U.S. Customs and Border Protection

Slip Op. 10–102

ALDEN LEEDS INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 09–00476
Public Version

[Defendant's motion to dismiss denied.]

Dated: September 7, 2010

Sokol, Behot & Fiorenzo (*Joseph B. Fiorenzo*), for plaintiff.

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OPINION AND ORDER

Eaton, Judge:

Introduction

This matter is before the court on the motion of defendant the United States, on behalf of United States Customs and Border Protection ("CBP" or "Customs"), to dismiss the complaint of plaintiff Alden Leeds Inc. ("Alden Leeds") for (1) lack of subject-matter jurisdiction or (2) failure to state a claim for which relief can be granted. The question presented is whether the court may hear plaintiff's claim even though Alden Leeds failed to protest timely the unlawful publication of a notice of deemed liquidation. Defendant makes no serious argument that it has any rightful claim to plaintiff's money; rather, it insists that the court has no power to order its return.

By its complaint, plaintiff asks the court to use its equitable powers to "instruct CBP to refund Alden Leeds the difference between the estimated deposits of 24.83[percent] and the final assessment duties [of 4.07 percent] calculated for Alden Leeds [following an administra-

tive review] along with interest." Am. Compl. ¶ 21(b).[1] For the reasons set forth below, defendant's motion to dismiss is denied.

Background

On June 24, 2005, the United States Department of Commerce ("Commerce") published an antidumping duty order for chlorinated isocyanurates ("isos") from Spain (the "subject merchandise"). Chlorinated Isocyanurates from Spain, 70 Fed. Reg. 36,562 (Dep't of Commerce June 24, 2005) (notice of antidumping duty order) (the "Order"). The Order provided that the isos exported by Aragonesas Delsa S.A. would receive an antidumping duty margin of 24.83 percent. *Id.* at 36,563. On July 2, 2007, Aragonesas Industrias y Energia S.A., the successor-in-interest of Aragonesas Delsa S.A. (collectively, with Aragonesas Industrias y Energia S.A., "Aragonesas"),[2] filed a request for an administrative review of the isos it produced and exported to the United States. *See* 19 C.F.R. § 351.213(b) (2009). Commerce subsequently published a notice of initiation of an administrative review of the Order for the period June 1, 2006 through May 31, 2007 (the "POR"). Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 72 Fed. Reg. 41,057, 41,057 (Dep't. of Commerce July 26, 2007). Commerce issued the final results of the review on December 30, 2008, setting the final assessment rate for the subject merchandise at 4.07 percent. *See* Chlorinated Isocyanurates from Spain, 73 Fed. Reg. 79,789, 79,789 (Dep't. of Commerce Dec. 30, 2008) (final results of antidumping duty administrative review) (the "Final Results").

When its entries are subject to an antidumping duty order, an importer, such as Alden Leeds, generally makes a cash deposit of the estimated antidumping duties contained in Commerce's order. *See* 19 U.S.C. § 1673e(a)(3) (2006). Here, in accordance with the Order, Alden Leeds made a deposit with Customs covering the estimated duty of 24.83 percent (approximately $400,000) for its entries. Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Jur. or, in the Alt., for Fail. to St. a Cl. ("Pl.'s Resp.") 1–2. The amount of duty owed by an importer, however, is not final until the importer's entries are liquidated.[3] The final amount on liquidation may vary from the deposit amount after Commerce completes an administrative review. *See generally* 19

[1] Plaintiff's amended complaint mislabels ¶ 21 as (a second) ¶ 12.

[2] Aragonesas is a Spanish producer of isos, which can be used as a swimming pool chemical. Alden Leeds, located in South Kearny, New Jersey, is an American importer of swimming pool chemicals. During the period of June 1, 2006 through May 31, 2007, Alden Leeds imported isos produced by Aragonesas. Am. Compl. ¶ 1.

[3] *See* 19 C.F.R. § 159.1 ("Liquidation means the final computation or ascertainment of the duties . . . .").

U.S.C. § 1675; *see also Consol. Bearings Co. v. United States*, 348 F.3d 997, 1000 (Fed. Cir. 2003).

As a result of Aragonesas's request for an administrative review, the liquidation of plaintiff's merchandise was suspended. In order to prevent the liquidation of merchandise subject to a review prior to the final determination, the law provides for a suspension of liquidation while the review is proceeding. *Canadian Wheat Bd. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1329, 1334 n.6 (2009) ("*Canadian Wheat Bd.*").

