673d (2000); AD & CVD HANDBOOK, *supra* note 25, at II-3.

34. See 19 C.F.R. § 351.301(a) (2005).

35. 19 U.S.C. § 1673b(d), (f) (2000); AD & CVD HANDBOOK, *supra* note 25, at II-13; IMPORTING INTO THE UNITED STATES, *supra* note 15, at 101. The cash deposit does not represent the actual margin at which the imported goods subject to it are dumped. The actual dumping margin of the goods subject to the cash deposit will be determined in a subsequent administrative review.

36. 19 U.S.C. § 1675 (2000); 19 C.F.R. § 351.211(b)(3) (2005).

37. 19 U.S.C. § 1673b(d)(1)(B) (2000).

38. 19 U.S.C. § 1673d (2000); 19 C.F.R. § 351.307 (2005).

39. 19 U.S.C. § 1673d(c)(1), (d) (2000); 19 C.F.R. § 351.211 (2005). If the DOC’s final determination is negative, i.e., finding no dumping during the period of investigation, the DOC will publish the results in the Federal Register and instruct Customs to terminate the suspension of liquidation and to refund the cash deposits. 19 U.S.C. § 1673d(c)(2) (2000).

40. 19 U.S.C. §§ 1673d(c)(2); 1673e(a) (2000).

41. 19 U.S.C. § 1675(d) (2000); 19 C.F.R. §§ 351.222, 351.211(a) (2005). The DOC may revoke an antidumping order based on absence of dumping. 19 U.S.C. § 1675(d) (2000). The DOC and ITC also conduct so called “sunset” reviews every five years after the institution of an order to determine whether the order should “sunset” or if it needs to stay in effect longer. 19 U.S.C. § 1675(c), (d) (2000).

## 2. Administrative Review Phase

The DOC determines the actual dumping margin for entries made after the preliminary determination in the investigation phase during what is known as administrative reviews.<sup>42</sup> The DOC does not conduct administrative reviews automatically; a party must request one.<sup>43</sup> During the administrative review, the DOC determines the actual dumping margin by examining financial information for each entry of goods an importer has made since the imposition of the cash deposits.<sup>44</sup> The time period from the preliminary determination in the investigation to the initiation of the administrative review constitutes the period of review for the first administrative review after imposition of the antidumping order.<sup>45</sup> Liquidation of the covered entries remains suspended during the administrative review.<sup>46</sup> The dumping margin found in an administrative review constitutes the actual dumping margin for the entries subject to the original investigation (the final, actual duty liability). This final dumping margin serves as the final duty liability for the covered entries and as the cash deposit rate for any entries made after the date of the final results of the administrative review.<sup>47</sup>

After concluding an administrative review, the DOC publishes the final results in the Federal Register, notifies Customs Headquarters that suspension of liquidation has been lifted, and instructs Customs to liquidate the covered entries at the final antidumping duty rate determined in the administrative review.<sup>48</sup> Customs Headquarters, in turn, instructs the different Customs ports to liquidate the covered entries at the duty rate determined by the DOC. Finally, the individual Customs ports liquidate the entries, in one of three ways: (1) if the final duty liability determined in the administrative review is lower than the cash deposits collected, Customs will refund the difference;<sup>49</sup> (2) if the final duty liability determined in the administrative review is higher than the cash deposits collected, Customs will issue a bill for the difference;<sup>50</sup> finally, (3) if the cash deposit is the same as the final duty liability determined in the administrative review, no money is due or refunded.<sup>51</sup>

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42. 19 U.S.C. § 1675(a)(1) (2000). Administrative reviews are initiated in the anniversary month of antidumping orders. *Id.*

43. *Id.* The entries in question will be liquidated at the final dumping margin found in the original investigation if no party requests an administrative review. 19 C.F.R. § 351.212(c)(1)(i) (2005).

44. 19 U.S.C. § 1675(a)(1)(B), (a)(2) (2005).

45. The DOC will conduct a new administrative review every year after the imposition of the antidumping order for as long as the order remains in effect (if requested). The period of review for the second and all subsequent administrative reviews consists of the twelve month period preceding the anniversary month of the antidumping order. 19 C.F.R. § 351.213(e) (2005).

46. *See* 19 U.S.C. § 1673b(d) (2000); 19 C.F.R. § 351.221(b)(6) (2005).

47. 19 U.S.C. § 1675(a)(2)(c) (2000).

48. *See* 19 U.S.C. § 1675(a) (2000); 19 C.F.R. § 351.221(b)(5)-(6) (2005).

49. 19 C.F.R. § 159.6(c) (2005).

50. *Id.*

51. *Id.*

### 3. Judicial Review Phase

An interested party<sup>52</sup> may appeal the DOC's final determinations in antidumping proceedings to the Court of International Trade ("CIT") within thirty days of publication of the result in the Federal Register.<sup>53</sup> The DOC is required to publish notice of the CIT's decision in the Federal Register within ten days of the decision's issuance.<sup>54</sup> The DOC also instructs Customs to liquidate the entries according to the CIT's decision.<sup>55</sup> The administrative suspension of liquidation in effect during investigations and administrative reviews ceases to be in effect after the conclusion of an administrative review.<sup>56</sup> Consequently, Customs may liquidate entries subject to an appeal even though the final duty liability has not yet been reviewed by the CIT. To prevent such premature liquidation, the appealing party usually requests a court-ordered suspension of liquidation in the form of an injunction lasting through the appeals process.<sup>57</sup> A court-ordered suspension of liquidation is lifted when the time for appeal of the court decision has expired.<sup>58</sup>

### 4. Sample Timeline for Antidumping Proceedings<sup>59</sup>

The following is an example of how an antidumping proceeding progresses.<sup>60</sup> If an antidumping investigation is initiated on January 1, 2005, the period of investigation might consist of the year 2004. The DOC would examine entries of the product under investigation made during 2004 to see whether they were dumped. Sometime in May 2005 the DOC would issue its preliminary determination. Assuming that the DOC found that entries made during 2004 were dumped at a margin of fifteen percent, the DOC would direct Customs to collect cash deposits of fifteen percent on all entries made subsequent to that date (i.e. May 2005) and also suspend liquidation for those entries. Sometime in August 2005 the DOC would issue its final determination. Assume that the

52. See 19 U.S.C. § 1677(9)(A) (2000) (defining "interested party" to include both representatives of U.S. and foreign industry).

53. 19 U.S.C. § 1516a(a)(2) (2000). An appellant in effect has sixty days to file the appeal: it must file the summons within thirty days of publication of the DOC's determination and the complaint within thirty days of filing the summons. *Id.* Keep in mind that a party may appeal aspects of the DOC's determinations in both the investigation and administrative review. Therefore, it is not certain that the CIT's decision will result in a final dumping margin suitable for liquidation. For purposes of this article, it is assumed that the CIT's decision results in a final duty determination.

54. 19 U.S.C. § 1516a(e) (2000).

55. *Id.*

56. See 19 C.F.R. § 351.221(b)(6) (2005).

57. See, e.g., SKF USA Inc. v. United States, 316 F. Supp. 2d 1322, 1330–35 (Ct. Int'l Trade 2004) (holding that a preliminary injunction suspending liquidation is effective from date of issuance to completion of any appellate proceedings).

58. See, e.g., Peer Chain Co. v. United States, 316 F. Supp. 2d 1357, 1359–60 (Ct. Int'l Trade 2004) (finding that the suspension of liquidation was lifted after the time for appealing a decision of the Federal Circuit (filing a writ of certiorari with the U.S. Supreme Court) had expired).

59. Countervailing Investigations Timeline, 19 C.F.R. pt. 351, Annex VI (2005); Antidumping Investigations Timeline, 19 C.F.R. pt. 351, Annex VII (2005).

60. Please note that this is a very simplified description of the process and that it does not take into account potential extensions of time and judicial appeals.

DOC in its final determination found that the dumping margin for 2004 was twenty percent. The DOC would issue an antidumping order some time in October 2005.<sup>61</sup> The order would instruct Customs to collect antidumping duties of twenty percent on all entries from that date and to continue to suspend liquidation on all entries made after the preliminary determination in May 2005.<sup>62</sup>

Approximately one year after the final order in October 2005, an interested party could request that the DOC conduct an administrative review. During the review, the DOC would examine at what rate the entries of goods made after the preliminary determination in the investigation (i.e. May 2005) through the initiation of the administrative review (i.e. October 2006) actually were dumped. The DOC would issue its final results some time in October 2007. Assume that the DOC finds that the actual dumping margin for the period of review is thirty percent. Then, the DOC would inform Customs that suspension of liquidation for entries made between May 2005 and October 2006 has been lifted and direct Customs to liquidate those entries at the dumping margin found in the administrative review, i.e. thirty percent. The DOC would also inform Customs to continue the suspension of liquidation of entries made after October 2006 and to collect cash deposits of thirty percent on all entries made after October 2007. The DOC will conduct administrative reviews every year, if requested, until the antidumping order is revoked. Thus, some time in October 2007, the DOC could initiate an administrative review of entries made between October 2006 and October 2007.

As illustrated, an importer who imported goods in May 2005 will learn in October 2007, at the earliest, the final duty liability for those goods. This time period would be longer if the schedules for the investigation and/or the administrative review were extended or if there were intervening judicial reviews. In addition, the importer also must wait for Customs to liquidate the entries in question which might take months and even years. During this lengthy time period, almost a minimum of three years, the importer must take into account the uncertain duty liability in its business model and financial records.

### *C. Deemed Liquidation Under 19 U.S.C. §1504*

Deemed liquidation occurs as a consequence of Customs' failure to liquidate a particular entry within a statutorily set deadline.<sup>63</sup> Deemed liquidation may occur for all entries, regardless of whether they are sub-

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61. Provided that the ITC issues an affirmative finding of injury.

62. Even though the final dumping margin in the investigation was higher than the preliminary margin, Customs will not collect the difference because the preliminary rate is capped under the statute. 19 U.S.C. § 1673f(a)(1) (2000). Had the final dumping margin been lower than the preliminary rate, Customs would have refunded the difference. 19 U.S.C. § 1673f(a)(2) (2000).

63. See 19 U.S.C. § 1504 (2000).

ject to antidumping duties.<sup>64</sup> According to 19 U.S.C. § 1504(d), entries which have been subject to a statutorily imposed or court-ordered suspension of liquidation as a result of an antidumping proceeding, are deemed liquidated if Customs fails to liquidate them within six months after receiving notice that the suspension of liquidation has been removed.<sup>65</sup>

Customs and courts have taken inconsistent positions regarding the moment when the six-month time period in Section 1504 begins. The timing of notice is crucial as it may determine whether deemed liquidation has occurred. Customs has consistently argued that the six-month time period begins when the DOC issues liquidation instructions to Customs.<sup>66</sup> The DOC sends liquidation instructions in e-mails to Customs Headquarters.<sup>67</sup> These instructions may be public or non-public.<sup>68</sup> Customs Headquarters then issues liquidation instructions to its different Customs ports.<sup>69</sup> The Customs ports liquidate the entries and post the liquidation notice on their bulletin boards.<sup>70</sup> Customs argues that its role in the antidumping enforcement procedure is ministerial only.<sup>71</sup> According to Customs, it merely mechanically applies the dumping margin determined by the DOC and, therefore, cannot act until the DOC instructs it to do so.

The courts, however, have found that the time period should be measured, at the latest, from the publication in the Federal Register of the final results in an antidumping administrative review or the final results

64. The statutory deadlines for deemed liquidation vary depending on whether the particular entries are subject to a dumping finding. Compare § 1504(a) (for entries not subject to an antidumping finding, "an entry of merchandise not liquidated within 1 year from . . . the date of entry of such merchandise . . . shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer of record."), with § 1504(d) (for entries subject to an antidumping finding, "[a]ny entry . . . not liquidated . . . within 6 months after receiving . . . notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry . . .").

65. 19 U.S.C. § 1504(d) (2000).

66. See, e.g., *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1273 (Fed. Cir. 2002).

67. *Int'l Trading*, 281 F.3d at 1270.

68. 19 U.S.C. § 1677f(b) (2000). See, e.g., *Cemex, S.A. v. United States*, 384 F.3d 1314, 1316 (Fed. Cir. 2004), *reh'g granted*, No. 04-1058 (Fed. Cir. Dec. 14, 2004) (non-public email instructions).

69. See, e.g., *Cemex*, 384 F.3d at 1316.

70. *Id.* at 1317.

71. See, e.g., *id.* at 1324 ("Customs' role in making antidumping decisions . . . is generally ministerial . . ."); *Int'l Trading*, 281 F.3d at 1273 ("The government argues that because Customs acts in a ministerial capacity when liquidating antidumping duties, the suspension of liquidation cannot be removed until Customs has all the information it needs to perform its ministerial task . . ."); *Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1162, 1169 (Ct. Int'l Trade 2004) (citing *Yacheng Baolong Biochemical Prods. Co. v. United States*, 277 F. Supp. 2d 1349, 1364 (Ct. Int'l Trade 2003)) ("In implementing the instructions of Commerce to liquidate entries subject to an antidumping or countervailing duty order, Customs' actions are ministerial in nature."); *Am. Hi-Fi Int'l, Inc. v. United States*, 19 Ct. Int'l Trade 1340, 1342 (Ct. Int'l Trade 1995) ("[Customs] contends . . . that interest assessed on antidumping duties is not protestable . . . as Customs does not make any 'decisions,' but performs merely a ministerial role . . ."); U.S. Customs Headquarters Ruling Letter HQ 230339 (June 25, 2004), available at HQ 230339 (Westlaw) [hereinafter *Cust. HQ 230339*] ("[Customs] role in the antidumping process is simply to follow Commerce's instructions . . .").

after judicial review.<sup>72</sup> According to the courts, publication provides a public and unambiguous date from which to measure the six-month time period.<sup>73</sup> In the absence of publication, Customs may receive notice of the removal of the suspension of liquidation also through public, unambiguous liquidation instructions from the DOC to Customs (actual notice)<sup>74</sup> and by participating directly in the underlying litigation, in cases involving judicial review.<sup>75</sup>

## II. THE PROBLEMS ASSOCIATED WITH THE LIQUIDATION PROCESS

### A. *The Immediate Effects of Antidumping Proceedings and Delay in the Liquidation Process*<sup>76</sup>

The time between entry of goods and the determination of final duty liability through liquidation can be substantial. For goods subject to antidumping investigations, in the best-case-scenario, liquidation will occur approximately two-and-one-half years after importation.<sup>77</sup> The length of the process increases significantly if it also involves judicial review.

72. See, e.g., *Int'l Trading Co. v. United States*, 412 F.3d 1303, 1313 (Fed. Cir. 2005) (interpreting post-Uruguay Round Agreements Act ("URAA") statute); *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1380 (Fed. Cir. 2002); *Int'l Trading*, 281 F.3d at 1277 (interpreting pre-URAA statute). The Court of Appeals for the Federal Circuit recently decided the issue of whether the statutory amendments made to Section 1504(d) in 1994 as a result of the enactment of the URAA, which implemented U.S. WTO obligations, changed this analysis. Congress added the clause: "[e]xcept as provided in section 1675(a)(3) of this title" to the beginning of the sub-section in the 1994-version of Section 1504(d). The URAA also added a brand new section 1675(a)(3) to title 19 of the United States Code which provides that:

If the administering authority orders any liquidation of entries pursuant to a review under paragraph (1), such liquidation shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued. In any case in which liquidation has not occurred within that 90-day period, the Secretary of the Treasury shall, upon the request of the affected party, provide an explanation thereof.

19 U.S.C. §1675(a)(3)(B). The U.S. Government took the position that the addition of this clause removed the consequence of deemed liquidation from all entries falling under §1675(a)(3). *Int'l Trading*, 412 F.3d at 1306-07. According to the government, the only consequence attaching to Customs' failure to liquidate within 90 days is that the importer is entitled to ask the Secretary of the Treasury for an explanation of the delay. *Int'l Trading Co. v. United States*, 306 F. Supp. 2d 1265, 1268 (Ct. Int'l Trade 2004). The CAFC rejected these arguments in the second round of *Int'l Trading* cases and followed its precedent in the first round of *Int'l Trading* cases. See *Int'l Trading*, 412 F.3d at 1308-09.

73. *Int'l Trading*, 421 F.3d at 1308; *Fujitsu*, 283 F.3d at 1380; *Int'l Trading*, 281 F.3d at 1275.

74. *Fujitsu*, 283 F.3d at 1381; *NEC Solutions (Am.), Inc. v. United States*, 277 F. Supp. 2d 1340, 1341 (Ct. Int'l Trade 2003) (holding that Customs received actual notice of the removal of suspension of liquidation through e-mail instructions from the DOC to Customs despite the fact that the DOC failed to publish the final results after judicial review).

75. See *Fujitsu*, 283 F.3d at 1370.

76. This article does not purport to provide a full analysis of the economic effects of antidumping proceedings and the liquidation process. Such an analysis is beyond the scope of this article.

77. See, e.g., *Cemex, S.A. v. United States*, 384 F.3d 1314, 1316-17 (Fed. Cir. 2004), *reh'g granted*, No. 04-1058 (Fed. Cir. Dec. 14, 2004) (non-public email instructions); *Cemex*, 384 F.3d at 1316-17 (importation between 1991 and 1992; final results of judicial review in April 1998; DOC issued liquidation instructions in March 1998; Customs liquidated in April 2001); *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1368-70 (Fed. Cir. 2002) (importation in 1986 to 1988; DOC published final results after administrative review in February 1991; final results after judicial review in October 1996; DOC published final results after judicial review in September 1997; DOC issued liquidation instructions in September 1997; Customs liquidated between November 1997 and

There are three main actors who are affected by the length of the liquidation process: the U.S. government, representatives of U.S. industry and importers. The length of the liquidation process has little impact on the U.S. government because the government will collect the final duty liability or refund over-paid duties at some point.

Analyzing the effects on U.S. industry is more complicated. Before doing so, it is useful to briefly consider the nature of U.S. unfair trade laws and the characteristics and motivations of the two disputing parties in an antidumping proceeding.<sup>78</sup> Although the DOC has the power to initiate such proceedings *sua sponte*, most are initiated after a petition by representatives of U.S. industry.<sup>79</sup> Representatives of U.S. industry are referred to as petitioners. Companies on the “defendant” side of the dispute are called respondents. It is imperative to understand that the petitioner and respondent sides do not necessarily consist of one group of U.S. companies versus a group of foreign companies. The particular U.S. industry may consist of foreign-owned companies.<sup>80</sup> Conversely, respondent companies may be owned by U.S. owners. Hence, these trade disputes are rarely of a *de facto* “us-and-them” character. The motivating factor behind filing a petition for trade relief is to close the U.S. market to import competition. The effect of a successful petition is to make foreign imports more expensive when sold in the U.S. market. Thus, antidumping proceedings serve as a form of WTO-consistent protectionism.<sup>81</sup> Not surprisingly, U.S. trade laws are more favorable to petitioners than to respondents.<sup>82</sup>

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February 1998); *Int'l Trading*, 281 F.3d at 1270-71 (importation in 1993 and 1994; DOC published final results after administrative review in February 1996; DOC issued liquidation instructions in August 1996; Customs liquidated in October 1996); *Am. Permac, Inc. v. United States*, 191 F.3d 1380, 1381 (Fed. Cir. 1999) (importation in 1979; DOC published final results after administrative review in January 1985; final results after judicial review in August 1989; DOC issued liquidation instructions in October 1989; Customs liquidated in April 1994); *Peer Chain Co. v. United States*, 316 F. Supp. 2d 1357, 1359-60 (Ct. Int'l Trade 2004) (importation in 1985 and 1986; final results after administrative review in September 1992; final decision after judicial review in January 1996 (not published); DOC issued non-public liquidation instructions in May 2000; Customs liquidated in June and August 2000); *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1119-21 (Fed. Cir. 1998) (importation between 1980 and 1982; liquidation suspended pending final duty determination, 1980-1982; court-ordered injunctions maintaining suspension of liquidation, 1983-1985; liquidation in 1986); *LG Electronics U.S.A., Inc. v. United States*, 991 F. Supp. 668, 670-72 (Ct. Int'l Trade 1997) (importation from 1984 to 1988; suspension of liquidation between 1984 and 1990; settlement reached in May 1994; DOC sent instructions to Customs in September 1994; Customs never liquidated; and LG Electronics filed suit in 1996).