On February 7, 2008, Commerce sent Message No. 8038217 to Customs, which stated that Aragonesas's isos were subject to a suspension of liquidation. Admin. R. ("AR") 13. Despite Commerce's suspension of liquidation and despite having received clear instructions from Commerce that plaintiff's entries were not to be liquidated during the pendency of the review, Customs posted a bulletin notice of liquidation on April 25, 2008 (the "Bulletin Notice"). This posting indicated that the twelve entries for which Aragonesas was the exporter and Alden Leeds was the importer[4] had been liquidated by

[4] Counsel for defendant, at oral argument, appeared to attempt to convert what was obviously a mistake into a volitional act by suggesting that Customs might have intended to give notice that these entries were liquidated by operation of law. Tr. of Or. Arg. on Def.'s Mot. to Dismiss at 11–12. Apparently, the idea behind this argument is that, even though Customs had received notice that Aragonesas's entries were to remain unliquidated, the notice did not necessarily apply to Alden Leeds. Counsel appeared to suggest, without saying so directly, that Customs may have concluded that the suspension did not apply to Alden Leeds and that this conclusion could be contested only by way of a protest. *Id.* at 18–19. It is worth noting that this argument cannot be found in the briefs and papers that defendant submitted to the court.

To the extent that defendant actually is advancing this argument, it is obviously a litigation position. The only way that Customs was aware that Alden Leeds had entries to liquidate was that plaintiff's customs broker had filed certain papers when the entries were made. These papers, which Customs had before it when it issued the Bulletin Notice, were supplied to the court by defendant as part of the administrative record of this case. The court, therefore, has before it twelve separate sets of documents each representing an individual entry. AR 1–12. Each set contains: 1) an Environmental Protection Agency Notice of Arrival of Pesticides and Devices; 2) a Department of the Treasury/Customs Service Entry Summary; 3) an Importer's Blanket Statement of Non-Reimbursement of Antidumping Duties; and 4) a Department of the Treasury/Customs Service Entry/Immediate Delivery Form.

An examination of these forms demonstrates that 1) Aragonesas is clearly named as the "Shipper" and Alden Leeds is clearly named as the "Importer"; 2) the antidumping duty order to which the merchandise was subject was identified; 3) the antidumping duty rate for plaintiff's entries was set forth; and 4) the entry numbers, which correspond to the entry numbers listed on the Bulletin Notice, are set out clearly.

Additionally, as requested at oral argument, defendant, on June 14, 2010, filed Message No. [[

]].Message No. [[ ]] renders defendant's position, advanced at oral argument, implausible. Customs employees are, of course, familiar with the agency's own forms and their contents.

operation of law (the "purported deemed liquidation") on January 26, 2008 under the provisions of 19 U.S.C. § 1504(d). Def.'s Reply to Pl.'s Resp. to Mot. to Dismiss for Lack of Jur. or, in the Alt., for Fail. to St. a Cl. 6 (citing AR 14).

On December 30, 2008, Commerce published the final results of its review and found that the subject merchandise entered during the POR should be subject to an antidumping duty rate of 4.07 percent,[5] a substantially lower rate than the estimated deposit rate of 24.83 percent collected from Alden Leeds. Final Results, 73 Fed. Reg. at 79,789. Alden Leeds immediately sought a refund of the difference between the estimated deposit rate and the final rate determined in the review. Rather than receiving its refund, Alden Leeds was informed that the subject merchandise had been deemed liquidated at the deposit rate on January 26, 2008. Pl.'s Resp. 3–4.

Plaintiff then brought this suit to recover the difference between the deposit rate and the rate found in the Final Results. Am. Compl. ¶ 21(b). Defendant has moved to dismiss the case pursuant to USCIT Rule 12(b)(1) by insisting that because plaintiff failed to protest the purported deemed liquidation found in the Bulletin Notice, this Court does not have subject-matter jurisdiction to grant relief to plaintiff. Mem. in Supp. of Def.'s Mot. to Dismiss for Lack of Jur. or, in the Alt., for Fail. to St. a Cl. ("Def.'s Mem.") 5. In the alternative, defendant argues that plaintiff's complaint should be dismissed for failure to state a claim upon which relief can be granted because of the failure to protest timely the Bulletin Notice. Def.'s Mem. 11; *see* USCIT R. 12(b)(5). For the following reasons, defendant's motion is denied.

Customs has produced no evidence to refute the clear conclusion that the Bulletin Notice was a simple mistake. Thus, any suggestion that Customs intended to post the Bulletin Notice of a deemed liquidation because Customs was unaware that the entries in contention were the same entries whose suspension was reaffirmed by Message No. 8038217 of February 7, 2008 is so unreasonable as to be beyond the realm of serious consideration.

[5] "[T]he United States uses a retrospective assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported." 19 C.F.R. § 351.212(a). While an importer deposits estimated duties on entry of merchandise, the actual duties are determined later in the assessment process, at the time when the entries are liquidated. *See* 19 C.F.R. § 141.103. Thus, when an administrative review is requested by an interested party, an importer's payment of the actual duties is not due until the entries are liquidated at the rate determined by Commerce's review. *Parkdale Int'l v. United States*, 475 F.3d 1375, 1376–77 (Fed. Cir. 2007) (citing 19 C.F.R. § 141.1(a)); *see also* 19 C.F.R. § 351.212(a) (stating that "[g]enerally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time."). Additionally, "[b]ecause 19 U.S.C. § 1675(a)(2) expressly calls for the retrospective application of antidumping review determinations . . ., suspension of liquidation during the pendency of periodic antidumping review is unquestionably 'required by statute.'" *Am. Permac, Inc. v. United States*, 10 CIT 535, 539, 642 F. Supp. 1187, 1191 (1986).

Standard Of Review

As the party seeking to invoke this Court's authority, Alden Leeds bears the burden of establishing subject-matter jurisdiction. *Auto Alliance Int'l, Inc. v. United States*, 29 CIT 1082, 1088, 398 F. Supp. 2d 1326, 1332 (2005) (citations omitted). "[I]t is of utmost importance that mere recitation of a basis for jurisdiction not be controlling." *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1293 (Fed. Cir. 2008) (citation omitted). Alden Leeds must then plead facts from which this Court may conclude that it has subject-matter jurisdiction with respect to each of its claims. *Schick v. United States*, 31 CIT 2017, 2020, 533 F. Supp. 2d 1276, 1281 (2007) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (explaining that a plaintiff "must allege in his pleading the facts essential to show jurisdiction")).

In evaluating defendant's motion to dismiss for failure to state a claim upon which relief can be granted, this Court "must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party." *United States v. Ford Motor Co.*, 497 F.3d 1331, 1336 (Fed. Cir. 2007) (citation omitted).

Discussion

I. Jurisdiction Under 28 U.S.C. § 1581(i)

Defendant asserts that because 28 U.S.C. § 1581(a) jurisdiction was available to plaintiff as an avenue for relief, it cannot now bring a case under 28 U.S.C. § 1581(i). In other words, defendant insists that had Alden Leeds wished to dispute the purported deemed liquidation, it first was required to file a protest. *See* 19 U.S.C. § 1514(a). According to defendant, if plaintiff failed to gain relief by way of protest, it could then have petitioned this Court for relief pursuant to 28 U.S.C. § 1581(a).[6] Def.'s Mem. 7–8.

By its complaint, plaintiff asks the court to find jurisdiction under § 1581(i). Am. Compl. ¶¶ 2–3. As this Court's residual jurisdiction

[6] Section 1581(a) provides that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930."

provision, § 1581(i) provides for the exercise of jurisdiction when relief is not available under another subsection of § 1581.[7] *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992). According to plaintiff, in this case, jurisdiction under § 1581(i) is triggered because other possible remedies were "manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) ("*Miller*").

In making this argument, plaintiff asserts that, because the Bulletin Notice was posted at the customshouse while Commerce's suspension was in effect, plaintiff's entries were not, in fact, liquidated. Consequently, plaintiff maintains that there was no event for it to have protested under 19 U.S.C. § 1514(a). Pl.'s Resp. 5. As a result, plaintiff concludes that, as it could not lodge a protest, which if denied would have provided jurisdiction for a lawsuit in this Court under 28 U.S.C. § 1581(a), relief under that section was necessarily "manifestly inadequate." Pl.'s Resp. 5. Therefore, Alden Leeds urges the court to exercise its jurisdiction under § 1581(i) in order to provide the appropriate relief, i.e., the return of its money. Am. Compl. ¶¶ 2–3, 21.

II. Deemed Liquidation Under 19 U.S.C. § 1504(d) and the Suspension of Liquidation

Congress enacted the deemed liquidation statute, 19 U.S.C. § 1504(d), to protect importers from the uncertainties in the United States' duty assessment process. *See United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1559 (Fed. Cir. 1997). Pursuant to this provision, entries that remain unliquidated for six months are liquidated by operation of law at their entered rate. *See* 19 U.S.C. § 1504(d).