78. It is beyond the scope of this article provide an in-depth analysis of the effects of trade actions on the U.S. economy.

79. See 19 U.S.C. §§ 1671a(a)-(b), 1673a(a)-(b) (2000).

80. See 19 U.S.C. § 1677(4)(B), (9)(A) (2000).

81. See, e.g., Marie Louise Hurabiell, Comment, *Protectionism Versus Free Trade: Implementing the GATT Antidumping Agreement in the United States*, 16 U. PA. J. INT'L BUS. L. 567, 567 (1995) (“The trade policy of the United States government reflects an attempt to reconcile the inherently incompatible goals of free trade and protectionism. . . . [T]he United States regularly invokes antidumping measures. These protectionist policies are incompatible with a system of free trade . . .”).

82. See, e.g., Bruce M. Steen, *Economically Meaningful Markets: An Alternative Approach in Defining ‘Like Product’ and ‘Domestic Injury’ under the Trade Agreements Act of 1979*, 73 VA. L.

The initiation of an antidumping investigation will affect the market conditions for both petitioners and respondents. Immediately, both sides incur litigation costs.<sup>83</sup> The effects of litigation costs on petitioners and respondents depend on how well they can absorb the costs associated with the process.<sup>84</sup> Next, provided that the DOC makes an affirmative preliminary finding in the investigation phase, foreign imports will be subject to cash deposits, making imports comparatively more expensive than the domestic equivalent. The petitioners are likely to enjoy positive effects of the imposition of cash deposits. For example, imports become more expensive and the uncertainty of supply from foreign sources may force purchasers to switch suppliers from foreign to domestic sources. The longer the cash deposits remain in effect, the longer time period the petitioners enjoy protection from foreign imports. Thus, it is usually in the interest of U.S. industry to delay the process for as long as possible.

The effects of antidumping proceedings and the length of the liquidation process on respondents are easy to discern. The long time period between importation and final determination of duty liability has two primary negative effects.

First, the payment of cash deposits represents an opportunity cost and an importer also risks suffering a loss on goods sold if the final duty liability exceeds the cash deposits paid. The length of the liquidation process may mean that an importer will not be able to internalize the future increase in duty liability into the price of its products. Arguably, the negative effects of the uncertainty can be alleviated by the importer's awareness of the antidumping proceeding upon importation allowing the importer to make necessary price adjustments for future duty liability.<sup>85</sup> However, due to the uncertain nature of the final duty liability, the importer would have to "guesstimate" the final duty liability. Not infrequently, the final duty liability applied at liquidation is higher than the cash deposits paid at importation.<sup>86</sup> On the other hand, the final duty liability might be lower than the cash deposits paid. In that case, the

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REV. 1459, 1471 (1987) (arguing that "the current approach of United States antidumping and countervailing duty law and enforcement is biased in favor of affirmative findings of injury.").

83. The parties incur litigation costs only to the extent to which they participate in the proceedings. Before participating, a rational economic actor will evaluate the costs and benefits from participating. Respondents often find that it is not economically defensible to participate because the costs of doing so will be higher than any reduction in dumping duties expected. In particular, small respondent-companies find it too burdensome to participate and may choose to stop importing into the United States.

84. To a certain extent, the cost of litigating a case may be spread among the representatives of one side by choosing joint representation or a division of labor, where applicable. The legal bills alone for an antidumping investigation may end up anywhere from in the hundred thousands of dollars to over a million. On top of that, a litigating party may find it wise to pay for legal representation in administrative reviews and judicial appeals.

85. Cf. H.R. REP. NO. 95-621, at 25 (1977) [hereinafter H.R. REP.].

86. See, e.g., *Cemex, S.A. v. United States*, 279 F. Supp. 2d 1357, 1359 (Ct. Int'l Trade), *aff'd*, 384 F.3d 1314 (Fed. Cir. 2004) ("Various entries were deemed liquidated as entered at rates under 60%, instead of at the antidumping duty rate sustained by the courts, which was over 106%."); *Int'l Trading*, 281 F.3d at 1270-71 (Imported towels initially subject to a 2.72% duty rate but were liquidated at a 42.31% duty rate).

importer would receive a windfall if the importer already took the potential for a duty increase into account when selling the goods. However, if the importer was unable to raise prices to recoup the cash deposits paid at importation, the importer has not gained anything.<sup>87</sup>

The second negative effect of the long time period between importation and final determination of duty liability is that a corporate entity must carry the uncertain duty liability in its financial statements during the time from importation until liquidation. This type of uncertain liability has accounting and business implications for importers. Under generally-accepted accounting principles ("GAAP"), an uncertain liability must be mentioned in a footnote to the financial statement.<sup>88</sup> If the liability can be estimated, a loss contingency, the company must accrue this loss in its financial statement.<sup>89</sup> The uncertain duty liability may also distort the company's financial statements and mislead investors because the unknown future duty liability is not taken into consideration in the cost of goods sold.<sup>90</sup> Therefore, the company may look more profitable than it actually is. However, the uncertain duty liability will have no effect on the company's cash flow.<sup>91</sup> From a business standpoint, the company may choose to segregate a potential future loss on its balance sheet.<sup>92</sup> Many importers set up an escrow account for the potential future duty liability. An uncertain liability may affect the creditworthiness of the company and its ability to plan its business.<sup>93</sup> In addition, the CIT has found that "[t]he public interest is also prejudiced by the impediment to the free flow of commerce caused by these inordinate delays."<sup>94</sup>

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87. The antidumping statutes intend that the cost of the antidumping duty be passed along to U.S. customers, thereby increasing the price of foreign imports sold in the U.S. market. While "unaffiliated" importers may choose to absorb the antidumping duties, the antidumping scheme prevents affiliated importers from doing so. See 19 U.S.C. § 1677a(a) (2000) (export price of unaffiliated party); 19 C.F.R. § 351.401 (2005) (dumping calculation generally); 19 C.F.R. § 351.403 (2005) (sales to affiliated parties); 19 C.F.R. § 351.402(f) (2005) (adjustment for duty absorption).

88. ALLAN AFTERMAN, GAAP PRACTICE MANUAL § 9.3.2 (2005) ("The basic types of current liabilities [include] . . . [a]ccruals."); see also *id.* § 9.4 ("GAAP requires that the total amount of current liabilities . . . be presented on the face of a classified balance sheet.")

89. *Id.* § 33.3.1 ("A contingency is . . . an existing . . . situation . . . involving uncertainty as to a possible gain or loss that will ultimately be resolved when or more future events occur or fail to occur."); *id.* § 33.3.2 ("An estimated loss from a contingency should be accrued and charged . . . if both of the following conditions are met: (1) Information . . . indicates that . . . a liability incurred as of the date of the financial statements; and (2) The amount of the loss can be reasonably estimated."); see also *id.* § 33.4 ("For a loss contingency, the following information should be disclosed: . . . If an estimated loss has been accrued . . . the nature of the contingency [and] the amount of accrued loss.")

90. Linda C. Quinn, *Federal Disclosure Developments, in* POSTGRADUATE COURSE IN FEDERAL SECURITIES LAW 83, 287 (1998) ("Offsetting a contingent liability against expected third-party recovery may mislead investors as to the probability of recovery and reflect unfounded optimism regarding the creditworthiness of the entity from whom recovery is expected."), available at, SD11 ALI-ABA 83 (Westlaw).

91. Patric R. Delaney et al., WILEY GAAP 2001: INTERPRETATION AND APPLICATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES 98 (2002) ("The statement of cash flows includes only inflows and outflows of cash and cash equivalents.")

92. *Id.* at 41 ("Assets [and] liabilities . . . are separated in the balance sheet so that important relationships can be shown and attention can be focused on significant subtotals.")

93. See *id.* at 37.

94. Nakajima All Co. v. United States, 691 F. Supp. 358, 364 (Ct. Int'l Trade 1988).

As illustrated, the long time period between importation and liquidation has a multitude of effects on petitioners and respondents. On the one hand, given that the process is lengthy from the start, further delays should be avoided. On the other hand, there are circumstances under which it would be beneficial to either side to delay as long as possible. It is in the interest of petitioners to achieve as much protection, i.e. with high margins, for as long as possible. Conversely, the respondents wish to minimize their margins and keep them in effect for as short a period of time as possible. Therefore, faced with a threat of having the situation change for the worse, e.g., if petitioners feared that the DOC would issue a lower rate than already in effect or the respondents feared a higher rate, either side has an incentive to delay to keep the favorable status quo for as long as possible. This conclusion is the simple effect of the time-value-of-money. The incentive to delay may create inefficiencies, such as judicial appeals doomed from the start.<sup>95</sup> To increase certainty in customs transactions by speeding up the liquidation process, Congress enacted 19 U.S.C. §1504 in 1978 which provides for deemed liquidation.<sup>96</sup>

#### *B. The Immediate Effects of Deemed Liquidation*

The immediate effects of deemed liquidation on an importer, the U.S. government and representatives of U.S. industry of deemed liquidation depend on whether the importer overpaid or underpaid estimated duties at the time of entry.<sup>97</sup> The effects on the government and the importer are fairly straight-forward: deemed liquidation will result in a windfall to one and a loss to the other. If an importer overpaid duties upon entry, meaning that the cash deposits determined by the DOC in the investigation were higher than the actual duties found to be owed in the administrative review, the importer will not be entitled to a refund if deemed liquidation occurs. Customs and courts take the position that deemed liquidation bars them from issuing a refund.<sup>98</sup> As a result, the importer lost money and the U.S. government received a windfall.<sup>99</sup>

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95. The DOC's decisions can be appealed to the CIT and those decisions, in turn, can be appealed to the Federal Circuit, adding a couple of years during which time the status quo is retained. See 19 U.S.C. § 1516a (2000); 28 U.S.C. § 1295(a)(5) (2000).

96. See Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 209(a), 92 Stat. 902 (1978). Courts have found that the purpose of the concept is to provide certainty in the customs protest for individuals and entities with a potential liability resulting from a customs transaction. See, e.g., *Cemex*, 279 F. Supp. 2d at 1360 n.5 (citing *Dal-Tile Corp. v. United States*, 829 F. Supp. 394, 399 (Ct. Int'l Trade 1993)); see also *Int'l Trading*, 281 F.3d at 1272; *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1559 (Fed. Cir. 1997).

97. Put differently, whether the final duty liability is less (overpayment) or more (underpayment) than the preliminary duties (cash deposits) paid at the time of entry.

98. See, e.g., *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1123-24 (Fed. Cir. 1998) (holding that Customs cannot refund over-paid countervailing duties for deemed liquidated entries); Cust. HQ 228929, *supra* note 11 (finding that Customs cannot refund over-paid duties for deemed liquidated entries); Cust. HQ 228712, *supra* note 11 (finding that Customs cannot refund over-paid countervailing duties for deemed liquidated entries).

99. Traditionally, antidumping duties are paid into the U.S. Treasury. Mark L. Movsesian, *Actions against Dumping and Subsidization – Antidumping and SCM Agreements – United States Continued Dumping and Subsidy Offset Act of 2000 (“Byrd Amendment”)—Interest Group Legislation*, 98 AM J. INT'L L. 150, 151 (2004). Currently, by reason of the Continued Dumping and Sub-

Conversely, if an importer underpays duties upon entry, i.e., the cash deposits determined by the DOC in the investigation were lower than the actual duties found to be owed in the administrative review, the importer will not have to pay the difference if deemed liquidation occurs. This scenario results in a windfall to the importer, who does not have to pay the additional duties owed, and in a loss to the government because it was unable to collect the duties owed.

The effects of deemed liquidation on representatives of U.S. industry are more amorphous. Generally, the antidumping statutes are intended to protect U.S. industry from unfairly traded imports causing injury.<sup>100</sup> U.S. industry may gain such protection by initiating an antidumping investigation followed by an affirmative finding by the DOC

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sidy Offset Act ("Byrd Amendment"), collected antidumping duties are distributed to the affected U.S. industry. See 19 U.S.C. §1675c (2000). Hence, the U.S. industry also has a significant, direct financial stake in the liquidation of entries beyond seeing the relief afforded by the administrative agencies under the U.S. trade laws properly enforced. However, the Appellate Body of the WTO has found the Byrd Amendment inconsistent with the United States' WTO obligations and the United States is under an obligation to repeal it. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) [hereinafter *WTD AB Report Byrd Amend.*], 42 I.L.M. 427; David Armstrong, *WTO Rebuffs U.S. on Tariffs: Trade Partners May Impose Tit-for-Tat Levies, It Rules*, S.F. CHRON., Sept. 1, 2004, at C1 ("Early indications were that Washington intends to comply with the WTO decision and that the Byrd Amendment could be off the books before sanctions are applied."). So far, Congress has not repealed the Byrd Amendment.

100. James T. Gathii, *Insulating Domestic Policy through International Legal Minimalism: A Re-characterization of the Foreign Affairs Trade Doctrine*, 25 U. PA. J. INT'L ECON. L. 1, 67 (2004) ("Both anti-dumping law and presidential constitutional and legal authority over foreign commerce were increasingly deployed to protect domestic industries."). While tariffs on imports traditionally have been used for a host of reasons, such as to generate revenue, the purpose of antidumping law and similar trade actions is not to generate revenue but to protect the domestic industry from unfairly traded injurious imports. See, e.g., *Altex, Inc. v. United States*, 370 F.3d 1108, 1110 (Fed. Cir. 2004) ("The antidumping laws protect United States industries against the domestic sale of foreign manufactured goods at prices below the fair market value of those goods in the foreign country."); *Kemira Fibres Oy v. United States*, 61 F.3d 866, 874 (Fed. Cir. 1995) ("Indeed . . . [the] . . . primary purpose of the antidumping law . . . is to protect domestic industry."); *Zenith Elec. Corp. v. United States*, 755 F. Supp. 397, 403 (Ct. Int'l Trade 1990) ("The Act is not intended to penalize the foreign industry, but to protect the domestic industry which is likely to be injured or prevented from being established by the sale of foreign goods in the United States market . . ."); *Badger-Powhatan v. United States*, 608 F. Supp. 653, 656 (Ct. Int'l Trade 1985) (finding that antidumping law "was designed to protect domestic industry from sales of imported merchandise at less than fair value which either caused or threatened to cause injury"); S. REP. NO. 96-249, at 37 (1979), reprinted in 1979 U.S.C.A.N. 381, 423, (stating that purpose of statute was to bolster and protect domestic industry); Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. INT'L L. & BUS. 491 (1993) ("Antidumping laws were designed to protect domestic industry from foreign competition."); James R. Cannon, Jr., *Should the Federal Circuit Take a "Hard Look" at International Trade Cases in the 1990s?*, 40 AM. U. L. REV. 1093, 1099 (1991) ("[T]he purpose of the law is to protect domestic industry from unfair trade . . ."); Judith A. Smith, Note, *American Lamb Co. v. United States: More Protection or Less for the Domestic Industry*, 36 AM. U. L. REV. 983, 986 (1987) ("Congress developed the antidumping laws to protect domestic industries from potentially injurious unfair pricing practices by foreign competitors."). Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399, 494 (2002) ("Some WTO policies, such as the rules contained in the Antidumping Agreement, have resulted in a proliferation of disputes because they offer a potent means of protecting domestic injury from dumping practices."); Nicole DiSalvo, Note, *Let's Dump the 1916 Antidumping Act: Why the 1994 GATT Provides Better Price Protection for U.S. Industries*, 37 VAND. J. TRANSNAT'L L. 791, 809 (2004) ("[T]he members of the WTO signed the Uruguay Round Code, and it is the current antidumping agreement used by member countries to protect domestic industry.").

and ITC.<sup>101</sup> The imposed antidumping duty is intended to compensate for the dumping taking place by raising the price of foreign imports to the level at which those goods are sold in the foreign manufacturer's home market, thereby leveling the playing field.<sup>102</sup> Thus, the protection afforded U.S. industry is the amount of the dumping duty – nothing more and nothing less. In the overpayment situation, the cash deposits collected are higher than the dumping found, and U.S. industry is therefore afforded a higher level of protection than it is entitled to.<sup>103</sup> Conversely, in the underpayment situation, the cash deposits are lower than the final antidumping duty liability, and U.S. industry is not afforded the level of protection it is entitled to.

An additional benefit to the U.S. industry from the collection of antidumping duties is the disbursement of those duties to the affected U.S. industry under the Byrd Amendment.<sup>104</sup> As long as the Byrd Amendment remains in effect, U.S. industry will have an added incentive to file antidumping petitions because it has a direct financial stake in the outcome of the liquidation process.<sup>105</sup> Therefore, it is in the U.S. industry's interest that entries are liquidated at the highest possible rate, through regular or deemed liquidation.

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101. See 19 USC § 1673, 1673a(2)(B) (2000).

102. See 19 U.S.C. § 1673 (2000) (“there shall be imposed . . . an antidumping duty . . . in an amount equal to the amount by which the normal value exceeds the export price . . . for the merchandise”); *Globe Metallurgical, Inc. v. United States*, 350 F. Supp. 2d 1148, 1157 (Ct. Int'l Trade 2004); *Allegheny Ludlum Corp. v. United States*, 182 F. Supp. 2d 1357, 1360 (Ct. Int'l Trade 2002); *GTS Indus. S.A. v. United States*, 182 F. Supp. 2d 1369, 1372 (Ct. Int'l Trade 2002); *Elkem Metal Co. v. United States*, 135 F. Supp. 2d 1324, 1335 (Ct. Int'l Trade 2001); Alan F. Holmer et al., *Enacted and Rejected Amendments to the Antidumping Law: In Implementation or Contravention of the Antidumping Agreement?*, 29 INT'L LAW 483, 507 (1995) (“The antidumping law is not intended as a revenue raiser for the government but as a remedial provision to ‘level the playing field.’”). There are several business rationales for dumping goods in a particular market. One strategy is to gain market share from competitors. Adam C. Hawkins, Comment, *Antidumping Beyond the GATT 1994: Supporting International Enactment of Legislation Providing Supplemental Remedies*, 10 IND. INT'L & COMP. L. REV. 149, 152 (1999) (“By reducing prices below cost of production and a reasonable profit (an inefficient act), producers seek to drive out the competition, gain market share, and ultimately reap monopoly profits.”). The manufacturer dumping the goods may decide to take a lower profit for a finite period of time hoping to out-compete competitors in order to be able to reap monopoly returns at a later stage. *Id.* Similarly, a manufacturer may settle for a lesser profit per unit by dumping hoping to recoup it on a higher volume of sales.

103. Arguably, this scenario is not an example of over-deterrence of the foreign manufacturer/importer because it has already imported the merchandise and paid the higher, estimated duties.

104. See 19 U.S.C. § 1675c (2000). However, as mentioned *supra* note 99, the U.S. government is under an obligation to repeal the Byrd Amendment as a result of the WTO appellate body finding that it is inconsistent with U.S. WTO obligations. See *WTD AB Report Byrd Amend.*, *supra* note 99; David Armstrong, *WTO Rebuffs U.S. on Tariffs: Trade Partners May Impose Tit-for-Tat Levies, It Rules*, S.F. CHRON., Sept. 1, 2004, at C1 (“Early indications were that Washington intends to comply with the WTO decision and that the Byrd Amendment could be off the books before sanctions are applied.”).

105. See *Eakin Letter*, *supra* note 7. (noting that the Byrd Amendment “encourages more firms to file or support antidumping cases . . . [because the] linkage of payments to support for a case is a direct incentive.”). However, a recent Government Accountability Office (“GAO”) study did not find any clear evidence that the Byrd Amendment had caused an increase in the number of trade cases filed or in the scope or duration of antidumping orders. U.S. GOV'T ACCOUNTABILITY OFF., INTERNATIONAL TRADE: ISSUES AND EFFECTS OF IMPLEMENTING THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT 37-40 (2005), <http://www.gao.gov/new.items/d05979.pdf>.

*C. The Sources of the Problems Associated with Deemed Liquidation*

The problems associated with deemed liquidation stem from the failure of administrative agencies to act in a timely manner, the lack of consequences in the scheme for failure to act, and the lack of an administrative remedy for interested parties to undo deemed liquidation.

Deemed liquidation occurs six months after Customs receives notice that the suspension of liquidation has been removed.<sup>106</sup> Interpreting courts have concluded that the six-month time period starts to run when the DOC publishes the final results of an administrative or judicial review in the Federal Register,<sup>107</sup> when the DOC issues public and unambiguous liquidation instructions to Customs,<sup>108</sup> and, potentially also if Customs is a party to the proceedings resulting in the removal of the suspension of liquidation.<sup>109</sup> However, Customs takes the position that it

106. 19 U.S.C. § 1504(d) (2000).