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[7] As noted by the United States Court of Appeals for the Federal Circuit, § 1581(i) "was intended to give the Court of International Trade broad residual authority" over cases involving trade transactions. *Conoco, Inc. v. United States Foreign Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed. Cir. 1994). Defendant cites *Norcal/Crosetti Foods, Inc. v. United States* for the proposition that "[t]his limitation 'preserves the congressionally mandated procedures and safeguards . . . provided in the other subsections [of 28 U.S.C. § 1581] . . ., absent which litigants could ignore the precepts of subsections (a)-(h) and immediately file suit in the Court of International Trade under subsection (i).'" 963 F.2d 356, 359 (Fed. Cir. 1992) (citation omitted). Indeed, the Federal Circuit has indicated that "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (citation omitted); *see, e.g.*, *Trs. in Bankr. of N. Am. Rubber Thread Co., Inc. v. United States*, 593 F.3d 1346, 1353 (Fed. Cir. 2010) (affirming § 1581(i) jurisdiction for party that "ha[d] no current or future opportunities to get judicial review"); *Pac Fung Feather Co., Ltd. v. United States*, 111 F.3d 114, 116 (Fed.Cir. 1997) (sustaining jurisdiction when "[s]ection 1581(i) was the importers' only available and potentially adequate option").

Before the law operates to bring about a deemed liquidation, however, three preconditions must be met: "(1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice." *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002). Once these three preconditions have been satisfied, deemed liquidation under 19 U.S.C. § 1504(d) occurs by operation of law. Deemed liquidation under § 1504(d), however, does not result from any affirmative action on the part of Customs. Accordingly,

> when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry . . . within 6 months after receiving notice of the removal from the Department of Commerce . . . . Any entry . .. not liquidated by the Customs Service 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 by the importer of record . . . .

19 U.S.C. § 1504(d). As this subsubsection makes clear, deemed liquidation results from operation of law, and Customs makes no decision and performs no act in order to bring about a deemed liquidation.[8]

A suspension of liquidation acts to stop liquidation, including a deemed liquidation, from occurring. Indeed, a suspension of liquidation serves an important purpose in ensuring the application of proper unfair trade duties. Thus, liquidation is suspended during an administrative review so that the entries may be liquidated at the rate determined by the review. *See, e.g.*, *Canadian Wheat Bd.*, 33 CIT at __, 637 F. Supp. 2d at 1334 n.6 ("A request for an administrative review results in the continuation of the suspension of liquidation."). In order to assure that the entries will be liquidated at the finally determined rate, the suspension of liquidation is not terminated until the final results of an administrative review are published in the Federal Register. *See*, *e.g.*, *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (2002) (holding that the "suspension of liquidation [is] removed when the final results of the administrative review [are] published in the Federal Register").

[8] When a deemed liquidation has taken place by operation of law, it may be the subject of a protest. *Koyo Corp. v. United States*, 497 F.3d 1231, 1243 (Fed. Cir. 2007). Judicial review is then available if that protest is denied. *See* 28 U.S.C. § 1581(a). Where, as here, no deemed liquidation has taken place, relief by way of protest is not available.

Defendant, however, asserts that plaintiff could not rely on the suspension of liquidation, resulting from the administrative review, to shield it from claims of erroneous or unlawful deemed liquidation. While defendant concedes that the suspension, in fact, prevented a deemed liquidation from taking place, it states that plaintiff has no avenue to relief by this lawsuit. Rather, defendant argues that plaintiff was required to protest the purported deemed liquidation that was announced in the Bulletin Notice, and only if the protest were denied could the matter be heard in this Court. According to defendant, this is the holding in *Juice Farms, Inc. v. United States*, 68 F.3d 1344 (Fed. Cir. 1995) ("*Juice Farms*").

In *Juice Farms*, the plaintiff importer's entries were subject to a suspension of liquidation pending an antidumping review. 68 F.3d at 1345. Despite the suspension, Customs, actually liquidated the entries. *Id.* That is, Customs took affirmative steps to liquidate the importer's merchandise. Customs also posted bulletin notices of liquidation at the customshouse. *Id.* at 1346. Relying on Commerce's suspension of liquidation, the plaintiff did not monitor the posting of bulletin notices of liquidation for its entries at the customshouse. *Id.*

In *Juice Farms*, as this case, it was only at the conclusion of the administrative review that the plaintiff learned of the liquidation of its entries, at which point it protested and requested a refund of the excess antidumping duty deposits that it posted for its entries. *Id.* at 1345–46. Customs, however, denied the plaintiff's protest as untimely. *Id.* at 1346. The plaintiff filed suit challenging Custom's erroneous liquidations of its entries, petitioning this Court to find jurisdiction under § 1581(i). *Id.* at 1345. Customs sought dismissal of the suit arguing that because Juice Farms did not protest the erroneous liquidations within the time frame prescribed by statute, it had forfeited its right to bring a lawsuit under § 1581(a). *Id.* Having forfeited that right, Customs argued, Juice Farms could not claim that § 1581(a) jurisdiction was "manifestly inadequate" and thus could not sue using § 1581(i) jurisdiction.

While the erroneous liquidations in *Juice Farms* were found to be unlawful, this Court found, and the Court of Appeals for the Federal Circuit affirmed, that it was unable to order the entries to be reliquidated because a timely protest was not made by the plaintiff importer. *Id.* at 1346. The Federal Circuit held that judicial review under 28 U.S.C. § 1581(i) was unavailable because:

> Despite information from Customs and Commerce about suspension of these liquidations pending investigation, the bulletin notices adequately notified Juice Farms of the [actual] liquidation. Juice Farms failed to file a protest within ninety days of

> [the] bulletin notice posting. Juice Farms' protest was untimely. The Court of International Trade properly dismissed this case for lack of jurisdiction.
>
> Section 1581(i) of title 28 provides equitable relief in those cases where jurisdiction under the other subsections of section 1581 are "manifestly inadequate." In this case, however, Juice Farms did not show that the relief in 28 U.S.C. § 1581(a), if properly invoked, would have been inadequate, let alone manifestly inadequate. If Juice Farms had protested within ninety days of bulletin notices, it would have had an opportunity to protest the legality of Customs' liquidations in the Court of International Trade. As this court has stated, a remedy is not inadequate "simply because appellant failed to invoke it within the time frame it prescribes."

Id. (citations omitted).

Defendant's argument notwithstanding, *Juice Farms* is distinguishable from the instant case because that case involved actual liquidations rather than deemed liquidations. Thus, the important difference between this case and *Juice Farms* is that, here, Customs, by posting the Bulletin Notice, claims to have announced a deemed, and not an actual, liquidation. This difference is critical because, here, unlike in *Juice Farms*, no liquidation took place or could have taken place, and thus no protestable event existed for plaintiff to contest. This important distinction lies in the different authority delegated to Customs with respect to actual and deemed liquidations.

Customs has the authority to take the steps that result in an actual liquidation decision. *See generally* 19 U.S.C. § 1500. By way of contrast, Customs has no authority to effect a deemed liquidation, and can make no finding or determination as to whether or not a deemed liquidation has occurred. As the plain language of the deemed liquidation provision makes abundantly clear, deemed liquidation occurs solely by operation of law. Thus, since the statute provides that "liquidation[s]" are the subject of protests, Alden Leeds had nothing to protest because here, unlike in *Juice Farms*, there was no liquidation. 19 U.S.C. § 1514(a).

This being the case, Alden Leeds is correct in arguing that *LG Electronics U.S.A., Inc. v. United States* is instructive. 21 CIT 1421, 991 F. Supp. 668 (1997) ("*LG Electronics* "). In that case, LG imported color television receivers from Korea that were subject to an antidumping duty order. *LG Electronics*, 21 CIT at 1422, 991 F. Supp. at 670. LG deposited antidumping duties with Customs upon entry of

the subject merchandise. *Id.* at 1422, 991 F. Supp. at 670. Plaintiff then petitioned this Court for review of Commerce's determinations. *Id.* at 1422, 991 F. Supp. at 670–71. Pending review, this Court issued preliminary injunctions against liquidation of the disputed entries. *Id.* at 1422, 991 F. Supp. at 671.

Nonetheless, during the period that liquidation was enjoined, Customs posted notices of deemed liquidation at the entered rate. *Id.* at 1422, 991 F. Supp. at 671. None of the purported liquidations were protested within the time frame required by statute. *Id.* at 1423, 991 F. Supp. at 671. LG and Commerce eventually reached a settlement that lowered the antidumping duty rates from those imposed at entry. *Id.* at 1423, 991 F. Supp. at 671. As a result, the preliminary injunctions against liquidation were lifted, permitting liquidation at the new rates set by Commerce. *Id.* at 1423, 991 F. Supp. at 671–72. Customs, however, refused to reliquidate the entries at the lower rate and the importer filed suit in this Court, invoking 28 U.S.C. § 1581(i) jurisdiction. *Id.* at 1423, 991 F. Supp. at 672. Customs moved for summary judgment claiming that the Court had no jurisdiction over LG's claims. *Id.* at 1421, 991 F. Supp. at 670. The *LG Electronics* Court denied Customs' motion for summary judgment and confirmed jurisdiction under § 1581(i). *Id.* at 1430, 991 F. Supp. at 677.

In doing so, the *LG Electronics* Court found that Customs' erroneous notices of deemed liquidation were invalid and of no legal consequence. *Id.* at 1429, 991 F. Supp. at 676.