107. *Int'l Trading*, 412 F.3d at 1313 (results after administrative review, post-URAA statute); *Fujitsu*, 283 F.3d at 1381 (results after judicial review); *Int'l Trading*, 281 F.3d at 1274-77 (results after administrative review, pre-URAA statute). For information on URAA, see *supra* note 72.

108. *Cemex*, 384 F.3d at 1321 (“Our case law further requires that, in addition to being unambiguous, the notice to Customs be public.”); *Fujitsu*, 283 F.3d at 1381-82 (“It is just as important that there be ‘an unambiguous and public starting point for the six-month liquidation period’ under these circumstances as it is when liquidation of entries is suspended pending an administrative review and thereafter the suspension is removed when the final results of the review are announced.”); In *Int'l Trading*, the court states:

[T]he date of publication provides an unambiguous and public starting point for the six-month liquidation period, and it does not give the government the ability to postpone indefinitely the removal of suspension of liquidation (and thus the date by which liquidation must be completed) as would be the case if the six-month liquidation period did not begin to run until Commerce sent a message to Customs advising of the removal of suspension of liquidation.

281 F.3d at 1275. It is unclear whether non-public liquidation instructions may provide the requisite notice to Customs. See *Cemex*, 384 F.3d at 1320-21 (holding that electronic mail liquidation instructions from Commerce to Customs were neither unambiguous nor public, but not deciding whether non-public instructions provided the requisite notice to Customs). Arguably, non-public instructions would provide actual notice to Customs. However, non-public instructions would not provide notice to parties involved in Customs transactions who are not privy to such instructions. As a result, such parties would be unable to safeguard their interests by monitoring the liquidation process. From a policy standpoint, it would appear that the better approach is not to allow non-public instructions to trigger the six-month time period for deemed liquidation.

109. See *Fujitsu*, 283 F.3d at 1379. In *Fujitsu*, the court stated:

[S]ection 1504(d) requires that Customs receive notice that a suspension of liquidation has been removed from “the Department of Commerce, other agency, or a court with jurisdiction over the entry.” There is no evidence in the record that Customs received such notice prior to September 16, 1997. It is true, as *Fujitsu* points out, that on or about July 3, 1996, the Clerk of the Federal Circuit served counsel for the government, the Department of Justice, with the decision in *Fujitsu General*. That fact does not help *Fujitsu*, however. The Justice Department represented Commerce, not Customs, before this court. Service of the *Fujitsu General* decision upon it did not constitute notice to Customs.

*Id.* Similarly, in *NEC Solutions (America), Inc. v. United States*, the Federal Circuit applied the *Fujitsu* rule described above. 411 F.3d 1340 (Fed. Cir. 2005). NEC argued that service of a court’s opinion on the Justice Department’s attorneys provided notice to Customs that the suspension of liquidation had been lifted. *NEC Solutions*, 411 F.3d at 1346. NEC distinguished *Fujitsu* by pointing out that in that case, the notice was of a Federal Court decision determining a dumping margin while in NEC’s case the notice was of a CIT decision ordering the lifting of suspension of liquida-

does not have to monitor the Federal Register and that it will only liquidate entries after receiving liquidation instructions from the DOC.<sup>110</sup> Thus, the DOC issues two types of notices to effect liquidation: first, it is required by statute to publish the final results of administrative and judicial reviews in the Federal Register,<sup>111</sup> and second, it issues liquidation instructions to Customs.<sup>112</sup>

In practice, both agencies frequently fail to act in a timely manner. For example, the DOC may fail to publish the final results in the Federal Register or fail to issue liquidation instructions to Customs. In such situations, the time period for deemed liquidation may never start to run.<sup>113</sup> Because Customs takes the position that it will not liquidate entries until it receives instructions from the DOC, if ever, when Customs finally receives the instructions, the deemed liquidation period may already have passed.<sup>114</sup>

*Peer Chain Co. v. United States*<sup>115</sup> is an example of how the DOC's delay in providing Customs with notice of the final duty liability may significantly injure an importer. In that case, the Peer Chain Company had imported roller chain from Japan subject to a preliminary antidumping duty rate of zero percent in 1985.<sup>116</sup> In 1992, the DOC determined that the final duty rate was 43.29 percent.<sup>117</sup> However, the DOC neither published notice of the final duty liability nor provided Customs with

tion. *Id.* The Federal Circuit rejected NEC's argument and agreed with the lower court that "'service of an opinion on Justice was not service on Customs.'" *Id.* (quoting *Fujitsu*, 283 F.3d at 1379).

110. *Int'l Trading*, 281 F.3d at 1274 n.2 ("Customs has stated its view that the six-month period of section 1504(d) is not triggered until Customs receives liquidation instructions from Commerce."). Customs' role in the liquidation procedure is purely "ministerial" in that Customs only is charged with executing the mandate given by the DOC. *See, e.g., Cemex*, 384 F.3d at 1324 ("Customs' role in making antidumping decisions . . . is generally ministerial."); *Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1162, 1169, (Ct. Int'l Trade 2004) (citing *Yacheng Baolong Biochemical Products Co. v. United States*, 277 F. Supp. 2d 1349, 1364 (Ct. Int'l Trade 2003)) ("In implementing the instructions of Commerce to liquidate entries subject to an antidumping or countervailing duty order, Customs' actions are ministerial in nature."); *Fujitsu Ten Corp. of Am. v. United States*, 957 F. Supp. 245, 248-49 (Fed. Cir. 1997) (finding that *Fujitsu* had no basis upon which to file suit against Customs, since Commerce made all the decisions); *Am. Hi-Fi Int'l, Inc. v. United States*, 19 Ct. Int'l Trade 1340, 1342 (1995) ("Customs does not make any 'decisions,' but performs merely a ministerial role in the collection of interest pursuant to the antidumping duty laws."); *see Cust. HQ 230339, supra* note 71. ("[Customs] role in the antidumping process is simply to follow Commerce's instructions . . .").

111. 19 U.S.C. §§ 1516a(c), (e), 1675(a)(1) (2000).

112. 19 U.S.C. §§ 1673d(c)(1), (2), 1673d(d) (2000).

113. *See, e.g., Peer Chain Co. v. United States*, 316 F. Supp. 2d 1357, 1368 (Ct. Int'l Trade 2004) (finding that the six-month time period will not begin to run if the DOC does not send liquidation instructions to Customs, despite the DOC's five-year delay).

114. *See, e.g., Int'l Trading*, 421 F.3d at 1303 (suspension lifted Oct. 30, 1996, deemed liquidation occurred six months thereafter, DOC sent liquidation instructions on July 1, 1997); *Fujitsu*, 283 F.3d at 1364 (suspension lifted on Oct. 1, 1996, deemed liquidation occurred six months thereafter, DOC sent liquidation instructions on Sept. 26, 1997); *Int'l Trading*, 281 F.3d at 1268 (suspension lifted Feb. 12, 1996, deemed liquidation occurred six months thereafter, DOC sent liquidation instructions on Aug. 29, 1996).

115. 316 F. Supp. 2d 1357 (Ct. Int'l Trade 2004).

116. *Peer Chain*, 316 F. Supp. 2d at 1359.

117. *Id.* In essence, the DOC determined that the entries imported at the zero percent duty rate at the time of importation were dumped and should have been subject to a 43.29 percent duty rate. *Id.* at 1358-59.

actual notice of the final duty liability.<sup>118</sup> Hence, the six-month time period for deemed liquidation never started to run. Finally, in 2000, the DOC provided Customs with actual notice of the final duty liability.<sup>119</sup> Customs liquidated the Peer Chain Company's entries within six months of receiving actual notice from the DOC.<sup>120</sup> The CIT found that Peer Chain Company's entries had been properly liquidated and that it could not provide any equitable relief, despite "the government's egregious delay."<sup>121</sup> Deemed liquidation did not occur because the six-month time period never started to run because of the DOC's failure to provide notice to Customs.<sup>122</sup> Consequently, the Peer Chain Company was forced to pay \$167,111 in back-duties, together with interest which had compounded daily from 1986 to 2000.<sup>123</sup>

Customs also often fails to act in a timely manner, causing deemed liquidation to occur. In *International Trading Co. v. United States*,<sup>124</sup> the importer had imported shop towels from Bangladesh between 1993 and 1994 and paid antidumping duty cash deposit of 2.72 percent.<sup>125</sup> On February 12, 1996, the DOC published in the Federal Register the final results of the administrative review covering the subject entries.<sup>126</sup> The final AD duty rate was 42.31 percent.<sup>127</sup> The DOC sent an e-mail message to Customs the next day noting that the administrative review had been completed but advising Customs not to liquidate until receiving liquidation instructions.<sup>128</sup> In August 1996, the DOC sent a non-public e-mail message to Customs notifying it that the suspension of liquidation had been lifted and instructing it to liquidate covered entries at the AD duty rate of 42.31 percent.<sup>129</sup> Customs liquidated the entries in October 1996, nine months after publication of the final results in the Federal Register but only approximately two months after receiving liquidation instructions from Customs, and issued a bill for additional antidumping duties.<sup>130</sup> The Court of Appeals for the Federal Circuit ("Federal Circuit") held that the entries in question liquidated by operation of law six months after publication of the final results after administrative review, February 12, 1996, at the rate asserted upon entry.<sup>131</sup> In *International*

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118. *Id.* at 1359-60.

119. *Id.* at 1360.

120. *Id.*

121. *Id.* at 1362, 1368.

122. *Id.* at 1363.

123. *Id.* at 1360.

124. 281 F.3d 1268 (Fed. Cir. 2002). The case dealt with the pre-URAA version of 19 U.S.C. Section 1504(d). In a subsequent case involving the same parties, the Federal Circuit reached the same general result when interpreting the post-URAA version of Section 1504(d). See *Int'l Trading Co. v. United States*, 412 F.3d 1303 (Fed. Cir. 2005).

125. *Int'l Trading Co.*, 281 F.3d at 1270.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1270-71.

131. *Id.* at 1277.

*Trading*, deemed liquidation worked to the advantage of the importer and to the detriment of representatives of U.S. industry and the U.S. government.

*Cemex, S.A. v. United States*<sup>132</sup> is an example of how the DOC and Customs' mistakes in the liquidation process may injure the U.S. government and U.S. industry. A U.S. importer had imported cement from Mexico, subject to a preliminary antidumping duty rate of 56.94 percent ad valorem.<sup>133</sup> The DOC determined the final duty rate to be 106.846 percent.<sup>134</sup> The DOC failed to publish official notice of the final results in the Federal Register but did send non-public liquidation instructions to Customs in March 1998.<sup>135</sup> In April 2001, approximately three years later, Customs, erroneously believing that the entries in question had been deemed liquidated six months after March 1998, liquidated the entries at the preliminary duty rate of 59.94 percent rather than the final rate of 106.846 percent.<sup>136</sup> The Federal Circuit concluded that the March 1998 notice was ineffective and that the six-month time period for deemed liquidation never started to run.<sup>137</sup> Nevertheless, Customs erroneous liquidation in April 2001 at the lower, preliminary duty rate had become final on the parties and was therefore valid.

Part of the problem caused by the DOC's delay in notifying Customs about the removal of the suspension of liquidation is the lack of statutory deadlines for doing so and the lack of consequences for failure to do so. In addition, the DOC is not under a statutory obligation to send liquidation instructions to Customs.<sup>138</sup> While the statute obligates the DOC to publish in the Federal Register final results after an administrative review, they do not contain any deadline within which to do so.<sup>139</sup> Finally, the statute requires that the DOC publish the final results after judicial review within ten days of the court's decision.<sup>140</sup> However, interpreting courts have concluded that the ten-day requirement is directory rather than mandatory and that no consequences attach for the DOC's failure to act.<sup>141</sup> In contrast, Section 1504(d) contains both a statutorily

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132. 384 F.3d 1314 (Fed. Cir. 2004).

133. *Id.* at 1316.

134. *Id.* at 1315.

135. *Id.* at 1316, 1318 n.3.

136. *Id.* at 1317.

137. *Id.* at 1321.

138. While not mandated explicitly by statute or regulations, it appears reasonable to conclude that issuing liquidation instructions is a necessary part of fulfilling the statutory scheme. The DOC appears to agree. In its Antidumping Manual, the DOC sets forth its internal procedure for issuing liquidation instructions to Customs. See U.S. DEP'T OF COMMERCE, ANTIDUMPING MANUAL, ch. 18 at 10-17 (Mar. 25, 1998) [hereinafter ANTIDUMPING MANUAL] (liquidation instructions are also known as appraisal instructions), available at <http://ia.ita.doc.gov/admanual>. Among other things, the DOC states that failure to issue liquidation instructions means that "the DOC has not fully applied the AD law." *Id.* at 11.

139. 19 U.S.C. §1675(a)(1) (2000).

140. 19 U.S.C. §1516a(c), (e) (2000).

141. See, e.g., *Cemex* 384 F.3d at 1321 n.6 ("[S]ection 1516a(e) sets forth no consequences for failure to comply with its publication requirement."); *Fujitsu*, F.3d at 1382 ("[T]here is no language in section 1516a(e) that attaches a consequence to a failure by Commerce to meet the ten-day publi-

mandated deadline, six months, and a consequence for Customs' failure to meet it – deemed liquidation. Therefore, the appropriate way to prevent negative effects of deemed liquidation will depend on whether the remedy is sought against the DOC or Customs.

Finally, it appears that interested parties have no available administrative remedy to prevent negative effects of deemed liquidation.<sup>142</sup> While there is a procedure for protesting Customs' decisions available to importers, in the majority of cases, courts and Customs have found that deemed liquidation is not a Customs decision and, therefore, cannot be protested.<sup>143</sup> Besides, before deemed liquidation has occurred, there has not been any Customs decision or action to protest; conversely, after deemed liquidation has occurred, it cannot be undone.<sup>144</sup> In addition, this protest procedure is not available to U.S. industry, which has a vested interest in monitoring the implementation of the protection afforded by

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cation requirement, let alone the consequence of deemed liquidation under section 1504(d)."); Canadian Fur Trappers Corp. v. United States, 884 F.2d 563, 566 (Fed. Cir. 1989) (“[T]he lack of consequential language in the latter part of section (d) if the Customs Service does not meet that time frame leads us to conclude that Congress intended this part of section (d) to be only directory.”). *But see* Timken Co. v. United States, 715 F. Supp. 373, 377 (Ct. Int'l Trade 1989) (“Section 1516a(e) thus mandated Commerce to publish notice of [a] decision . . .”).

142. *See supra* note 11 and accompanying text. In a recent case, the CIT indicated that there might be an available administrative remedy to deal with deemed liquidation once it has occurred in certain, limited circumstances. *Norsk Hydro Canada Inc. v. United States*, 350 F. Supp. 2d 1172 (Ct. Int'l Trade 2004). In *Norsk Hydro*, the CIT re-affirmed that Customs notices of reliquidation are protestable. *Id.* at 1178. More importantly, the CIT raised the possibility that a Customs notice that a particular entry has been deemed liquidation may be challenged under 19 U.S.C. § 1520(c). *Id.* at 1178-79. Under § 1520, an importer may request reliquidation to correct mistakes of fact, clerical errors, or other inadvertences in Customs liquidation decisions within one year of liquidation. 19 U.S.C. § 1520(c)(1) (2000) (repealed 2004). The CIT stated that “Customs’ failure to liquidate entries in accordance with Commerce’s instructions cannot be categorized as a mistake of fact or a clerical error [but that] liquidation by operation of law may result from inadvertence.” *Norsk Hydro*, 350 F. Supp. at 1179. According to the CIT, an importer may challenge such inadvertence under § 1520(c)(1). It is unclear what type of “inadvertences” would be challengeable under § 1520, especially in light of the consistent statements by courts and Customs that deemed liquidation cannot be protested or undone once it has occurred. *See, e.g., infra* note 143.

143. *See, e.g.,* Wolff Shoe Co. v. United States, 141 F.3d 1116, 1122-23 (Fed. Cir. 1998); United States v. Cherry Hill Textiles, Inc., 112 F.3d 1550, 1558-59 (Fed. Cir. 1997); Fujitsu Gen. Am., Inc. v. United States, 110 F. Supp. 2d 1061, 1063 (Ct. Int'l Trade 2000), *aff'd*, 283 F.3d 1364 (Fed. Cir. 2002); *see* Cust. HQ 228929, *supra* note 11 (review of protest application); *see* Cust. HQ 228712, *supra* note 11 (decision to a request for internal advice). *See also* Allegheny Bradford Corp. v. United States, 342 F. Supp. 2d 1162, 1169 (Ct. Int'l Trade 2004) (“The application of the voidance doctrine is supported by the inadequacy of administrative remedies and the inappropriateness of Customs as a forum for any such remedies. Here, as in other cases where liquidations violated an order of this Court, there is no meaningful protest to be had at the administrative level nor is a determination of Customs really at issue.”); Eurodif S.A. v. United States, 306 F. Supp. 2d 1288, 1289-90 (Ct. Int'l Trade 2004); AK Steel Corp. v. United States, 281 F. Supp. 2d 1318, 1321-23 (Ct. Int'l Trade 2003) (holding that the plaintiff did not have “standing to challenge the illegality of these liquidations . . . because it is not an importer, and . . . 19 U.S.C. § 1516a and not § 1514 was the [sole] mechanism governing challenges to antidumping duty determinations”); Yacheng Baolong Biochemical Products Co., Ltd. v. United States, 277 F. Supp. 2d 1349, 1358 (Ct. Int'l Trade 2003). Courts have not made a definitive finding on the issue. In two recent cases, the CIT has indicated in dicta that deemed liquidation possibly could be protested under certain circumstances. *See* *Norsk Hydro Canada, Inc. v. United States*, 350 F. Supp. 2d 1172, 1178 (Ct. Int'l Trade 2004); *Cemex*, 279 F. Supp. 2d at 1362, *aff'd*, 384 F.3d 1314 (Fed. Cir. 2004).

144. *See, e.g.,* Wolff Shoe Co. v. United States, 141 F.3d 1116, 1122-23 (Fed. Cir. 1998) (holding that deemed liquidation cannot be protested before it has occurred and cannot be undone thereafter); *see* Cust. HQ 228929, *supra* note 11; *see* Cust. HQ 228712, *supra* note 11 (finding that Customs decisions are protestable but that deemed liquidation occurs by operation of law and does not involve a Customs decision).

the U.S. trade laws.<sup>145</sup> Furthermore, there is no administrative remedy available to force the DOC to provide notice of the removal of the suspension of liquidation. As illustrated, the current liquidation scheme is plagued by statutory gaps and administrative failure which may injure importers, the U.S. Government or representatives of U.S. industry.

#### *D. Pertinent Public Policy Considerations*

The problems associated with the liquidation process are caused by the DOC and Customs' delays in executing their statutory duties. But, the DOC's obligation to act is hard to enforce because the statutes do not contain deadlines or consequences for the DOC's failure to act. However, Customs is under a clear obligation to liquidate within six months of receiving notice of the removal of the suspension of liquidation.<sup>146</sup> The proper administration of U.S. trade laws is "clearly in the public interest."<sup>147</sup> Any solution to the problems associated with the liquidation process must take into consideration public policy concerns.

First, it is necessary to examine the interests of the parties involved in the process. Foreign manufacturers and importers have an interest in market access and the ability to sell imported goods in the United States. This interest has a discernable effect on the U.S. economy. For example, foreign manufacturers and importers may have operations in the United States providing jobs, goods and services to the U.S. market. In addition, competition from foreign goods has beneficial effects on consumer choice and prices in the U.S. market. Of course, competition from foreign imports may have negative effects on the U.S. market as well. Representatives of U.S. industry, in turn, also provide jobs, goods and services to the U.S. market. Many U.S. companies are dependent on foreign imports for manufacturing inputs. The imposition of duties on foreign imports will decrease the competitive pressure on U.S. industry from foreign sources. On the other hand, additional duties imposed on important production inputs will negatively affect U.S. industry. In addition, U.S. industry has a direct stake in the collection of antidumping duties as long as the Byrd Amendment remains in effect. The Byrd Amendment provides that the collected duties be distributed to the affected industry.<sup>148</sup> The U.S. government has an interest in maintaining a healthy economy which can provide job opportunities for the population. To the extent that collected duties are not distributed to the affected industry, the government also has a direct stake in the collection of duties because it goes into the federal Treasury. This stream of revenue could

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145. 19 U.S.C. §1514(c)(2) (1994). See also *Cemex*, 384 F.3d at 1323 n.9; *Cemex*, 279 F. Supp. 2d at 1362.

146. See 19 U.S.C. §1504(d) (2000).

147. *U.S. Ass'n of Imps. of Textiles & Apparel v. United States*, 350 F. Supp. 2d 1342, 1351 (Ct. Int'l Trade 2004) (finding that proper administration of trade laws is in the public interest for purposes of meeting the fourth requirement of the test for issuing a preliminary injunction).

148. 19 U.S.C. §1675c (2000).

be used for governmental purposes.<sup>149</sup> The U.S. government also has an interest in the proper administration of U.S. laws and policies. Finally, U.S. multilateral trading partners also have a stake in the outcome of the U.S. liquidation process. WTO members negotiate international trade concessions and rules in complicated multilateral negotiations under the auspice of the WTO. These negotiations take years to complete. The resulting international trade law represents painstakingly negotiated compromises. In addition, the development of international trade law is intimately connected to the negotiation of trade concessions as WTO members grant trade concessions in exchange for support of trade rule. Antidumping laws are examples of such negotiated international trade rules. The United States incorporated the outcome of the latest WTO negotiation round, the Uruguay Round, into U.S. law. The DOC and Customs are responsible for executing U.S. international trade obligations. These agencies' failure to follow the WTO-implementing U.S. laws negates the beneficial results trade negotiations are intended to produce and causes friction with U.S. multilateral trading partners.<sup>150</sup>

Second, the incentives created by the current scheme, and any future scheme, must comport with public policy. Courts have concluded that the effects of deemed liquidation are binding on all parties with an interest in the liquidation process.<sup>151</sup> Importers stand to lose money in the overpayment situation if deemed liquidation occurs. The U.S. government and representatives of U.S. industry stand to lose money and protection against unfair imports in the underpayment situation. The three parties stand to gain or save money in the converse situations. From an equity standpoint, it would appear wise public policy to impose negative consequences only on the party who is in control of those consequences occurring: in this case, the U.S. government. Indeed, the economic principle of the least-cost avoider is well-recognized in law and economics, tort law and contract law.<sup>152</sup> The U.S. government itself

149. For example, Customs has recently been given new, additional responsibilities in protecting the United States against terrorism. These new responsibilities add new stress to already scarce and stretched administrative resources. The money lost through deemed liquidation could have been used to fund such activities.

150. Colloquially, compare U.S. international trade obligations to a football game. The WTO negotiations represent a close-to-100-yard drive starting at one end zone and ending close to the other. The benefits of the negotiations represent the goal line of the opposing team. When the DOC and Customs fail to fulfill their statutory obligations, mandated by U.S. international trade obligations, it is as if the football team fumbles the ball on the one-yard line of the opposing team after a 99-yard drive.

151. See, e.g., *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1122-23 (Fed. Cir. 1998) (finding that an importer was not entitled to a refund of duties paid for entries which were deemed liquidated); see Cust. HQ 228929, *supra* note 11 (holding that Customs is unable to reliquidate entries already deemed liquidated); see Cust. HQ 228712, *supra* note 11 (denying a refund because entries were deemed liquidated).

152. See, e.g., *Conoco Inc. v. J.M. Huber Corp.*, 289 F.3d 819, 827 n.6 (Fed. Cir. 2002) (“[T]he district court’s equitable calculus relies in part on the concept that placing liability with the least-cost avoider increases the incentive for that party to adopt preventive measures and ensures that such measures would have the greatest marginal effect on preventing the loss.”) (internal quotations omitted); *Holtz v. J.J.B. Hilliard W.L. Lyons, Inc.*, 185 F.3d 732, 743 (7th Cir. 1999) (“The liability resulting from placing such a duty on the party who is not the least-cost avoider would expose that

in *Canadian Fur Trappers Corp. v. United States*,<sup>153</sup> argued against deemed liquidation applying to an importer because importers who had overpaid duties then would be unjustly affected.<sup>154</sup> The Federal Circuit recognized the validity of the argument but, in the end, found that deemed liquidation had not occurred.<sup>155</sup> The current interpretation of the statutes gives the U.S. government little incentive to prevent deemed liquidation from occurring in the overpayment situation.

In addition, the government has the power to prevent deemed liquidation from occurring in the underpayment situation by preventing the six-month time period from starting. The Federal Circuit has noted that 19 U.S.C. Section 1504 was enacted to remove from the government the power to delay liquidation indefinitely, which was the case prior to 1978.<sup>156</sup> The interests of U.S. industry and the government are aligned in this respect. Hence, whether deemed liquidation occurs and the effect it has is wholly within the control of the government. The money collected will directly benefit the U.S. government. Granted, the benefit currently is passed through to U.S. industry in the form of Byrd Amendment distributions.<sup>157</sup> However, the WTO appellate body has found that the Byrd Amendment is inconsistent with U.S. WTO obligations and that the United States must repeal it.<sup>158</sup>

In the overpayment situation, if deemed liquidation occurs, U.S. industry also benefits indirectly by gaining more protection against foreign imports than allowed under the statute (and WTO rules). The fact that the government stands to lose money in the underpayment situation is of no consequence as it is the desired result under equitable principles be-

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party to an almost incomprehensible number of claims in which a variety of plaintiffs – related and unrelated to defendants – allege the duty was breached because this particular plaintiff was supposed to be designated the beneficiary or, conversely, the owner of the account really meant for no one to be designated.”); *Nat'l Union Fire Ins. Co. v. Riggs Nat'l Bank*, 5 F.3d 554, 557 (D.C. Cir. 1993) (Silberman, J., concurring) (“Placing liability with the least-cost avoider increases the incentive for that party to adopt preventive measures and ensures that such measures would have the greatest marginal effect on preventing the loss.”); Roger G. Noll, *Reforming Risk Regulation*, 545 ANNALS AM. ACAD. POL. & SOC. SCI. 165, 167 (1996) (“In addition, regulation shifts some of the costs of identifying and ameliorating the risk to those who are most informed about it . . . [thus,] regulation has a potential efficiency benefit according to the ‘least-cost avoider’ principle . . . .”); David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Precautions*, 36 ARIZ. L. REV. 357, 367 (1994) (“Whenever the unilateral precautions of one of the actors involved in an accident scenario would be sufficient to avoid the risk of harm, an efficient incentive is one that motivates the least cost avoider of the risk to take his available cost-justified precautions.”). For more information on the concept of least cost avoider, see generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 135-40 (1970) (discussing the concept of “least cost avoider,” a theory Calabresi authored).

153. 613 F. Supp. 364 (Ct. Int'l Trade 1988).

154. *Canadian Fur Trappers*, 613 F. Supp. at 365-66.

155. *Id.* at 617-18.

156. *Int'l Trading Co.*, 281 F.3d at 1272 (citing *Int'l Cargo & Surety Ins. Co. v. United States*, 779 F. Supp. 174, 177 (Ct. Int'l Trade 1991)) (“Customs could delay liquidation as long as it pleased, with or without giving notice.”).

157. See 19 U.S.C. §1675c (2000).

158. *WTD AB Report Byrd Amend.*, *supra* note 99, ¶ 318; David Armstrong, *WTO Rebuffs U.S. on Tariffs; Trade Partners May Impose Tit-for-Tat Levies, It Rules*, S.F. CHRON., Sept. 1, 2004, at C1 (“Early indications were that Washington intends to comply with the WTO decision and that the Byrd Amendment could be off the books before sanctions are applied.”).

cause the government controls the prevention of such loss. Of course, one could argue that U.S. industry will suffer a loss of protection against unfairly traded imports in the underpayment situation. However, any potential loss of protection is of little concern from a policy standpoint. In antidumping proceedings, U.S. industry affirmatively avails itself of the protection afforded by the U.S. government. Because errors are within the exclusive control of the government, U.S. industry has to accept them as part of doing business with the government. Importers, on the other hand, are involuntarily involved in the process and should not be forced to bear negative consequences resulting therefrom.

Third, public policy dictates that the scheme must operate in a cost-effective manner. The DOC and Customs usually point to a large workload, lack of personnel and human error for failure to take prompt action.<sup>159</sup> Potential costs associated with removing these delays could include the hiring of more personnel, the creation of new administrative agencies to alleviate the work load of current agencies or the development of a procedure to eliminate human error.<sup>160</sup> Most likely, a remedy to prevent agency delay would involve the federal government providing additional funding to the agency. From that standpoint, other non-monetary remedies, such as statutory deadlines with consequences enforceable in a federal court or before an administrative agency, might be more cost-efficient.

Fourth, it is important to make sure that any remedy for the problems with the liquidation process does not give rise to new inefficiencies. For example, the tightening of administrative deadlines could lead to more erroneous agency decisions. In addition, the creation of a new administrative remedy may add to the already large administrative burden of the involved agencies, thereby giving rise to more errors and delays.

Finally, judicial economy dictates that problems in the process are remedied at the agency level as opposed to in federal courts. Without any change in the statutory scheme, as evidenced by the apparent recent increase in litigation, courts will become increasingly involved in the enforcement of statutory mandates. Courts have expressed frustration with agency delays in the process and indicated that changes in the proc-

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159. *Cemex*, 384 F.3d at 1316-17 (confusing communications between Customs and the DOC); *NEC Solutions (Am.), Inc. v. United States*, 277 F. Supp. 2d 1340, 1346 n. 15 (Ct. Int'l Trade 2003) ("According to the Government, [its] administrative oversight occurred, in part, because of Commerce's 'time consuming' publication process," but "Commerce's self-imposed bureaucracy . . . is no excuse for delay."); *LG Electronics U.S.A., Inc. v. United States*, 991 F. Supp. 668, 676-77 (Ct. Int'l Trade 1997) (erroneous electronic and automatic liquidation).

160. In this respect, it is interesting to note that Customs has in place an automated system for the liquidation of goods. See U.S. Customs and Border Protection, *Yes You Can* (n.d.), available at <http://customs.gov/> (follow "publications" hyperlink; then follow "Trade Automated Systems" hyperlink; then follow "Yes You Can on ACS" hyperlink) (last visited Nov. 12, 2005). Customs' Automated Commercial System ("ACS") enables Customs "to track, control, and process all commercial goods imported into the United States . . . [and] facilitates merchandise processing, significantly cuts costs, and reduces paperwork requirements for both Customs and the importing community." *Id.* Despite the use of this system, errors occur.

ess are necessary.<sup>161</sup> In particular, courts appear concerned with the fact that the agencies are not following clear statutory mandates and that parties instead must rely on the judiciary branch for enforcement.<sup>162</sup> In this respect, it is important to point out that judicial review also may serve as a source of delay in the liquidation process. Under the principle of time-value of money, it may be beneficial to a party to delay the liquidation process as long as possible if the expected end-results will be unfavorable to the party. For example, if an importer has paid low cash deposits but faces the possibility of high liquidation rates, it may be in the best interest of the importer to delay liquidation as long as possible by, e.g., filing a judicial appeal. The converse situation applies to U.S. industry.

### III. DEEMED LIQUIDATION AND CONGRESSIONAL INTENT

Deemed liquidation may result in a windfall to either the importer or the U.S. government depending on whether the importer overpaid or underpaid duties at the time of entry.<sup>163</sup> The plain language of the statute does not make a distinction between whether deemed liquidation is beneficial to importers or the government.<sup>164</sup> However, this interpretation appears somewhat at odds with the legislative history of 19 U.S.C. Section 1504(d). In enacting the provision, Congress appears to have intended that deemed liquidation would protect importers from unknown future liabilities.<sup>165</sup>

Congress has long recognized that undue delay in liquidation resulted in losses to importers and surety companies.<sup>166</sup> Before enacting Section 1504(d) in 1978, there was no statutory requirement that liquida-

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161. See, e.g., *NEC*, 277 F. Supp. 2d at 1346 n.15 (Ct. Int'l Trade 2003). In *NEC*, the court stated:

Commerce's self-imposed bureaucracy . . . is no excuse for delay. Commerce is aware of its statutory obligations and should have crafted its procedures accordingly. The Government brazenly claims that an interested party who believes it will be injured by a delay "is not without remedy" because it can seek relief by petitioning for a writ of mandamus. . . . The idea that a party must seek such an extraordinary remedy to ensure that Commerce simply fulfills its statutory responsibilities is untenable. By delaying liquidation in this manner, Commerce undermines both the antidumping duty laws and Congress' intent to settle importers' liabilities promptly.

*Id.* See also *Nakajima All Co. v. United States*, 691 F. Supp. 358, 360 (Ct. Int'l Trade 1988) (quoting the transcript from a telephone conference between the parties and the trial court) ("Suffice it to say, [the Court] will not permit the Court to be the administrative agency nor is the Court interested in being involved in impeding the administrative process.").

162. See, e.g., *NEC*, 277 F. Supp. 2d at 1346 n.15.

163. See *supra* Part II.B.

164. 19 U.S.C. §1504(d) (2000) ("Customs . . . shall liquidate the entry . . . within 6 months after receiving notice of the removal [of the suspension] . . . Any entry . . . not liquidated . . . within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record."). See *Cust. HQ 228929*, *supra* note 11 ("[T]he relief and certitude of deemed liquidation [does not] turn on who, the government or the industry, lays claim to the event. When the clock is ticking, it is ticking for both parties.")

165. See *S. REP.*, *supra* note 6, at 32.

166. Surety companies are in essence "insurance companies" vouching for the duty liability of a principal, e.g., an importer. See <http://www.surety.org/content.cfm?lid=70&catid=2> (last visited Nov. 12, 2005).

tion be completed within a specified time limit.<sup>167</sup> The enactment of Section 1504(d) appears to have been prompted by a fear that delay in liquidation would negatively affect U.S. relations with foreign nations as well as the financial situation of importers and surety companies. During the 1975 hearings regarding Customs Administration and Valuation (in the context of the Antidumping Act of 1921<sup>168</sup>), a congressional witness from the U.S. Treasury Department pointed out that the intentional withholding of liquidation created “an unjustified impediment to trade” because it “would risk a major confrontation with [U.S.] trading partners.”<sup>169</sup> The U.S. Treasury further stated that “a purposeful delay in liquidation would unfairly subject the U.S. taxpayers and the importer, to tax liabilities which could not be reasonably anticipated.”<sup>170</sup> Even though the U.S. Treasury did not so state, it is obvious that undue delay of liquidation has the same potential negative effect regardless of whether it is inadvertently or purposefully delayed.

When enacting Section 1504 in 1978, both the House of Representatives and the Senate emphasized that the provision was intended to protect importers and surety companies from unknown future liabilities. The House Committee on Ways and Means reported that adoption of the deemed liquidation provision would lead to “considerable benefit to . . . importers.”<sup>171</sup> The deemed liquidation concept would eliminate future Customs’ requests for additional duties from an importer which had already sold the goods at a price that did not take into consideration the future increase in duty liability.<sup>172</sup> Similarly, the Senate Committee on Finance stated that the adoption of Section 1504 would “increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction.”<sup>173</sup> According to the Committee, the problem with the pre-1978

167. See S. REP., *supra* note 6, at 31; see H.R. REP., *supra* note 85, at 24. See also Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 209(a), 92 Stat. 888, 905 (1978). Compare 19 U.S.C. § 1504 (1976), with 19 U.S.C. § 1504 (Supp. II 1978).

168. Anti-Dumping Act of 1921, §§ 201-12, 42 Stat. 11-15 (1921), amended by Trade Agreement Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978-2076 (1975). The Anti-Dumping Act of 1921 was subsequently repealed except as to findings or court orders in effect on the date of repeal. Trade Agreement Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 193 (1979).

169. *Customs Administration and Valuation of Imports: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways and Means*, 94th Cong. 9 (1975) (statement of David R. Macdonald, Assistant Secretary of the Treasury for Enforcement, Operations, and Tariff Affairs; answers to questions submitted by the Hon. William J. Green, Chairman of the subcommittee).

170. *Customs Administration and Valuation of Imports: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways and Means*, 94th Cong. 25 (1975) (answers by the Treasury Department to questions submitted by the Hon. William J. Green, Chairman of the subcommittee).

171. See H.R. REP., *supra* note 85, at 4. The Committee also noted that Customs would benefit from the enactment of the provision through “improved management of the liquidation process which would result in some costs savings.” *Id.*

172. *Id.* In addition, the deemed liquidation provision would allow surety companies to better control their liabilities and alleviate the risk of loss caused by the dissolution (default) of the surety companies’ principals caused by undue delay in liquidating entries. *Id.*

173. See S. REP., *supra* note 6, at 32 (cited in *Cemex S.A. v. United States*, 279 F. Supp. 2d 1357, 1360 n.5 (Ct. Int’l Trade 2003) (citing *Dal-Tile Corp. v. United States*, 829 F. Supp. 394, 399 (Ct. Int’l Trade 1993) (internal quotations and citation omitted)); see also *Int’l Trading Co.*, 281 F.3d at 1272; *Cherry Hill Textiles*, 112 F.3d at 1559.

scheme (without deemed liquidation) was that “an importer may learn years after goods have been imported and sold that additional duties are due, or may have deposited more money for estimated duties than are actually due but be unable to recover the excess for years as he awaits liquidation.”<sup>174</sup> The legislative history lends strong support for the argument that Congress intended Section 1504 to protect mainly importers.

Customs and interpreting courts have agreed that the main purpose of Section 1504 is to protect importers and surety companies from unknown liabilities by providing finality in the liquidation procedure. For example, in *United States v. Cherry Hill Textiles, Inc.*,<sup>175</sup> the Federal Circuit noted that “the ‘deemed liquidation’ provision of section 1504 was added to the customs laws in 1978 to place a limit on the period within which importers and sureties would be subject to the prospect of liability for a customs entry.”<sup>176</sup> As was pointed out earlier, in *Canadian Fur Trappers v. United States*,<sup>177</sup> the U.S. Government actually argued, and the CIT recognized, that importers would be injured in the overpayment situation if deemed liquidation occurred barring them from receiving a refund.<sup>178</sup> However, the CIT concluded that deemed liquidation had not occurred in that case.<sup>179</sup>

The legislative history expresses a clear intent that Section 1504 was enacted to protect importers. “A clear statement in the committee report responsible for drafting a proposed statute is reliable evidence of congressional intent where that congressional statement is not contrary to other sources of legislative history or the clearly expressed language in the statute.”<sup>180</sup> Congress expressed a concern with delays in the process and the negative effects those delays had on the financial health of importers and surety companies. Congress also expressed a strong preference for the protection of importers, recognizing that they are valuable

174. See S. REP., *supra* note 6, at 32. In addition, the Committee noted that the provision of deemed liquidation would allow surety companies to better control their liabilities and to protect them from the risk of default by the principals caused by undue delay in liquidating entries. *Id.* See also *supra* note 166 (regarding definition of “surety” companies).

175. 112 F.3d 1550 (Fed. Cir. 1997).

176. *Id.* at 1559. The Federal Circuit further stated that “[t]he purpose of section 1504 was to bring finality to the duty assessment process.” *Id.* See also *Int’l Trading Co.*, 281 F.3d at 1272 (Fed. Cir. 2002) (citing *Dal-Tile Corp.*, 829 F. Supp. at 399) (“The primary purpose of [section 1504] was to ‘increase certainty in the customs process for importer, surety companies, and other third parties with a potential liability relating to a customs transaction.’”).

177. 691 F. Supp. 364 (Ct. Int’l Trade 1988).

178. *Canadian Fur Trappers*, 691 F. Supp. at 369 (the defendant, the U.S. Government, argued that “if deemed liquidation . . . resulted as a consequence of Custom’s [sic] failure to liquidate within 90 days of the termination of suspension, then importers who ha[d] deposited estimated duties greater than the amount that they actually owe[d] would be unjustly affected by this outcome, as they [could] not be entitled to a refund.”).

179. *Id.*

180. *Id.* at 616 (citation omitted). The U.S. Customs Court has stated that:

It is the function of this court on judicial review to interpret and apply the tariff laws in light of the intent of Congress. In the performance of this function, the court cannot defer to an administrative interpretation or application of a statute if it is inconsistent with the statutory language or congressional intent.