> Liquidation is deemed to have occurred by operation of law . . . [except] in cases of extension, suspension or court order . . . . Here liquidation was suspended. Thus, as a matter of law, no deemed liquidation . . . occurred. Although LG received erroneous notice of liquidation of these entries, plaintiff's claim may be heard, because LG did not have to protest within 90 days, as specified by 19 U.S.C. § 1514, to preserve its right to judicial review. The computer-generated notices of deemed liquidation are invalid and legally inconsequential, as deemed liquidation can occur only by operation of law.

Id. at 1429, 991 F. Supp. at 676 (citation omitted). The court further noted:

> Notwithstanding Customs' provision for posting notice of deemed liquidation . . . deemed liquidation itself occurs by operation of law. Where a liquidation has occurred by operation of law, notice starts the clock for the protest period, . . . but the regulations specify that the notice be "dated as of the date of expiration of the statutory period[]" . . . . Such notice may be

> posted any time "within a reasonable period after each liquidation by operation of law[]" . . . . Accordingly, erroneous notice cannot create a deemed liquidation. Without the expiration of the statutory period, there is no date to be noticed. As the statutory period for protest never began to run, plaintiff may bring suit under 28 U.S.C. § 1581(i) to compel liquidation in accordance with the prior order of the court.

Id. at 1430, 991 F. Supp at 676–77 (citations omitted). In *LG Electronics*, as here, the entries purportedly deemed liquidated were not, because "as a matter of law, no deemed liquidation . . . occurred." *Id.* at 1429, 991 F. Supp. at 676.

III. This Court Has Jurisdiction to Hear Plaintiff's Case

As has been seen, Customs posted the Bulletin Notice while Commerce's suspension of liquidation was in effect and after having received clear notice of the suspension of liquidation for the subject merchandise. In addition, none of the § 1504(d) preconditions necessary for a deemed liquidation to take place were met prior to the posting of the Bulletin Notice at the customshouse. Further, as this Court has made clear, "Congress intended the suspension of liquidation required during § 1675 reviews to override the 'deemed liquidated' provisions of § 1504." *Am. Permac, Inc. v. United States*, 10 CIT 535, 543, 642 F. Supp. 1187, 1194–95 (1986). As a result, no argument can be advanced to support a claim that a deemed liquidation did, in fact, occur.

As has been noted, only "liquidation[s]" may be the subject of protests. 19 U.S.C. § 1514(a). Consequently, Customs' posting of the Bulletin Notice was a legal nullity and did not have the legal ramifications that defendant argues.[9] As a result, despite defendant's argument to the contrary, Alden Leeds was not required to protest Customs' legally inconsequential Bulletin Notice. *See LG Electronics*, 21 CIT at 1429, 991 F. Supp. at 676.

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[9] Title 19 U.S.C. § 1514(a) provides, in relevant part, that

> the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation 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 in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title. When a judgment or order of the United States Court of International Trade has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the Customs Service, which shall take action accordingly.

Since no protest of the Bulletin Notice was required, judicial review of its contents under § 1581(a) was unavailable. As a result, plaintiff has met the "manifestly inadequate" standard, thus triggering this Court's § 1581(i) residual jurisdiction. *Miller*, 824 F.2d at 963. Therefore, the court finds it has jurisdiction to hear plaintiff's claims under § 1581(i)(4).

IV. Plaintiff Has Stated a Claim Upon Which Relief Can Be Granted

For the same reasons that this Court has jurisdiction, plaintiff also has also stated a valid claim, notwithstanding defendant's contention that "19 U.S.C. § 1514(a) precludes any relief." Def.'s Mem. 11; *see* USCIT R. 12(b)(5). By claiming jurisdiction under 19 U.S.C. § 1581(i), plaintiff asserts that its cause of action arises under the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 702 *et seq.*; *see also Royal United Corp. v. United States*, 34 CIT __, __, Slip Op. 10–71 at 13 (June 25, 2010) ("It is, of course, axiomatic that this Court exercises jurisdiction pursuant to Subsection 1581(i) to adjudicate a cause of action under the APA."). Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. Here, plaintiff alleges that it suffered a legal wrong as a result of Customs' "wrongful disregard of the suspension of liquidation instructions" by posting the Bulletin Notice. Am. Compl. ¶ 18. The court's previous discussion of the lawfulness of this Bulletin Notice indicates that has plaintiff stated a valid claim.

Moreover, under the APA, the court has the authority to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Because it is apparent that the court may grant relief to plaintiff by setting the aside the Bulletin Notice, Alden Leeds has stated a claim upon which relief can be granted, and defendant's motion must fail. *See Totes-Isotoner Corp. v. United States*, 32 CIT __, __, 569 F. Supp. 2d 1315, 1328 (2008) (holding, in light of the Supreme Court's pleading analysis in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), that plaintiffs must now "allege facts that could provide a showing that [they are] entitled to relief").

Conclusion

Here, Customs seeks to impose procedural bars to judicial review of its erroneous act. Should its efforts succeed, Customs would retain money that otherwise would be returned to Alden Leeds. Customs does not argue, nor indeed could it argue, that it is entitled to Alden Leeds's money. Indeed, in order to advance such an argument, Cus-

toms would have to contend that a deemed liquidation that could not and did not take place actually transpired. Nonetheless, premised on the notion that Alden Leeds should have monitored Customs' behavior in order to catch the agency's own mistakes, Customs seeks to avoid returning the company's funds. As has been seen, the law does not direct this result. Therefore, for the foregoing reasons, defendant's motion to dismiss is denied.

Dated: September 7, 2010
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 10–116

FORD MOTOR COMPANY, Plaintiff, v. UNITED STATES, U.S. DEPARTMENT OF HOMELAND SECURITY, AND U.S. CUSTOMS AND BORDER PROTECTION Defendants.

Before: Gregory W. Carman, Judge
Court No. 09–00151

[*Plaintiff's motion for reconsideration denied.*]

Dated: October 15, 2010

Ford Motor Company, Office of General Counsel (*Paulsen K. Vandevert*); *Baker & Hostetler LLP* (*Matthew W. Caligur*), of counsel, for Plaintiff.

Tony West, Assistant Attorney General, *Barbara S. Williams*, Attorney-in-Charge, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*, *Justin R. Miller*); and *Yelena Slepak*, of counsel, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, Department of Homeland Security, for Defendants.

OPINION & ORDER

CARMAN, JUDGE:

Introduction

Plaintiff Ford Motor Company has moved under USCIT Rule 59 for reconsideration (ECF No. 41) of the Court's Final Order of July 22, 2010, and accompanying opinion, *Ford Motor Co. v. United States*, Court No. 09–00151, 34 CIT __, 2010 WL 2941505 (Jul. 22, 2010). The granting of a motion for reconsideration is within the sound discretion of the Court, and is typically granted only in the case of "an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice." *Almond Bros. Lumber Co. v. United States*, Court No. 08–00036, 34 CIT ___, 2010 WL 1409656 at *4 (Apr.

8, 2010) (internal citation omitted); *see also Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990). A motion for reconsideration is thus a mechanism to correct a significant flaw in the original judgment, but is not a mechanism to "allow a losing party the chance to repeat arguments or to relitigate issues previously before the court." *Peerless Clothing Intern., Inc. v. United States*, 33 CIT ___, 637 F. Supp. 2d 1253, 1256 (2009) (citations omitted).

None of the arguments raised by Plaintiff in its motion for reconsideration would justify granting the motion. First, Plaintiff erroneously asserts that this Court should have taken jurisdiction over liquidated entries pursuant to 28 U.S.C. § 1581(i). (Mot. at 1–2, 7–11.) With respect to entries B, C, and D, which were liquidated after the filing of the complaint, but before the Court's opinion was issued, the Court finds Plaintiff's argument disingenuous. As the Court's explained in its opinion, Ford has already protested these entries and brought suit in this court challenging Customs' treatment of these entries pursuant to 28 U.S.C. § 1581(a). *Ford Motor Co.*, 2010 WL 2941505 at *4. Ford's insistence that the Court was obligated to take jurisdiction over entries B, C, and D pursuant to § 1581(i) is specious. Similarly, with entries E and F, Plaintiff makes no argument as to why the relief available under 28 U.S.C. § 1581(a) would be manifestly inadequate for reviewing its claims of illegal treatment of these entries. Entries E and F were liquidated during the pendency of the litigation, and for reasons set forth in the opinion, the Court decided not to prohibit that liquidation with a temporary restraining order or preliminary injunction. *Id. at 6–7.* Once liquidated, then, the appropriate route to judicial review of these entries was also for Ford to file a protest, comply with all jurisdictional prerequisites, and commence a suit under 28 U.S.C. § 1581(a).