*C.B.S. Imports Corp. v. United States*, 80 Cust. Ct. 61, 66 (Cust. Ct. 1978).

U.S. taxpayers and market actors. Absent from the legislative history is a discussion of the potential negative or positive effects of deemed liquidation for the government or U.S. industry.<sup>181</sup> The legislative history would support an argument that the negative consequences of deemed liquidation should apply only against the government.

A counter-argument is that Section 1504 in its current interpretation fulfills congressional intent because it creates certainty and finality for importers regardless of whether deemed liquidation results in negative consequences to importers or not. Indeed, the duty liability is certain and final at the time deemed liquidation occurs. From that time on, the importer no longer has to suffer from the negative effects of an uncertain liability. While congressional concern with “finality” to a certain extent is answered even when deemed liquidation applies against importers, equity dictates that the government act in a timely manner to prevent a negative outcome for importers because, whether or not liquidation is completed in a timely manner is within the exclusive control of the government. Congress’ main motivator in enacting Section 1504 was to minimize delays in the process.<sup>182</sup> It is questionable whether delays will be minimized by deemed liquidation in a system where the government may have incentives to delay, such as in the overpayment situation. Of course, courts operate under the presumption that U.S. agencies act in a diligent manner and that any delays are caused solely by nonfeasance as opposed to malfeasance.<sup>183</sup> Regardless of the propensity of the government to willfully delay liquidation, the current scheme certainly provides an incentive to do so. Therefore, it would be consistent with congressional intent to apply the negative consequences of deemed liquidation only against the government. One commentator even has gone so far as

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181. The Senate Committee on Finance estimated in 1978 that the enactment of the provision would result in a “maximum annual customs revenue loss of \$9.5 million.” See S. REP., *supra* note 6, at 32. The sum \$9.5 million in 1978 would equal between \$21.9 and 45.4 million today See Economic History Services, *What is its Relative Value in US Dollars?*, <http://eh.net/hmit/compare>. More interestingly, the total value of imports in 1978 was \$176 million. See U.S. CENSUS BUREAU, U.S. TRADE IN GOODS AND SERVICES 1 (2004), available at <http://www.census.gov/foreign-trade/statistics/historical/gands.pdf>. The sum \$176 million would equal between \$406 and 842 million today. See Economic History Services, *supra*. The total value of imports in 2004 amounted to almost \$1,500 billion. Press Release, U.S. Dep’t of Commerce, U.S. Int’l Trade in Goods & Services July 2005, Exhibit 1 (Sept. 13, 2005), [http://www.census.gov/foreign-trade/Press-Release/current\\_press\\_release/exh1.pdf](http://www.census.gov/foreign-trade/Press-Release/current_press_release/exh1.pdf).

182. See, e.g., *Customs Administration and Valuation of Imports: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways and Means*, 94th Cong. 25 (1975) (answers by the Treasury Department to questions submitted by the Hon. William J. Green, Chairman of the subcommittee); see S. REP., *supra* note 6, at 32.

183. See, e.g., *Spezzaferrero v. F.A.A.*, 807 F.2d 169, 173 (Fed. Cir. 1986) (citations omitted) (“Government officials are presumed to carry out their duties in good faith. . . . Unsubstantiated suspicions and allegations are not enough. The proof must be almost ‘irrefragable.’”); *Kalvar Corp., Inc. v. United States*, 211 Ct. Cl. 192, 198 (Ct. Cl. 1976) (citing *Librach v. United States*, 147 Ct. Cl. 605, 612 (Ct. Cl. 1959)) (“Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act ‘conscientiously in the discharge of their duties.’”).

to argue that deemed liquidation was intended to be a penalty on the government for failure to act in time.<sup>184</sup>

An added wrinkle to an argument based on legislative history is the recent decision in *Tianjin Machinery Import & Export Corp. v. United States*.<sup>185</sup> In *Tianjin*, the CIT held that the DOC's practice of sending liquidation instructions to Customs within fifteen days of the publication of final results after administrative review conflicted with the statutory right of the interested parties to appeal the DOC's decision to the CIT within sixty days.<sup>186</sup> The government argued that it would be administratively unwise to wait sixty days before sending liquidation instructions to Customs because liquidation is time-consuming and Customs, then, may not have enough time to liquidate within the six-month deemed liquidated period.<sup>187</sup>

The court rejected the argument finding that the DOC had failed to explain why a sixty-day wait would be "administratively unwise."<sup>188</sup> From a policy standpoint, the CIT noted that the DOC's practice might "compel parties, in every instance, to seek a preliminary injunction within fifteen days to prevent liquidation and preserve the Court's jurisdiction, regardless of whether the party ultimately decides to [file an appeal]."<sup>189</sup> Under *Tianjin*, the DOC must wait 60 days before sending liquidation instructions to Customs.

The court's decision in *Tianjin* is consistent with prior court decisions finding that suspension of liquidation is removed upon the expiration of the time for an appeal of the DOC's decision.<sup>190</sup> However, it gives rise to some tension with the line of cases holding that publication in the Federal Register of final results constitutes notice to Customs of the removal of the suspension of liquidation.<sup>191</sup> Section 1504(d) provides that Customs has six months to liquidate entries.<sup>192</sup> The six month time period starts to run when the DOC publishes final results in the Federal Register.<sup>193</sup> Under *Tianjin*, the DOC must wait sixty days after making a final determination before sending liquidation instructions to Customs.

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184. Lawrence M. Segan, *Deemed Liquidation: Whose Rate is This Anyway?*, 10 FORDHAM INT'L L.J. 689, 704-06 (1987) (addressing whether the deemed liquidation rate should be the rate asserted by the importer or the rate asserted by Customs).

185. 353 F. Supp. 2d 1294 (Ct. Int'l Trade 2004).

186. *Tianjin Mach. Imp. & Exp. Corp.*, 353 F. Supp. 2d at 1309-10.

187. *Id.*

188. *Id.* at 1310. The court found the DOC's argument was "conveniently vague and entirely fail[ed] to address exactly how 'time-consuming' the liquidation process [was]." *Id.*

189. *Id.* at 1309.

190. See, e.g., *Cemex, S.A. v. United States*, 384 F.3d 1314, 1320 (Fed. Cir. 2004), *reh'g granted*, No. 04-1058 (Fed. Cir. Dec. 14, 2004) ("[T]he suspension of liquidation under 19 U.S.C. § 1516a(e)(2) cannot be removed until the time for petitioning the Supreme Court for certiorari expires." (citing *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1379 (Fed. Cir. 2002))).

191. See *Fujitsu*, 283 F.3d at 1381-82; *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1275 (Fed. Cir. 2002) (holding that "[p]ublication of the final results in the Federal Register constitutes notice to Customs within the meaning of section 1504(d)").

192. 19 U.S.C. § 1504(d) (2000).

193. *Fujitsu*, 283 F.3d at 1381-82; *Int'l Trading*, 281 F.3d at 1275.

Provided that the DOC publishes final results in the Federal Register in close proximity to making its final determination,<sup>194</sup> Customs may have as little as four months left to liquidate before deemed liquidation occurs. In Section 1504(d), Congress explicitly provided a six-month time period during which Congress must liquidate. Under *Tianjin*, the time period effectively has been reduced to four months which appears contrary to congressional intent as expressed in the current version of Section 1504(d). However, Congress does not appear to have put any particular relevance on the length of the liquidation period when comparing previous versions of Section 1504. Earlier versions required liquidation within ninety days of the removal of the suspension of liquidation.<sup>195</sup> In those earlier versions of Section 1504, Congress considered ninety days long enough to liquidate. Therefore, the effective four-month time period to liquidate resulting from the decision in *Tianjin* would be long enough when judged by Congress' intent in prior versions of the statute.

Furthermore, the CIT in *Tianjin* did not appear categorically opposed to the government's argument that the sixty-day wait was "administratively unwise."<sup>196</sup> The court merely found that the DOC's argument was "conveniently vague and entirely fail[ed] to address exactly how 'time-consuming' the liquidation process [was]."<sup>197</sup> It would appear that the CIT would have been willing to further entertain the argument had the DOC provided a full explanation of its position. Therefore, given an opportunity to further elaborate, the government may provide a more persuasive explanation which potentially could influence the CIT to reach a different position.

Amending the statute or re-interpreting it to only apply against the government would prevent the negative effect of deemed liquidation for an importer. Under this suggested revision, the government would be obligated to refund overpaid antidumping duties regardless of whether deemed liquidation has occurred. But, deemed liquidation would still prevent the government from collecting additional antidumping duties in case of underpayment of duties. Obviously, this solution would not take care of the concerns of representative of U.S. industry. In addition, this solution would not fully take care of the importer's concern with carrying uncertain liabilities for long periods of time.

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194. The DOC is not under a statutory deadline to publish final results of an administrative review. See 19 U.S.C. § 1675(a)(1) (2000). But, the DOC must publish in the Federal Register the final results of a court decision within ten days. 19 U.S.C. § 1516(f) (2000).

195. See, e.g., 19 U.S.C. § 1504 (1978).

196. See *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 353 F. Supp. 2d 1294, 1310 (Ct. Int'l Trade 2004).

197. *Id.*

#### IV. POSSIBLE JUDICIAL REMEDIES: INADEQUACY OF DECLARATORY JUDGMENTS, WRITS OF MANDAMUS, INJUNCTIONS AND COMPELLING AGENCY ACTION UNDER THE APA

A party injured by delay or error in the liquidation process has access to a number of judicial remedies. In addition to the more traditional remedies, federal courts also may compel agency action under the Administrative Protective Act<sup>198</sup> (“APA”).

There are two administrative agencies whose delay in the liquidation process may give rise to negative effects: Customs and the DOC. Customs is obligated to liquidate an entry within six months of receiving notice of the removal of the suspension of liquidation.<sup>199</sup> If Customs fails to do so, the entries are deemed liquidated at the duty rate paid upon entry.<sup>200</sup> Reviewing courts have found that Customs receives notice of the removal of the suspension of liquidation upon publication by the DOC in the Federal Register of the final results of an administrative review or judicial appeal, or in the absence of publication, by receiving actual notice in unambiguous, public liquidation instructions from the DOC.<sup>201</sup> The DOC’s failure to provide such notice prevents the six-month deemed liquidation time period from starting.<sup>202</sup> Consequently, a party may be interested in compelling the DOC to issue timely liquidation instructions to Customs or compelling Customs to liquidate in a timely manner.

Judicial remedies available include requesting a declaratory judgment, an injunction, a writ of mandamus, or other remedies to “compel agency action unlawfully withheld or unreasonably delayed.”<sup>203</sup> However, those remedies are inadequate to safeguard the interests involved both from a pragmatic and policy standpoint.

##### A. Declaratory Judgment

A declaratory judgment may serve as an acceptable remedy in certain situations but cannot undo deemed liquidation once it has occurred. A party may request a declaratory judgment that deemed liquidation has

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198. 5 U.S.C. §§ 551-706 (2000).

199. 19 U.S.C. § 1504(d) (2000).

200. *Id.*

201. See *Int’l Trading Co. v. United States*, 412 F.3d 1303, 1313 (Fed. Cir. 2005); *Fujitsu Gen. Am. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002); *Int’l Trading Co. v. United States*, 281 F.3d 1268, 1272 (Fed. Cir. 2002); *Cemex, S.A. v. United States*, 384 F.3d 1314, 1320 (Fed. Cir. 2000), *reh’g granted*, No. 04-1058e (Fed. Cir. Dec. 14, 2004).

202. See, e.g., *Cemex*, 384 F.3d at 1321 (“The Court of International Trade correctly held that . . . notice purporting to lift the suspension of liquidation was not [published] and, as such, failed to commence the six-month statutory period.”).

203. 5 U.S.C. § 706(1) (2000). The CIT has exclusive jurisdiction of the enforcement by Customs of laws and regulations over imports. *Anderson v. United States*, 611 F. Supp. 975, 977 (Ct. Int’l Trade 1985) (citing *Vivitar Corp. v. United States*, 761 F.2d 1552 (Fed. Cir. 1985)). The CIT has jurisdiction under 28 U.S.C. § 1581 (2000).

or has not occurred.<sup>204</sup> In the underpayment situation, a declaratory judgment that deemed liquidation has occurred is useful to an importer as a “shield” against the government’s enforcement action to collect additional duties owed.<sup>205</sup> Similarly, in the overpayment situation, a declaratory judgment may be useful to an importer to prevent Customs from erroneously liquidating entries as deemed liquidated.<sup>206</sup> But, an importer has little incentive to request a declaratory judgment that deemed liquidation *has not* occurred in the underpayment situation because the importer then would potentially have to pay additional duties on top of the cash deposits already paid. Similarly, an importer would not benefit from a declaratory judgment that deemed liquidation *has* occurred in the overpayment situation. Obviously, the opposite situations would pertain to representatives of U.S. industry but their access to judicial remedies is limited.<sup>207</sup>

The biggest flaw of a declaratory judgment is that it cannot undo deemed liquidation if it already has occurred.<sup>208</sup> Therefore, a declaratory judgment is an inadequate remedy for both importers and representatives of U.S. industry, to the extent available to U.S. industry, when deemed liquidation already has occurred.

### B. *Writ of Mandamus*<sup>209</sup>

Before the enactment of the APA, a party had to request that a court issue a writ of mandamus or an injunction to compel action by govern-

204. See, e.g., *Fujitsu Gen. Am., Inc. v. United States*, 110 F. Supp. 2d 1061, 1069 (Ct. Int’l Trade 2000) (“[Where] an importer believes its entries were deemed liquidated under [19 U.S.C.] § 1504(d), and Customs has not actively liquidated the entries anew, the importer’s only remedy, at that point, is to seek a declaratory judgment from the CIT confirming that there was a deemed liquidation under 28 U.S.C. § 1581(i).”).

205. See, e.g., *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1559 (Fed. Cir. 1997) (*construing* *United States v. Sherman & Sons, Co.*, 237 U.S. 146 (1915)) (stating that once the government’s cause of action expires through deemed liquidation, Customs cannot breathe new life into it by liquidating the entry anew).

206. Note that the importer must protest such Customs action under 19 U.S.C. § 1514. See, e.g., *Cemex*, 384 F.3d at 1323-25 (finding that Customs’ liquidation decision becomes final and conclusive on all persons under § 1514(a)(5) regardless of legality); *Cherry Hill*, 112 F.3d at 1557 (“[L]iquidation is ‘final and conclusive’ . . . when the liquidation has not been protested in accordance with the provisions of section 1514.”); *LG Electronics U.S.A., Inc. v. United States*, 991 F. Supp. 668, 676 (Ct. Int’l Trade 1997) (“A decision to liquidate, including the legality of the liquidation itself, becomes final unless a protest of the decision is filed . . .”).

207. *Cemex*, 384 F.3d at 1322 (noting that U.S. industry does not have any “avenue of relief for improper liquidation” under the current statutory scheme). In *Cemex*, the Federal Circuit noted that representatives of U.S. industry had access to prospective remedies under 19 U.S.C. § 1516 to contest Customs’ decisions regarding appraisal, classification or duty rates applied to imported goods and also to judicial review of antidumping and countervailing duty proceedings under 19 U.S.C. § 1516a. *Id.* Neither § 1516 nor § 1516a permits U.S. industry to challenge Customs’ liquidations after-the-fact. *Id.* at 1323.

208. See, e.g., *Fujitsu*, 110 F. Supp. 2d at 1069 (noting that deemed liquidation occurs as an operation of law and, therefore, cannot be reversed). See also *Int’l Trading Co. v. United States*, 306 F. Supp. 2d 1265, 1273-74 (Ct. Int’l Trade 2000); *Rheem Metalurgica S/A v. United States*, 951 F. Supp. 241, 247 (Ct. Int’l Trade 1996).

209. Black’s Law Dictionary defines a writ of mandamus as “[a] writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly.” BLACK’S LAW DICTIONARY 973 (7th Ed. 1999).

ment officials. Today, federal courts, such as the CIT, still have the power to issue writs of mandamus under the All Writs Act.<sup>210</sup> It appears that neither the CIT nor the Federal Circuit has ever issued a writ of mandamus to compel Customs or the DOC to act in a timely manner.

The CIT has stated that the issuance of a writ of mandamus is “an extraordinary equitable remedy which should be employed to compel the performance of a ministerial duty specifically enjoined by law where performance has been refused, and no meaningful alternative remedy exists.”<sup>211</sup> The Supreme Court has emphasized that the key prerequisite for a writ of mandamus to issue is the presence of an obligation to act in a ministerial capacity leaving the agency no discretion as to whether to act.<sup>212</sup> Unreasonable delays in the agency performance of ministerial duties may also constitute sufficient basis for a writ of mandamus to issue.<sup>213</sup> The CIT and the Court of Appeals for the D.C. Circuit both agree that a reviewing court must ensure that agencies comply with statutory deadlines in a timely manner.<sup>214</sup> “Regardless of [whether the statutory time frame] is mandatory or directory, the Court has a duty to determine ‘whether the agency’s delay is so egregious as to warrant mandamus.’”<sup>215</sup>

### 1. Writ of Mandamus to Compel Customs Action

Customs’ obligation to liquidate fits the CIT’s test for issuing a writ of mandamus. However, a writ of mandamus is an ineffective remedy to compel Customs to liquidate in a timely manner under the current scheme.

Section 1504(d) of title 19 provides that Customs must liquidate an entry within six months of receiving notice of the removal of the suspension of liquidation.<sup>216</sup> Customs’ involvement in the liquidation process is ministerial in nature because the DOC determines the duty rate to apply

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210. See 28 U.S.C. § 1651(a) (2000). The CIT has the power to issue a writ of mandamus under 28 U.S.C. §§ 1585, 1651(a), and 2643(c)(1) (2000). *Nakajima All Co. v. United States*, 691 F. Supp. 358, 361 (Ct. Int’l Trade 1988) (citing *Sharp Corp. v. United States*, 837 F.2d 1058 (Fed. Cir. 1988)). Section 2643(c)(1) provides that: “[T]he Court of International Trade may . . . order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.” 28 U.S.C. § 2643(c)(1) (2000).

211. *Nakajima*, 691 F. Supp. at 361 (quoting *UST, Inc. v. United States*, 648 F. Supp. 1, 5 (Ct. Int’l Trade 1986), *aff’d on other grounds*, 831 F.2d 1028 (Fed. Cir. 1987)). The CIT issues a writ of mandamus provided that there is: “(1) a clear right of the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) absence of an adequate alternative remedy.” *Timken Co. v. United States*, 715 F. Supp. 373, 375 (Ct. Int’l Trade 1989).

212. See *Norton v. S. Utah Wilderness Alliance*, 541 U.S. 36, 63 (2004).

213. See *Nakajima*, 691 F. Supp. at 361 (“Unreasonable delays in the agency performance of ministerial duties may also constitute sufficient basis for a writ of mandamus to issue.”) (citing *UST, Inc. v. United States*, 648 F. Supp. 1, 5 (Ct. Int’l Trade 1986), *aff’d on other grounds*, 831 F.2d 1028 (Fed. Cir. 1987)); see also *Matsushita Elec. Indus. Co. v. United States*, 688 F. Supp. 617, 621 (Ct. Int’l Trade 1988).

214. *Nakajima*, 691 F. Supp. at 361 (citing *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir.1987)).

215. *Id.*

216. 19 U.S.C. § 1504(d) (2000); see also 19 U.S.C. § 1500 (2000).

and Customs merely liquidates entries using the pre-determined rate.<sup>217</sup> Thus, Customs has no discretion in deciding whether to act, within which time frame to act or which duty rate to employ. Therefore, Customs' obligation to liquidate appears to fall squarely within the parameters within which the CIT issues a writ of mandamus because Customs is under a clear obligation to liquidate within six months of receiving notice of the removal of suspension of liquidation. As noted by the CIT in *Timken v. United States*<sup>218</sup>, the law not only authorizes the demanded action (i.e. liquidation), it requires it.<sup>219</sup>

Similarly, Section 1500(e) imposes an absolute obligation on Customs to issue liquidation notices to, among others, importers.<sup>220</sup> While this obligation is absolute, Section 1500(e) does not contain any time frame within which Customs must act. Hence, this notice obligation leaves some discretion to Customs as to timing and a party would only be able to enforce the obligation after unreasonable delay. Customs is not under an obligation to notify representatives of U.S. industry about liquidation decisions.<sup>221</sup>

Arguably, the availability of an administrative remedy for importers in the form of a protest filed under 19 U.S.C. Section 1514 could serve as another, meaningful, alternative remedy, thereby precluding the issuance of a writ of mandamus under CIT case law.<sup>222</sup> However, the filing, and subsequent denial by Customs, of a protest is essentially a prerequisite for judicial review under Section 1514(a) and the doctrine of exhaustion of judicial remedies. Therefore, the CIT's no-meaningful-alternative-remedy requirement for issuing a writ of mandamus should not be an obstacle for importers. Representatives of U.S. industry may not protest Customs' liquidations and, therefore, do not have access to any meaningful, alternative remedy.

In the end, obtaining a writ of mandamus is an inadequate remedy for importers and representatives of U.S. industry. In the underpayment situation, U.S. industry would want to compel Customs to liquidate before deemed liquidation occurs in order to achieve the full protection afforded by U.S. trade laws, while importers would want to compel Customs to issue a notice that deemed liquidation has occurred after the fact.

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217. *Cemex*, 384 F.3d at 1324 ("Customs' role in making antidumping decisions . . . is generally ministerial."); see *Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1162, 1169 (Ct. Int'l Trade, 2004) ("In implementing the instructions of Commerce to liquidate entries subject to an antidumping or countervailing duty order, Customs' actions are ministerial in nature.") (citing *Yancheng Baolong Biochemical Prods. Co. v. United States*, 277 F. Supp. 2d 1349, 1364 (Ct. Int'l Trade 2003)); *Fujitsu Ten Corp. of Am. v. United States*, 957 F. Supp. 245, 248 (1997); *Am. Hi-Fi Int'l, Inc. v. United States*, 19 Ct. Int'l Trade 1340, 1342-43 (1995); see Cust. HQ 230339, *supra* note 71.

218. 715 F. Supp. 373 (Ct. Int'l Trade 1989).

219. See *Timken*, 751 F. Supp. at 375.

220. 19 U.S.C. § 1500(e) (2000).

221. See *id.*

222. See, e.g., *Nakajima*, 691 F. Supp. at 361.

The roles are reversed in the overpayment situation where U.S. industry would want to compel Customs to issue a notice that deemed liquidation has occurred after the fact, and the importer would want to compel Customs to liquidate before deemed liquidation occurs in order to obtain a refund. The problem associated with requesting a writ of mandamus to compel Customs to liquidate is that deemed liquidation cannot be undone after the fact. A writ of mandamus would, therefore, only be useful if issued before deemed liquidation has occurred. But, before deemed liquidation has occurred, Customs has not yet violated its statutory duty to liquidate and is not guilty of unreasonable delay as the six-month time period for liquidation has not yet expired.<sup>223</sup> Arguably, the CIT should not issue a writ under its current case law before expiration of the statutorily mandated time frame. Hence, a writ of mandamus could never be issued.

Nevertheless, the CIT has noted in dictum that a writ of mandamus would be appropriate to compel Customs to liquidate in a correct and timely manner.<sup>224</sup> It would appear that the CIT believes that a writ of mandamus could be issued under these circumstances. If so, and if issued before deemed liquidation has occurred, a writ of mandamus could provide the necessary relief for importers and U.S. industry. However, the CIT has never actually issued a writ of mandamus in that situation.

Finally, a writ of mandamus could prove useful in compelling Customs to recognize that deemed liquidation has occurred. For example, in the underpayment situation, importers might be interested in using deemed liquidation as a “shield” against the government’s enforcement action to collect additional duties owed.<sup>225</sup> However, a declaratory judgment might be a better vehicle for this.<sup>226</sup> Nevertheless, a writ of mandamus could serve the same purpose.

## 2. Writ of Mandamus to Compel DOC Action

A writ of mandamus could be an effective remedy to compel the DOC to provide notice to Customs of the removal of the suspension of liquidation. Under current case law, however, it appears that the CIT only would compel the DOC to issue notice of the final duty liability after an appeal but would not compel issuance of a notice after completion of an administrative review or the issuance of liquidation instruc-

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223. See § 1504(d) (2000).

224. See, e.g., *Fujitsu*, 110 F. Supp. at 1078 (noting that judicial action might compel Commerce to act in a timely and proper manner).

225. See, e.g., *Cherry Hill*, 112 F.3d at 1559 (stating that once the government’s cause of action expires (through deemed liquidation), Customs cannot breathe new life into it by liquidating the entry anew). Conversely, representatives of U.S. industry might be interested in compelling Customs to recognize that deemed liquidation precludes the issuing of a refund in the overpayment situation.

226. See *id.*

tions to Customs because the former is subject to statutory deadline while the latter two are not.

To issue a writ of mandamus, the CIT requires, among other things, that the agency has failed to take action mandated by statute.<sup>227</sup> The DOC is not under a statutory obligation to issue liquidation instructions to Customs. Hence, the CIT would not issue a writ of mandamus to compel the DOC to issue liquidation instructions to Customs because the DOC is not required to do so by statute. This result is not problematic under the current scheme, provided that the DOC publishes final results in the Federal Register, because the Federal Circuit has determined that publication in the Federal Register constitutes notice to Customs that the suspension of liquidation has been removed, thereby starting the six-month time period for deemed liquidation.<sup>228</sup>

In contrast, the DOC *is* under an obligation to publish notice of the final results of an administrative review but is not subject to any deadline.<sup>229</sup> The duty to publish notice, therefore, appears to fall within the CIT's test for issuing a writ of mandamus because the DOC is subject to a statutory mandate. However, the absence of a statutory deadline leaves the agency with some discretion as to when to publish which could increase the burden of persuasion of the requesting party. The CIT appears to focus its inquiry on whether the agency has "refused" to act and, therefore, will not issue a writ if the agency promises to take prompt action or has a "good cause" explanation for the delay.<sup>230</sup> In light of this, a writ of mandamus might be an adequate remedy de jure but not de facto.

Finally, the DOC must publish notice of a court decision after appeal within 10 days of the decision under Section 1516a.<sup>231</sup> In *Timken*, the CIT granted a writ of mandamus to compel the DOC to comply with the ten-day publication rules.<sup>232</sup> Hence, as illustrated by *Timken*, a writ

227. *Nakajima*, 691 F. Supp. at 361 (citing *UST Inc. v. United States*, 648 F. Supp. 1, 5 (Ct. Int'l Trade 1986), *aff'd on other grounds*, 831 F.2d 1028 (Fed. Cir. 1987)). The CIT will issue a writ of mandamus provided that there is: "(1) a clear right of the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) absence of an adequate alternative remedy." *Timken*, 715 F. Supp. at 375.

228. *Int'l Trading Co.*, 412 F.3d at 1313; *Fujitsu*, 283 F.3d at 1383; *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1275 (Fed. Cir. 2002) (finding that the six-month time period begins to run upon publication of final results in the Federal Register).

229. See 19 U.S.C. § 1671(a) (2000).

230. See, e.g., *Daido Corp. v. United States*, 796 F. Supp. 533, 536 (Ct. Int'l Trade 1992) (declining to issue a writ of mandamus after the DOC's fifteen-year delay where the DOC agreed to take action within an agreed-upon time frame); *Sharp Corp. v. United States*, 725 F. Supp. 549, 556 (Ct. Int'l Trade 1989) (declining to issue a writ of mandamus after noting that long delays were not caused solely by the DOC's refusal to act but rather also by the importer); *Nakajima*, 691 F. Supp. at 359 (declining to issue a writ of mandamus where the DOC indicated that it would take prompt action).

231. 19 U.S.C. § 1516(f) (2000).

232. *Timken*, 715 F. Supp. at 378. The ten-day publication rule subsequently was dubbed "*Timken* notice." The issue in *Timken* was whether the DOC was under an obligation to publish such notice within ten days after the CIT decision in the case. *Id.* at 374. The court found in the affirmative. *Id.* at 378. Hence, *Timken Co.*, a domestic producer, was entitled to a writ of mandamus to force the DOC to publish in the Federal Register the results after judicial review of the under-

of mandamus would serve as an adequate remedy to compel the DOC to publish final results after judicial appeals. However, the number of final determinations after completion of administrative reviews greatly outnumbered the number of court decisions after appeal. Hence, the statutory mandate in Section 1516a providing prompt notice of results after judicial appeals should be replicated in Section 1675 to provide prompt notice of results after administrative reviews.

### C. Injunctions<sup>233</sup>

An injunction is an extraordinary equitable remedy which can be used to either prevent an agency from taking a particular action or to compel agency action.<sup>234</sup> As with a writ of mandamus, an injunction will not solve the problems associated with deemed liquidation: before expiration of the six-month time period, the importer has not suffered any harm and an injunction could not be issued, after expiration, deemed liquidation cannot be undone and an injunction would have no effect.

A moving party is not likely to be successful in requesting an injunction to compel Customs to liquidate in a timely manner. The CIT issues an injunction if the movant can show that: “(1) without . . . the injunction, [the movant] will suffer irreparable harm; (2) the balance of hardships weighs in [the movant’s] favor; (3) it is likely that [the movant] succeed on the merits of the case; and (4) granting the . . . injunction will not run counter to the public’s interest.”<sup>235</sup> No doubt, deemed liquidation will result in hardship to at least one of the parties involved in a Customs transaction. The problem is that a party will only suffer hardship after deemed liquidation has occurred. Hence, a moving party would be unable to show hardship until after that. At that time, deemed liquidation cannot be undone and an injunction would be ineffective. Thus, an injunction would only be useful if issued before deemed liquidation has occurred. However, the CIT is unlikely to issue an injunction at that time because of the lack of hardship.

Similarly, a moving party is not likely to be successful in requesting an injunction to compel the DOC to provide notice of the removal of

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lying proceeding. *Id.* The court found that it was “unlawful for Commerce to hold in abeyance the effectiveness of the final decision” of the court beyond the statutory deadline. *Id.* at 376.

233. It is beyond the scope of this article to fully explore the CIT and Federal Circuit’s use of injunctions in antidumping proceedings.

234. See *Ugine-Savoie Imphy v. United States*, 121 F. Supp. 2d 684, 687 (Ct. Int’l Trade 2000) (noting that a preliminary injunction is an extraordinary remedy). A movant may request an injunction to prohibit an agency from taking action, as in *Anderson v. United States*, 611 F. Supp. 975, 977 (Ct. Int’l Trade 1985), or to compel agency action, as in *Johnson v. Guhl*, 91 F. Supp. 2d 754, 759 (D.N.J. 2000).

235. *SKF USA Inc. v. United States*, 316 F. Supp. 2d 1322, 1326 (Ct. Int’l Trade 2004) (citing *NMB Singapore Ltd. v. United States*, 120 F. Supp. 2d 1135, 1139 (Ct. Int’l Trade 2000)). See also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982) (discussing the basis for injunctive relief). Additionally, “the court ‘balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.’” *Id.* at 312 (quoting *Yakus v. United States*, 321 U.S. 414, 440, (1944)).

suspension of liquidation. The lack of notice in itself does not amount to hardship for the parties. As illustrated, an injunction is not an adequate remedy for parties involved in Customs transactions.

*D. Compelling Agency Action Under the APA*<sup>236</sup>

The APA generally allows both importers and representatives of the U.S. industry to seek judicial review of agency action.<sup>237</sup> However, standing to challenge agency decisions in the liquidation process is limited to importers. Under the APA, reviewable actions include “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.”<sup>238</sup> The scope of review is provided for in APA section 706 which includes compelling “agency action unlawfully withheld or unreasonably delayed.”<sup>239</sup> It appears that neither the CIT nor the Federal Circuit has used APA Section 706(1) to compel Customs or the DOC to act in a timely manner.

The Supreme Court has found that, under the APA, courts may compel only agency action required by law.<sup>240</sup> Federal courts may “compel an agency ‘to perform a ministerial or non-discretionary act,’ or ‘to take action upon a matter, without directing how it shall act.’”<sup>241</sup> Thus, a court may compel agency action within a statutorily required time period but may not specify what that action must be (provided the substance of the act is left to the discretion of the agency).<sup>242</sup> In addition, courts may compel agency action unreasonably delayed. Generally, courts will defer to the agency so long as no significant prejudice has resulted to the party seeking relief from the delay.<sup>243</sup> Thus, an importer seeking to show an “unreasonable delay” on the part of Customs or the DOC would need to meet a fairly high quantum of proof.

Customs is required by statute to liquidate entries within six months of receiving notice of the removal of the suspension of liquidation.<sup>244</sup> APA Section 706(1) does not provide a remedy before liquidation has occurred. That is, a party cannot use APA Section 706(1) to force Cus-

236. It is beyond the scope of this article to explore fully the role of APA § 706(1) in the context of agency inaction. Instead, the discussion focuses on the application of § 706(1), in its current interpretation, to the liquidation process.

237. 5 U.S.C. § 702 (2000) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof.”); see generally *Heckler v. Chaney*, 470 U.S. 821, 828-29 (1985) (discussing judicial review under the APA).

238. 5 U.S.C. § 704 (2000); see generally *Heckler*, 470 U.S. at 828-29 (discussing judicial review under the APA).

239. 5 U.S.C. § 706(1)(2000); see generally *Heckler*, 470 U.S. at 828-29 (discussing judicial review under the APA).

240. See, e.g., *Norton*, 542 U.S. at 63 (“This limitation appears in § 706(1)’s authorization for courts to ‘compel agency action unlawfully withheld.’”).

241. *Id.* (citing ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947)).

242. *Id.* at 65.

243. *GTE Service Corp. v. FCC*, 782 F.2d 263, 268-69 (D.C. Cir. 1986).

244. 19 U.S.C. § 1504(d) (2000).

toms to liquidate in a timely manner because before deemed liquidation has occurred, agency action has not been unlawfully withheld nor has there been unreasonable delay. But, under the plain meaning of the provision, a party should be able to use APA Section 706(1) to provide a remedy after deemed liquidation has occurred. Deemed liquidation occurs because an agency has failed to act within a statutorily imposed deadline. Arguably, such inaction constitutes “agency action unlawfully withheld or unreasonably delayed” remediable under APA Section 706(1). Regardless, Customs and courts take the position that deemed liquidation cannot be undone after it has occurred.<sup>245</sup> Therefore, under current precedent, APA Section 706(1) cannot remedy Customs’ delay in liquidating.

However, if some of the suggestions described in this article were implemented, APA Section 706(1) could serve as an adequate remedy. For example, provided deemed liquidation only occurs against the government, importers could use Section 706(1) to force Customs to liquidate after expiration of the six-month time period. It would be unwise, however, to also allow the U.S. government and representatives of U.S. industry access to a remedy under Section 706(1) to undo deemed liquidation. Allowing this would contravene congressional intent to protect importers by inserting certainty in the process because liquidation would never be final. Of course, adopting other suggestions made in this article might obviate the need for a remedy under APA Section 706(1). For example, the creation of a new, administrative remedy would supplant the use of Section 706(1).

In contrast, the DOC is not under a statutory deadline to publish final results after concluding an administrative review or to send liquidation instructions to Customs.<sup>246</sup> Because the Federal Circuit has found that the six-month time period for deemed liquidation starts to run upon publication of final results,<sup>247</sup> the DOC’s inaction might result in the six-month time period for deemed liquidation never starting. In *Norton*, the Supreme Court held that only agency action statutorily mandated can be compelled under the APA.<sup>248</sup> Therefore, because the DOC is under no legal obligation to publish notice, a party cannot compel the DOC to act

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245. See, e.g., *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1123 (Fed. Cir. 1998) (finding that an importer was not entitled to a refund of duties paid for entries which were deemed liquidated); see *Cust. HQ 228929*, *supra* note 11 (holding that Customs is unable to reliquidate entries already deemed liquidated); see *Cust. HQ 228712*, *supra* note 11 (denying a refund because entries were deemed liquidated).

246. See 19 U.S.C. § 1675(a)(1) (2000). However, the DOC is under an obligation to publish in the Federal Register the final results of a court decision after appeal within ten days. 19 U.S.C. § 1516a(c), (e) (2000).

247. See, e.g., *Int’l Trading Co.*, 412 F.3d at 1313; *Fujitsu*, 283 F.3d at 1380 (“Commerce’s publication of notice . . . in the Federal Register . . . constituted notice to Customs . . .”); *Int’l Trading Co. v. United States*, 281 F.3d 1268, 1275 (Fed. Cir. 2002).

248. See *Norton*, 542 U.S. at 63.

under APA Section 706(1). Instead, a party must seek to compel agency action “unreasonably withheld.”

#### *E. Imposition of Judicial Deadlines*

Lastly, another possible remedy for agency inaction is the imposition of judicial deadlines within which the agency must act in cases where a particular statute does not contain any deadlines.<sup>249</sup> Judicially imposed deadlines might be appropriate to force the DOC to publish the final results of an administrative review and to issue liquidation instructions to Customs as the DOC currently is not under any statutory deadlines to do so.<sup>250</sup>

However, federal case law has established the principle that courts are hesitant to impose judicial deadlines in the absence of congressional acquiescence. In *Heckler v. Day*,<sup>251</sup> the Supreme Court refused to impose judicial deadlines on the Secretary of Health and Human Services in adjudicating social security disability benefit claims because Congress had not. The complainants argued that the delays violated their statutory right to a “hearing within a reasonable time.”<sup>252</sup> The Court found that Congress was aware of the problem but nevertheless had repeatedly declined to impose mandatory deadlines to prevent delays.<sup>253</sup> The Court found that congressional concern with the quality and uniformity of agency decisions had prevailed over considerations of timeliness.<sup>254</sup> In that situation, according to the Court, judicially imposed deadlines would constitute “an unwarranted judicial intrusion into [a] pervasively regulated area.”<sup>255</sup> Similarly, it is unlikely that the CIT would impose judicial deadlines on the DOC when Congress has not.

#### *F. Public Policy Considerations*

The currently available judicial remedies are inadequate to remedy the problems associated with the liquidation process. Most glaringly, courts cannot undo deemed liquidation once it has occurred. Even if adequate judicial remedies were available, public policy dictates that the

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249. As was previously described, in cases where a particular statute contains a deadline but it does not attach any consequences for failure to meet it, courts find that those deadlines are “directory” as opposed to “mandatory” and that no consequence follows from failure to meet them. *See, e.g., Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989) (“[T]he lack of consequential language ... leads us to conclude that Congress intended this [section] to be only directory.”); *Alberta Gas Chem., Inc. v. United States*, 515 F. Supp. 780, 785 (Ct. Int’l Trade 1981). Hence, the courts have indicated that it is up to Congress to attach consequential language to the statute, negating any attempt at a judicial remedy.

250. *See Tianjin Mach. Imp. & Exp. Corp. v. United States*, 353 F. Supp. 2d 1294 (Ct. Int’l Trade 2004) (striking down the DOC’s policy of issuing liquidation instructions to Customs within fifteen days of making a final determination). This remedy is not an issue for Customs because Customs is under a mandatory statutory obligation to liquidate. *See* 19 U.S.C. § 1504(d) (2000).

251. 467 U.S. 104 (1984).

252. *Id.* at 108.

253. *Id.* at 111.

254. *Id.* at 113.

255. *Id.* at 119.

problems associated with the liquidation process be resolved at the administrative level as opposed to by judicial intervention. Therefore, a statutory amendment is necessary to solve these problems.

First, judicial remedies require a party, who should be able to rely on the involved administrative agencies performing their duties under the statute, to take affirmative action in enforcing its rights at significant cost. Courts have frequently expressed their frustration with agency delay in the liquidation process. In *NEC Solutions (America), Inc. v. United States*,<sup>256</sup> the CIT rejected the government's argument that the rights of a party injured by the DOC's delay in publishing notices of final results after administrative reviews were adequately protected by the availability of a judicial remedy: a writ of mandamus.<sup>257</sup> The CIT stated, "[t]he idea that a party must seek such an extraordinary remedy to ensure that Commerce simply fulfills its statutory responsibilities is untenable."<sup>258</sup> Judicial economy dictates that agencies diligently exercise their statutory mandates thereby obviating the need for judicial review. Second, agency inaction may thwart congressional intent and upset the balance between coordinate branches of government. More importantly, unchecked agency delay may negate trade concessions and rules carefully negotiated under the auspice of the WTO. Third, recourse to judicial remedies causes more delay in the liquidation process thereby exacerbating the negative effects associated therewith, at least for importers. Finally, access to judicial remedies is a burden on the moving party and costs significant sums of money, thereby causing further injury. In addition, judicial review of agency inaction is truly only an effective check on the executive branch in situations where the benefit of obtaining the remedy outweighs the associated costs. That is, there is a "twilight zone" in which no party would find it cost-efficient to seek a judicial remedy because the costs, e.g. for legal representation, of doing so would be larger than the potential gain. In these "small-stake" situations, an agency is effectively insulated from challenge and has little incentive to diligently monitor its actions. Of course, given the size of the administrative process of liquidation, it is unlikely that an agency would have the ability to single out small stake situations for less-than-optimal agency action.

For these reasons, judicial remedies should only be used as a last resort to solve the problems in the liquidation process. Instead, the statutory scheme must be amended to take care of the associated problems at the administrative level.

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256. 277 F. Supp. 2d 1340 (Ct. Int'l Trade 2003), *aff'd*, 411 F.3d 1340 (Fed. Cir. 2005).

257. *Id.* at 1346.

258. *Id.*

V. THE CASE FOR A STATUTORY AMENDMENT CREATING DEADLINES  
AND CONSEQUENCES FOR FAILING TO MEET THEM

The problems associated with the liquidation process under the current scheme are caused by the DOC and Customs' delay in taking action. The DOC publishes in the Federal Register the final results of an administrative review and sends liquidation instructions to Customs.<sup>259</sup> After receiving notice of the removal of suspension of liquidation, Customs liquidates the covered entries.<sup>260</sup> However, both agencies frequently fail to act in a timely manner or, even worse, fail to act at all.<sup>261</sup> The delays cause injury to importers, the U.S. government, and representatives of U.S. industry. Judicial remedies are inadequate to protect the parties involved in the liquidation process from the negative consequences of deemed liquidation. Therefore, statutory amendments are necessary to solve the problems at the administrative agency level.

Section 1504(d) of title 19 U.S.C. provides both a time requirement within which liquidation must occur and a consequence for Customs' failure to meet it, deemed liquidation.<sup>262</sup> In contrast, no consequences follow from the DOC's failure to publish the final results of administrative or judicial reviews.<sup>263</sup> In fact, the DOC is not even under a statutory deadline to publish the final results of an administrative review (unless the final results were appealed under 19 U.S.C. Section 1516a).<sup>264</sup> In addition, the DOC is not under a statutory deadline to send liquidation instructions to Customs (unless the final results were appealed under 19 U.S.C. Section 1516a).<sup>265</sup> Publication in the Federal Register of final results of an administrative review or the DOC's providing actual notice

259. See 19 U.S.C. § 1675(a)(3)(c) (2000); 19 C.F.R. § 354.18 (2005); 19 C.F.R. § 351.207(b) (2005).

260. 19 U.S.C. § 1500(d) (2000); 19 U.S.C. § 1675(a)(3)(B); 19 C.F.R. §§ 159.2, 351.207(e) (2005).

261. See, e.g., *Int'l Trading Co. v. United States*, 412 F.3d 1303, 1313 (Fed. Cir. 2005); *Cemex S.A. v. United States*, 384 F.3d 1314, 1316, 1317 n.2 (Fed. Cir. 2004), *reh'g granted*, No. 04-1058 (Fed. Cir. Dec. 14, 2004); *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1367 (Fed. Cir. 2002); *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1271 (Fed. Cir. 2002); *Daido Corp., v. United States*, 796 F. Supp. 533, 534-55 (Ct. Int'l Trade 1992); *Nakajima All Co. v. United States*, 691 F. Supp. 358, 361 (Ct. Int'l Trade 1988); *Am. Permac, Inc. v. United States*, 642 F. Supp. 1187, 1189 (Ct. Int'l Trade 1986) *aff'd*, 831 F.2d 269 (Fed. Cir. 1987).

262. 19 U.S.C. § 1504(d) (2000).

263. See 19 U.S.C. § 1675(a)(1) (2000) (“[The DOC] shall publish in the Federal Register the results of [an administrative review], together with the notice of any duty to be assessed . . . .”); 19 U.S.C. § 1675(a)(3)(C) (“[The DOC] shall, within 10 days after the final disposition of [a judicial] review . . . transmit to the Federal Register for publication the final disposition and issue instructions to the Customs Service with respect to the liquidation of entries pursuant to the review.”).

264. See 19 U.S.C. § 1675(a)(3)(B)-(C) (2000). However, the DOC is under an obligation to publish in the Federal Register final results of judicial reviews of administrative reviews within 10 days after a court decision. See 19 U.S.C. §§ 1516a(e), 1675(a)(3)(C) (2005). Courts which have interpreted 19 U.S.C. Section 1516a(e)(2) have found it to be directory rather than mandatory. See, e.g., *Cemex*, 384 F.3d at 1321 n.6 (“[S]ection 1516a(e) sets forth no consequences for failure to comply with its publication requirement.” (citing *Fujitsu*, 283 F.3d at 1382)); *Fujitsu*, 283 F.3d at 1382 (“[T]here is no language in section 1516a(e) that attaches a consequence to a failure by Commerce to meet the ten-day publication requirement . . . .”); *NEC Solutions*, 277 F. Supp. 2d at 1346 (stating that the defendant was “technically correct” that Section 1516a(e) is directory rather than mandatory).

265. See 19 U.S.C. § 1675(a)(3)(C) (2000).

of the removal of the suspension of liquidation to Customs through liquidation instructions mark the start of the six-month time period for deemed liquidation.<sup>266</sup> Consequently, the DOC can prevent deemed liquidation from ever occurring by not publishing the final results or failing to send liquidation instructions to Customs.

Courts are generally hostile to imposing time limits on administrative agencies in the absence of clear congressional intent.<sup>267</sup> In addition, the CIT and the Federal Circuit have found that “a statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provisions.”<sup>268</sup>

The current notice regime appears to conflict with congressional intent in enacting Section 1504 in 1978. Before Section 1504, there was no statutory requirement that liquidation be completed within a specified time limit.<sup>269</sup> Congress enacted Section 1504 out of concern for the negative effects delay in liquidation would have on importers and others involved in customs transactions.<sup>270</sup> One court noted that one of Congress’ concerns was that the DOC and Customs could delay liquidation indefinitely prior to 1978.<sup>271</sup> Despite the enactment of Section 1504, under its current interpretation, the DOC still has the power to delay liquidation indefinitely by failing to publish notice of the final results of an administrative or judicial review, or failing to send liquidation instructions to Customs.<sup>272</sup> Of course, federal courts operate under the judicial presumption that federal agencies exercise their duties in a diligent manner.<sup>273</sup> However, the frequently egregious delays in the liquidation process caused by the DOC and Customs have led courts to voice their frus-

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266. *Int’l Trading Co. v. United States*, 412 F.3d 1303, 1309 (Fed. Cir. 2005) (post-URAA entries); *Fujitsu*, 283 F.3d at 1376; *Int’l Trading*, 281 F.3d at 1271 (pre-URAA entries). For information on URAA, see *supra* note 72.

267. See, e.g., *Heckler v. Day*, 467 U.S. 104, 112, 119 (1984) (finding that a court-ordered injunction imposing an administrative deadline constituted an “unwarranted judicial intrusion” where Congress had expressed concern over serious delays but nevertheless declined to impose a deadline).

268. *Alberta Gas Chem., Inc. v. United States*, 515 F. Supp. 780, 785 (Ct. Int’l Trade 1981) (citations omitted) *cited in* *Canadian Fur Trappers Corp. v. United States*, 691 F. Supp. 364, 367 (Ct. Int’l Trade 1988). See also *Liesegang v. Sec’y of Veterans Affairs*, 312 F.3d 1368, 1377 (Fed. Cir. 2002) (noting that courts should refrain from imposing their own consequences when Congress fails to specify a statutory consequence for failure to comply with a time deadline).

269. See S. REP., *supra* note 6, at 31; See H.R. REP., *supra* note 85, at 24.

270. See S. REP., *supra* note 6, at 31.

271. *Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1562 (Fed. Cir. 1984).

272. See, e.g., *Cemex*, 384 F.3d at 1321 (finding that Customs did not receive notice that the suspension of liquidation had been lifted for purposes of §1504(d) where the DOC had issued premature, non-public liquidation instructions to Customs and did not publish notice under §1516a(e)).

273. See generally *Spezzaferro v. FAA*, 807 F.2d 169, 173 (Fed. Cir. 1986) (citations omitted) (“Government officials are presumed to carry out their duties in good faith. . . . Unsubstantiated suspicions and allegations are not enough. The proof must be almost ‘irrefragable.’”); *Kalvar Corp., Inc. v. United States*, 543 F.2d 1298, 1301 (Ct. Cl. 1976) (“Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act ‘conscientiously in the discharge of their duties.’” (citing *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959))).

tration. For example, in *NEC Solutions (America), Inc. v. United States*,<sup>274</sup> the CIT stated that:

Commerce's self-imposed bureaucracy . . . is no excuse for delay. Commerce is aware of its statutory obligations and should have crafted its procedures accordingly. The Government brazenly claims that an interested party who believes it will be injured by a delay "is not without remedy" because it can seek relief by petitioning for a writ of mandamus. The idea that a party must seek such an extraordinary remedy to ensure that Commerce simply fulfills its statutory responsibilities is untenable. By delaying liquidation in this manner, Commerce undermines both the antidumping duty laws and Congress' intent to settle importers' liabilities promptly. . . . [T]he court finds no excuse for Commerce's failure to comply with the statute and will likely craft future orders under the presumption that Commerce will fail to timely publish.<sup>275</sup>

To remedy the shortcomings of the current scheme, U.S. trade laws should be amended to impose strict statutory deadlines within which the DOC must publish in the Federal Register the final results of administrative and judicial reviews, and issue liquidation instructions to Customs. Failure to do so should result in some form of consequence to the government in order to make sure that the government does not have an incentive to delay action. For example, 19 U.S.C. Section 1675(a)(3)(C) provides that the DOC must publish the final results after a judicial review within ten days of the decision (and issue liquidation instructions to Customs). Congress should enact the same or a similar rule for publication of the final results after an administrative review, and for sending liquidation instructions to Customs, regardless of whether the review

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274. 277 F. Supp. 2d 1340 (Ct. Int'l Trade 2003). In *NEC Solutions*, NEC had imported television sets subject to an antidumping order between 1982 and 1989. *Id.* at 1341-43. NEC challenged Customs' liquidation of two groups of entries, the fifth through eighth review periods and the ninth through tenth review periods. *Id.* at 1343-44. After judicial review of the fifth through eighth review periods, the suspension of liquidation was automatically lifted in September 1999 but the DOC did not publish the final results as required by 19 U.S.C. § 1516a(e). *Id.* at 1342. In June 2000, the DOC sent an informational email to Customs noting that "THERE SHOULD BE NO UNLIQUIDATED ENTRIES" in the fifth through eighth review periods, requesting Customs to report the status of the covered entries. *Id.* at 1342-43. In January and March 2001, the DOC informed Customs that the suspension of liquidation had been lifted. *Id.* at 1343. Customs liquidated the entries between February and June 2001 and NEC protested, arguing that the entries were deemed liquidated. *Id.* Similarly, suspension of liquidation for the entries in the ninth through tenth review periods was lifted in June 1996. *Id.* The DOC sent liquidation instructions to Customs in April and May 2000 and Customs liquidated the entries between June and September 2000. *Id.* NEC protested arguing that the entries were deemed liquidated. *Id.* at 1343-44.

275. *NEC Solutions*, 277 F. Supp. 2d at 1346, n.15 (citation omitted). The CIT further noted that:

In 2002 and the first four months of 2003, Commerce published a total of eight (8) amended final determinations . . . . [N]one [of which] were published within [the requisite] ten days . . . . The most egregious violations occurred (a) 1 year and 3 months, (b) 3 years and 1 month, and (c) 5 years and 8 months after the reviewing courts' decision became final. According to Defendant, there is presently one matter pending before [the CIT] concerning the delay of eight years and two months. Such delays are unacceptable. And, of course, here there was no publication at all.

*Id.*

results were appealed. In addition, any such rule should contain a consequence for failure to publish, currently absent even from Section 1675(a)(3)(C) which only contains a deadline. One way to do this would be to explicitly provide that the six-month time period for deemed liquidation starts to run at the expiration of the publication period, e.g., the ten-day period in Section 1675(a)(3)(C).

Such statutorily-imposed consequences are found in 19 U.S.C. Section 1504(d) and other U.S. trade and customs law provisions. For example, 19 U.S.C. Section 1499(c)(1) provides that Customs has five days to determine whether to release or detain merchandise presented for examination. "Merchandise not released within such 5-day period shall be considered to be detained merchandise."<sup>276</sup> Another subsection of the same provision provides that a failure to make a final determination of admissibility for detained goods within 30 days after the merchandise has been presented for examination "shall be treated as a decision . . . to exclude the merchandise."<sup>277</sup> Similarly, 19 U.S.C. Section 1515(b) and (c) provide that Customs' failure to act on requests for accelerated dispositions of protest and to set aside denial of further review, respectively, result in a deemed denial of the requests.<sup>278</sup>

As illustrated, statutorily-imposed deadlines with consequences for failure to act are already used in trade and customs law provisions and Congress should amend the publication provisions similarly. Such amendment would greatly enhance the transparency of the trade laws and provide certainty for importers, consistent with congressional intent in enacting Section 1504.<sup>279</sup> The absence of statutory deadlines and consequences in the relevant statutory provisions has left courts reluctant to enforce rights accruing to parties negatively affected by agency delay.

Clear statutory deadlines with consequences attached would make the liquidation process more efficient. By creating statutory deadlines, the DOC and Customs would be under unambiguous obligations to act. The DOC and Customs are unlikely to object to adhering to clear, statutory mandates which would enable interested parties to enforce rights accruing to them at the agency level without judicial intervention. Should the agencies fail to take timely action, the application of consequences for failure to act would allow courts to enforce the deadlines because the deadlines would be mandatory, as opposed to directory.<sup>280</sup>

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276. 19 U.S.C. §1499(c)(1) (2000).

277. 19 U.S.C. §1499(c)(5)(A). If Customs decides to "exclude" a particular good, it means that it is not allowed into the Customs territory of the United States.

278. 19 U.S.C. §1515(b)(c) (2000).

279. See S. REP., *supra* note 6, at 31 (1978). See also H.R. REP., *supra* note 85, at 24.

280. See, e.g., *Canadian Fur Trappers*, 691 F. Supp. at 367 ("It is settled that 'a statutory time period is not mandatory unless it both expressly requires an agency . . . to act within a particular time period and specifies a consequence for failure to comply with the provisions.'") (citation omitted); *Philipp Bros. v. United States*, 630 F. Supp. 1317, 1323 (Ct. Int'l Trade 1986) ("In several other contexts courts have recognized that statutory time periods are directory, as opposed to mandatory,

Courts would no longer be forced to show deference to agency promises to take prompt action, as currently is the case.

Of course, clear statutory deadlines and attached consequences will not prevent the negative effects of deemed liquidation once it has occurred. Instead, the suggested statutory amendments described in this section must be combined with other changes to the liquidation scheme. For example, if deemed liquidation only applies against the government, importers would not be concerned as much with the DOC's sending instructions to Customs because if Customs failed to liquidate in time, the importer would not be injured in the overpayment situation. Therefore, multiple, simultaneous amendments to U.S. trade and customs laws may be necessary as the different suggested remedies are interdependent.

#### VI. A CASE FOR THE CREATION OF AN ADMINISTRATIVE REMEDY TO PROTECT AGAINST THE NEGATIVE EFFECTS OF DEEMED LIQUIDATION

There is no administrative remedy available for interested parties to compel timely and accurate liquidation. More importantly, it appears that there is no administrative remedy available that is capable of undoing the negative effects of deemed liquidation.<sup>281</sup> Generally, importers may protest Customs' liquidation decisions under 19 U.S.C. Section 1514.<sup>282</sup> Representatives of U.S. industry have no similar right.<sup>283</sup> Deemed liquidation cannot be protested under Section 1514: before deemed liquidation has occurred, there is no decision to protest and after it has occurred it cannot be undone.<sup>284</sup> Therefore, U.S. customs law should be amended to allow importers, and potentially representatives of

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when no restraint is affirmatively imposed on the doing of the act after the time specified and no adverse consequences are imposed for the delay.”).

281. See *supra* text accompanying note 11.

282. 19 U.S.C. §1514(a)(5), (c)(3) (2000). Congress recently amended Section 1514 to give importers 180 days to protest Customs decisions as opposed to the prior 90-day deadline. Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, §2103(2)(A), 188 Stat. 2434, 2597-98 (2004). Section 1514 only allows an importer to challenge Customs decisions and not DOC decisions. *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004) (stating that when Commerce is alleged to have committed an error in providing liquidation instructions, §1514 does not apply). Instead, an action challenging the DOC's liquidation instructions is a challenge to the administration and enforcement of final results, and accordingly finds its jurisdictional basis in 28 U.S.C. Section 1581(i)(4). *Id.* at 1305 (citing *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003)).

283. *Cemex, S.A. v. United States*, 279 F. Supp. 2d 1357, 1360 (Ct. Int'l Trade 2003), *aff'd*, 384 F.3d 1314 (Fed. Cir. 2004).

284. Courts have not made a definitive finding on the issue. In the majority of cases, courts and Customs have stated that deemed liquidation cannot be protested or undone. See, e.g., *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1380-82 (Fed. Cir. 2002) (holding that only Customs decisions are protestable and that deemed liquidation occurs by operation of law and is not a decision of Customs); *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1122-23 (Fed. Cir. 1998); *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1558-1559 (Fed. Cir. 1997); *Fujitsu Gen. Am., Inc. v. United States*, 110 F. Supp. 2d 1061, 1069 (Ct. Int'l Trade 2000), *aff'd*, 283 F.3d 1364 (Fed. Cir. 2002); see Cust. HQ 228929, *supra* note 11; see Cust. HQ 228712, *supra* note 11. However, in two recent cases, the CIT has indicated in dicta that deemed liquidation possibly could be protested under certain circumstances. See *Norsk Hydro Canada, Inc. v. United States*, 350 F. Supp. 2d 1172, 1178 (Ct. Int'l Trade 2004); *Cemex*, 279 F. Supp. 2d at 1362.

U.S. industry, a way to preserve their rights in case of deemed liquidation, either before or after it has occurred.

*A. An Administrative Remedy for Importers*

In general, an importer dissatisfied with Customs liquidation decisions may protest such decisions within 180 days under 19 U.S.C. Section 1514.<sup>285</sup> Section 1514 provides that Customs decisions are final and conclusive unless protested.<sup>286</sup> Hence, the statute grants a right of protest to importers but also imposes a burden on them to diligently monitor the liquidation of entries in order to preserve their right of protest; unless an importer exercises its right to protest, its cause of action is waived.

Deemed liquidation is connected to the protest requirement in a number of ways. First, deemed liquidation may occur because Customs failed to liquidate an entry within the six-month time period after proper notice of the removal of suspension of liquidation. For example, in Customs Headquarters Ruling HQ 228249,<sup>287</sup> an importer imported bricks from Mexico in 1986 and paid a preliminary unfair trade duty of 3.51 percent ad valorem. The DOC subsequently revoked the unfair trade duty and, in May 1996, sent instructions to Customs to liquidate the importer's entries of bricks at zero percent duty. Customs failed to do so and discovered in July 1998, approximately twenty-five months after receiving notice of the final duty liability, that the goods were deemed liquidated at the 3.51 percent duty paid upon entry. Customs rejected the importer's argument that it was entitled to a refund of the 3.51 percent duty paid upon entry. Similarly, in the majority of cases, courts have taken the position that deemed liquidation cannot be undone and that it is not protestable, as it is not a Customs "decision" under Section 1514.<sup>288</sup>

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285. The statute states:

[D]ecisions of the Customs Service . . . as to . . . (5) the liquidation or reliquidation of an entry . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade . . . within the time prescribed by [28 U.S.C. § 2636] . . . .

19 U.S.C. §1514(a)(5), (c)(3) (2000). See *supra* note 282 regarding a recent statutory amendment of § 1514.

286. 19 U.S.C. §1514(a)(5) (2000).

287. See Cust. HQ 228249, *supra* note 4.

288. See, e.g., *Fujitsu*, 283 F.3d at 1380-82; *Wolff Shoe*, 141 F.3d at 1122-23; *Cherry Hill Textiles*, 112 F.3d at 1558-59; *Fujitsu*, 110 F. Supp. 2d at 1069; *LG Electronics U.S.A., Inc. v. United States*, 991 F. Supp. 668, 673 n.7 (Ct. Int'l Trade 1997) (noting that Customs asserted that it cannot reliquidate an entry that has been deemed liquidated); see Cust. HQ 228249, *supra* note 4. Courts have not made a definitive finding on the issue. The Federal Circuit has held that 19 U.S.C. Section 1514 does not apply to decisions made by other agencies, but only to Customs decisions named in the statute. See *Mitsubishi Elec. Am. Inc. v. United States*, 44 F.3d 973, 976-77 (Fed. Cir. 1994). Deemed liquidation is not listed in § 1514 and because it only applies to Customs, and not to the DOC, an importer cannot protest DOC decisions. Furthermore, the "final and conclusive" language found in § 1514 refers to Customs decisions. 19 U.S.C. §1514 (2000). Arguably, if deemed liquidation occurs by operation of law and not as a result of a Customs decision, it cannot become conclusive and final on the parties under Section 1514. In two recent cases, the CIT has indicated in dicta that deemed liquidation possibly could be protested under certain circumstances. See *Norsk Hydro*, 350 F. Supp. 2d at 1178; *Cemex*, 279 F. Supp. 2d 1357 at 1362. The Federal Circuit stated in

This means that an importer is not entitled to a refund in the overpayment situation, but it also means that deemed liquidation is a defense, even without a protest, in an enforcement action brought by the government to collect additional duties owed in the underpayment situation.<sup>289</sup>

Second, a sub-set of the above-mentioned situation occurs when Customs believes that deemed liquidation has occurred and issues a liquidation notice to that effect. For example, in *Cemex, S.A. v. United States*,<sup>290</sup> the DOC failed to publish notice of the final duty liability in the Federal Register and also failed to send effective liquidation instructions to Customs.<sup>291</sup> Hence, the six-month time period for deemed liquidation never started to run.<sup>292</sup> Nevertheless, about three years later, erroneously believing that deemed liquidation had occurred, Customs posted public notice to that effect.<sup>293</sup> The Federal Circuit held that deemed liquidation had not occurred but that Customs' liquidation notice to that effect had become conclusive and final because the importer had failed to protest the liquidation decision.<sup>294</sup> The *Cemex* case is an example of a situation in which the DOC's and Customs' failures to act in a diligent manner may have serious implications for interested parties.

Third, deemed liquidation may occur because Customs erroneously liquidated an entry as deemed liquidated contrary to an agency-imposed suspension of liquidation. In that situation, courts have found that Customs' erroneous liquidation becomes conclusive and final unless the importer protests the decision.<sup>295</sup> Note, however, that in that situation, an entry is not deemed liquidated by operation of law, but rather, Customs' decision to consider it deemed liquidated becomes final and conclusive on the parties.

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*Cemex* that deemed liquidation can be protested. See *Cemex*, 279 F. Supp. 2d at 1362 ("If a deemed liquidation or any liquidation is adverse to an importer, it has its protest remedied under 19 U.S.C. § 1514 and access to judicial review under 28 U.S.C. § 1581(a)."). However, its statement appears to have been limited to the facts of the case which involved Customs' decision to recognize entries as deemed liquidated even though they were not. *Id.* at 1361-62 (distinguishing the facts in *Cemex* from both *Fujitsu* and *Int'l Trading*). In *Norsk Hydro*, the CIT did not discuss the issue further but indicated that, under certain, limited circumstances, there might be an administrative remedy available to importers under 19 U.S.C. Section 1520(c)(1) to undo deemed liquidation once it had occurred. *Norsk Hydro*, 350 F. Supp. 2d at 1178-79.

289. See, e.g., *Cherry Hill Textiles*, 112 F.3d at 1558.

290. 384 F.3d 1314 (Fed. Cir. 2004), *reh'g granted*, No. 04-1058 (Fed. Cir. Dec. 14, 2004).

291. *Cemex*, 384 F.3d at 1314.

292. *Id.*

293. *Id.* at 1317.

294. *Id.* at 1325.

295. See, e.g., *id.* at 1324-26; *Juice Farms* 68 F.3d at 1346 (Fed. Cir. 1995) ("[A]ll liquidations, whether legal or not, are subject to the timely protest requirement."). In fact, any liquidation occurring during an agency-ordered suspension of liquidation must be protested or it becomes final and conclusive on all parties. *Cherry Hill Textiles*, 112 F.3d at 1559; *Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1162, 1167 (Ct. Int'l Trade 2004). Courts have consistently rejected the proposition that "where a Customs decision violated an existing agency order, the decision was void and the party was able to bypass the requirements of the protest procedure." *Allegheny Bradford Corp.*, 342 F. Supp. 2d at 1167 (citing *Cherry Hill Textiles*, 112 F.3d at 1557).

Finally, the CIT has distinguished cases such as *Juice Farm* and *Cherry Hill*, involving erroneous liquidations contrary to prior administrative decisions, from cases involving erroneous liquidation contrary to court-ordered injunctions against liquidation.<sup>296</sup> A preliminary injunction against liquidation issued by the CIT in an appeal of an agency determination remains in effect until the CIT decision becomes final which is at the time of the expiration of the appeals process.<sup>297</sup> Customs' purported liquidation contrary to a court-ordered suspension of liquidation has "no legal effect" and need not be protested.<sup>298</sup> This result follows from the fact that administrative agencies have no "authority . . . to determine whether a court-ordered injunction of liquidation should be enforced."<sup>299</sup> In such a situation, courts have held the government in contempt of court.<sup>300</sup>

As illustrated above, there are many ways in which deemed liquidation can effectively occur. Customs can make a liquidation decision, except if subject to a court-ordered suspension of liquidation, final and conclusive on an importer regardless of the accuracy of the decision. Congress created the protest procedure in Section 1514 to protect importers from erroneous Customs action. The right to protest granted by Section 1514, however, is coupled with an obligation on behalf of the importer to exercise that right in a timely manner. If not, a consequence for failure to act occurs: Customs' decision becomes final and conclusive on all parties. The burden imposed on importers to monitor liquidation of their entries appears equitable on its face. However, when viewed in light of the sometimes lengthy delays in the liquidation protest, equity may favor a different result. The time period between the DOC's determination of final duty liability and Customs liquidation may be lengthy,

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296. See, e.g., *Allegheny Bradford Corp.*, 342 F. Supp. 2d at 1164. Courts issue such injunction during judicial review under 19 U.S.C. § 1516a(c)(2). This provision allows CIT to enjoin "some or all entries of merchandise covered by a determination of the . . . administering authority . . . upon request by an interested party . . ." *Fujitsu*, 283 F.3d at 1382.

297. See *PAM S.P.A. v. JCM, Ltd.*, 347 F. Supp. 2d 1362, 1367 (Ct. Int'l Trade 2004).

298. *Allegheny Bradford Corp.*, 342 F. Supp. 2d at 1169 (citing *LG Electronics*, 991 F. Supp. at 675; *Cemex*, 279 F. Supp. 2d at 1362 (citing *LG Electronics*, 991 F. Supp. at 675)). The CIT in *Allegheny Bradford Corp.* went on to find that

Top Line is thus correct in arguing that the improper liquidations are void ab initio, and that it is inappropriate to subject a legal nullity to reliquidation and other administrative action before this Court may provide a remedy. "The proper means to enforce an order of this Court against the Government is to seek relief in this Court; it is not to file a protest with Customs."

*Allegheny Bradford Corp.*, 342 F. Supp. 2d at 1170 (quoting *Yancheng Baolong Biochemical Products Co. v. United States*, 277 F. Supp. 2d 1349, 1364 (Ct. Int'l Trade 2003)).

299. *Allegheny Bradford Corp.*, 342 F. Supp. 2d at 1169. In *Allegheny Bradford Corp.*, the Government took the position that liquidation in violation of a court-ordered injunction was not yet final under § 1514(b) and that the importer had to wait for the final court decision in the litigation. *Id.* The CIT stated that "[t]his, of course, would allow the economic detriment of a liquidation and exaction of funds to persist through the course of the litigation, thereby frustrating Congress' intent to provide injunctive relief from liquidations pursuant to 19 U.S.C. §1516a(c)." *Id.*

300. See, e.g., *Yancheng*, 277 F. Supp. 2d at 1364 (holding the government in contempt of a court-ordered preliminary injunction when it liquidated subject entries after the CIT entered judgment in the case, as the injunction remained in effect pending the appeals process).

sometimes several years.<sup>301</sup> During this time, importers must spend money monitoring their entries to assure that Customs does not impose on them a final and conclusive erroneous liquidation decision. Thus, importers must spend resources to assure that Customs diligently performs its statutory duty. From this viewpoint, erroneous Customs decisions should not become final and conclusive on importers, especially in light of congressional intent in creating 19 U.S.C. Section 1504(d) to provide finality and certainty for importer and others involved in Customs transactions.

A possible counter-argument is that Congress' concern with the creation of finality and certainty for importers would still be served under the current protest scheme because Customs decisions become final and certain upon the expiration of the protest period. Arguably, Congress was not necessarily concerned with the accuracy of Customs decisions when enacting Sections 1504(d). Instead, Congress appeared mainly concerned with the long-time periods during which importers carried uncertain liabilities.<sup>302</sup> From this viewpoint, the finality aspect of Section 1514 is of little concern because negative consequences will only materialize if an importer fails to monitor its entries.

More troubling, however, is the fact that deemed liquidation cannot be undone by protest once it has occurred.<sup>303</sup> Regardless of how diligently an importer monitors its entries, an importer has no available administrative remedy to prevent deemed liquidation from occurring. Congress enacted Section 1504(d) to protect importers against financial loss and uncertain liabilities caused by delays in the liquidation process.<sup>304</sup> Therefore, a revised liquidation scheme should allow importers access to some form of administrative remedy to safeguard their interest in accurate liquidation. Otherwise, importers have no protection against arbitrary agency action.<sup>305</sup>

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301. See *supra* Parts II.A-B.

302. See S. REP., *supra* note 6, at 32, cited in *Cemex*, 279 F. Supp. 2d at 1360 n.5 (citing *Dal-Tile Corp. v. United States*, 829 F. Supp. 394, 399 (Ct. Int'l Trade 1993)). See also *Int'l Trading*, 281 F.3d at 1272; *Cherry Hill Textiles*, 112 F.3d at 1559.

303. See *Wolff Shoe*, 141 F.3d at 1122-23; *Cherry Hill Textiles*, 112 F.3d at 1558-60; see *Cust. HQ 228929*, *supra* note 11.

304. See S. REP., *supra* note 6, at 32 (cited in *Cemex*, 279 F. Supp. 2d at 1360 n.5 (citing *Dal-Tile Corp.*, 829 F. Supp. at 399)). See also *Int'l Trading*, 281 F.3d at 1272; *Cherry Hill Textiles*, 112 F.3d at 1559.

305. Remedies available under 19 U.S.C. § 1520 do not appear to have any effect on deemed liquidation. Under § 1520, an importer may request reliquidation to correct mistakes of fact, clerical errors, or other inadvertences in Customs liquidation decisions within one year of liquidation. 19 U.S.C. §1520(c)(1)(2005); U.S. Customs Headquarters Ruling Letter HQ 230116 (Jan. 29, 2004), available at HQ 230116 (Westlaw); *Executone Info. Sys. v. United States*, 96 F.3d 1383, 1386 (Fed. Cir. 1996). In *Norsk Hydro*, the CIT raised the possibility that a Customs notice that a particular entry has been deemed liquidation could be challenged under 19 U.S.C. § 1520(c). *Norsk Hydro*, 350 F. Supp. 2d at 1178-79. The CIT stated that "Customs' failure to liquidated entries in accordance with Commerce's instructions cannot be categorized as a mistake of fact or a clerical error [but that] liquidation by operation of law may result from inadvertence." *Id.* at 1179. According to the CIT, an importer may challenge such inadvertence under § 1520(c)(1). It is unclear what type of

A newly-created administrative remedy could come in a number of different forms. One possibility would be to allow Customs to undo deemed liquidation and providing importers with an opportunity to protest deemed liquidation. The problem with this approach is that the protest remedy should only be available for importers who have diligently participated in the liquidation protest. It should not be an avenue for an importer asleep at the wheel to undo a negative consequence cause by the importer's own failure to act. Another possibility would be to allow an importer to file a request for expedited liquidation or some form of anticipatory, administrative protest shortly before deemed liquidation occurs. That way, Customs would be alerted of the pending deemed liquidation and could take appropriate action. Under the latter approach, an importer would have provided proof that it had diligently monitored its entries.

*B. An Administrative Remedy for Representatives of U.S. Industry*

Antidumping proceedings are intended to protect U.S. industry from unfairly traded imports.<sup>306</sup> The antidumping duties are intended to level the playing field by forcing an increase in the price of foreign, dumped goods.<sup>307</sup> To a certain extent, U.S. industry has a "right" to expect that the protection it has been afforded under the statutes is implemented. If deemed liquidation occurs in the case of underpayment, U.S. industry has lost part of the protection it was entitled to because the foreign goods were not subject to as high of a duty as they should have been.<sup>308</sup> In addition, U.S. industry has a direct financial stake in the liquidation process as long as the Byrd Amendment remains in effect because any antidumping duties collected will be distributed to the affected U.S. industry.<sup>309</sup> Accordingly, U.S. industry has a vested interest in the correct liquidation of entries subject to antidumping duties (at least in the underpayment situation).

U.S. industry plays a key role in antidumping investigations and administrative reviews.<sup>310</sup> However, it has no influence over the liquidation

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"inadvertences" would be challengeable under § 1520, especially in light of the consistent statements by courts and Customs that deemed liquidation cannot be protested or undone once it has occurred.

306. See, e.g., James Thuo Gathii, *Insulating Domestic Policy Through International Legal Minimalism: A Re-characterization of the Foreign Affairs Trade Doctrine*, 25 U. PA. J. INT'L ECON. L. 1, 67 (2004) ("Both anti-dumping law and presidential constitutional and legal authority over foreign commerce were increasingly deployed to protect domestic industries.").

307. See, e.g., Alan F. Holmer et al., *Enacted and Rejected Amendments to the Antidumping Law: In Implementation or Contravention of the Antidumping Agreement?*, 29 INT'L L. 483, 507 (1995) ("The antidumping law is not intended as a revenue raiser for the government but as a remedial provision to 'level the playing field.'").

308. Conversely, if deemed liquidation occurs in the case of overpayment, U.S. industry has received more protection than it was entitled to and also, currently, perhaps a direct benefit in the form of Byrd Amendment disbursements.

309. See 19 U.S.C. §1675c (2005).

310. For example, U.S. industry almost always is the initiator of an antidumping investigation. See, e.g., Raj Bhala, *Rethinking Antidumping Law*, 29 GEO. WASH. J. INT'L L. & ECON. 1, 26 (1995) ("Although the DOC may initiate an antidumping action, in almost every case an interested party

phase of antidumping proceedings. Once the DOC has issued its final determination of duty liability in an administrative review, the U.S. industry has no available administrative remedies to safeguard its interest in accurate liquidation because U.S. industry does not have standing<sup>311</sup> to file a Customs protest of incorrect liquidation.<sup>312</sup> Instead, standing to file Customs protests under Section 1514 is reserved to, inter alia, importers.<sup>313</sup>

From the U.S. industry's standpoint, this lack of standing to protest erroneous Customs decision may seem problematic as U.S. industry cannot enforce the protection from unfair imports afforded to it under the U.S. antidumping statutes. For that reason, U.S. industry potentially should be allowed to protest the accuracy of the liquidation process as well as deemed liquidation.

However, there are multiple, meritorious reasons not to allow representatives of U.S. industry such an administrative remedy. First, the deemed liquidation provision was created to protect importers and not the U.S. industry.<sup>314</sup> Second, U.S. industry has an incentive to bring antidumping cases regardless of their objective merits because the antidumping procedure is heavily biased in favor of U.S. industry. By bringing a case, U.S. industry gains immediate, albeit temporary, protection from foreign goods by imposition of temporary duties and by creating uncertainty about supply in the market. Third, allowing U.S. industry to intervene in the liquidation process would increase the workload of Customs by adding administrative cost to the liquidation process. Such intervention might also lead to additional delays if Customs would be forced to adjudicate an adversarial proceeding between importers and U.S. industry. In addition, allowing such protest might inject an adversarial aspect into the process, forcing both importers and representatives of U.S. industry to incur substantial costs in legal representation during the process. Of course, it is likely that importers would have legal representation anyway as importers currently have access to limited administrative remedies during the process. Fourth, another reason to leave U.S. industry out of the liquidation process is that its interests are represented by the U.S. government. Finally, representatives of U.S. industry should not be allowed to take part in the liquidation process because the information involved in Customs transactions is confidential business information. Giving U.S. industry access to this information would greatly

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files a petition.”). U.S. industry also works intimately with the DOC during investigations and administrative reviews to safeguard its interests.

311. The word “standing” as used in this article refers to a particular party’s ability to challenge agency action and is not intended to raise issues relating to the legal concept of standing.

312. Of course, U.S. industry has the ability to request that the CIT enforce decisions by the DOC or prior court decisions. *See, e.g., Cemex*, 384 F.3d at 1325.

313. 19 U.S.C. §1514(c)(2) (1994). *See also Cemex*, 384 F.3d at 1323 n.9; *Cemex*, 279 F. Supp. 2d at 1362.

314. *See H.R. REP., supra* note 85, at 4.

harm the competitive position of importers and foreign manufacturers. Indeed, during antidumping proceedings similar information, so called business proprietary information, is protected by administrative protective orders and access to it is only given to the parties' counsel; U.S. industry does not have access to it even during antidumping proceedings.<sup>315</sup> While it is theoretically possible to institute an administrative protective order system to protect information involved in the liquidation process, it is not administratively wise. The costs associated therewith would be high, both for Customs and the parties involved. For these reasons, representatives of U.S. industry should not be allowed to participate in the liquidation process.

#### SUMMARY AND CONCLUSION

The DOC and Customs' delays are the source of the problems in the liquidation process. While courts work under the assumption that administrative agencies act diligently, it is safe to assume that the delays of the past will continue in the future. Therefore, the governing statutes must be amended to eliminate the negative effects of agency delay. First, the statutes must be amended to provide deadlines within which the DOC must publish notice of the final results of administrative reviews and issue liquidation instructions to Customs. Such deadlines are common in other U.S. trade and Customs law provisions and would provide the DOC with an unambiguous directive to act. Second, the statutes must be amended to provide consequences for the DOC's failure to meet these deadlines. Negative consequences should apply only against the government because the government is the least-cost-avoider as the delays are within its exclusive control. Third, the statutes must be amended to provide an administrative remedy for importers to either prevent deemed liquidation from occurring or to alleviate negative consequences once it has occurred. Currently, there are no administrative remedies. In addition, the judicial remedies available are inadequate to safeguard the interests of the involved parties.

Accurately predicting the possibility of a statutory reform is impossible. Congress is a political entity and the success of any statutory amendment will depend on the perceived benefits and costs to its political constituencies. Traditionally, Congress has taken a pro-U.S. industry stance in enacting U.S. trade laws. Most likely, the amendments suggested in this article would be perceived to be in the main interest of importers and foreign manufacturers. Therefore, it may be politically costly for Congress to even propose amendments. It is possible that international pressure to reform may assist Congress in gaining the necessary momentum. The United States is currently part of the Doha Round of

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315. See 19 U.S.C. § 1677f(b)-(c) (2005); 19 C.F.R. §§ 351.304-06 (2005).

trade negotiations under the auspice of the WTO.<sup>316</sup> The suggested amendments may form part of a larger reform package to implement the results of those trade negotiations. However, Congress has shown little ability to repeal the controversial Byrd Amendment despite international pressure and a directive to do so from the WTO.<sup>317</sup> In addition, the current record trade deficit and growing dissatisfaction with the WTO in Congress may indicate a current trend towards isolation and prejudice against foreign imports. At the same time, members of Congress frequently take positions which can be dismissed as political rhetoric intended to satisfy a particular political constituency. In light of this, a pro-import statutory amendment is politically challenging to achieve but not impossible.

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316. The WTO landed its latest round of trade negotiations in Doha, Qatar in November 2001. The negotiations cover, among other things, trade in goods, services and issues specifically related to agriculture.

317. *See supra* note 99.