The remaining arguments raised by Plaintiff variously misapprehend the Court's opinion, assert the existence of clear legal error where there is none, or attempt to re-litigate claims and issues that were decided by the Court in its opinion. Plaintiff complains that the Court found "the reconciliation entries [to have] been validly extended." (Pl.'s Mot. for Recons. ("Mot.") at 2–3, 11–14.) This is not true. To the contrary, the Court only noted that Plaintiff admitted its entries had been extended (which the Court took as an abandonment of claim 1), while still noting Plaintiff's position that these extensions were not valid (for the reasons set forth in claims 2–4). *Ford Motor Co.*, 2010 WL 2941505 at *7. Plaintiff also objects to the Court's exercise of discretion not to issue a declaratory judgment, and disputes the application of the four factor test in determining whether or not to grant injunctive relief, claiming instead that the Court "should

have only considered whether injunctive relief was necessary to stop Customs' wrongful actions." (Mot. at 3–4, 14–21.) However, Plaintiff does not establish why the Court's determination not to grant declaratory relief amounts to an abuse of discretion, or why the four factor test for determining the propriety of injunctive relief, advanced by Plaintiff during the course of litigation, should now be retroactively exchanged for a singular equitable consideration. (*Id.* at 4.) Finally, Plaintiff reiterates its substantive claims: that Customs' liquidations and reliquidations were untimely, and therefore invalid, and that Customs unreasonably delayed in seeking information about the Subject Entries, nullifying its purported extensions. (*Id.* at 5, 21–26.) This ungainly attempt to re-litigate will not meet with success here.

For the foregoing reasons, then, it is hereby

ORDERED that Plaintiff's motion for reconsideration be, and hereby is, denied.

Dated: October 15, 2010
New York, NY

/*s*/ *Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

Slip Op. 10–117

NSK LTD., et al., Plaintiffs, v. THE UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 10–00288

[Denying plaintiffs' motion for injunction against liquidation of entries subject to administrative review of antidumping duty order]

Dated: October 15, 2010

Crowell & Moring LLP (*Matthew P. Jaffe*, *Alexander H. Schaefer*, *Robert A. Lipstein*) for plaintiffs NSK Ltd., NSK Corporation, and NSK Precision America, Inc.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Misha Preheim*); *Shana Hofstetter*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Stewart and Stewart (*Geert M. De Prest*, *Terence P. Stewart*, *William A. Fennell*, and *Lane S. Hurewitz*) for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

I. Introduction

Plaintiffs NSK Ltd., NSK Corporation, and NSK Precision America, Inc. (collectively, "NSK" or "plaintiffs") brought this action to contest a final determination of the U.S. Department of Commerce ("Commerce" or the "Department"), published as *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, & Revocation of an Order in Part*, 75 Fed. Reg. 53,661 (Sept. 1, 2010) ("Final Results"). Plaintiffs bring a single claim challenging as unlawful the use of the Department's "zeroing" methodology to calculate a weighted-average dumping margin for NSK Ltd., under which U.S. sales of ball bearings and parts thereof from Japan ("subject merchandise") at prices above normal value are deemed to have individual dumping margins of zero rather than negative margins.[1] Compl. ¶¶ 5, 10–13. Plaintiffs claim that the "Department's zeroing methodology by excluding negative margins from offsetting positive comparisons has led to an inaccurate calculation of the weighted-average margin for NSK." *Id.* ¶ 10. They move for a preliminary injunction against liquidation of the entries of merchandise produced or exported by NSK Ltd. that were affected by the administrative review of the antidumping duty order on subject merchandise from Japan, as provided in Section 516A(c)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(c)(2) (2006). Mot. for Prelim. Inj. ("Pls. Mot."). Defendant and defendant-intervenor oppose the motion, arguing that plaintiffs' challenge to the Department's zeroing methodology has no likelihood of success on the merits and that the injunction plaintiffs seek would not be in the public interest. Def.'s Opp'n to Pls.' Mot. for a Prelim. Inj. ("Def. Opp'n") 1–5; The Timken Co.'s Opp'n to the Mot. of NSK for a Prelim. Inj. ("Def.-Intervenor's Opp'n") 5–8. The court concludes that plaintiffs have failed to demonstrate any likelihood that they will succeed

[1] To calculate a weighted-average dumping margin in an administrative review, the U.S. Department of Commerce ("Commerce" or the "Department") first determines two values for each entry of subject merchandise falling within the period of review: the normal value and the export price ("EP") (or the constructed export price ("CEP") if the EP cannot be determined). 19 U.S.C. § 1675(a)(2)(A)(i) (2006). Commerce then determines a margin for each entry by taking the amount by which the normal value exceeds the EP or CEP. 19 U.S.C. §§ 1675(a)(2)(A)(ii), 1677(35)(A). If normal value does not exceed EP or CEP, Commerce assigns a value of zero, not a negative value, to the entry. Finally, Commerce aggregates these values to calculate a weighted-average dumping margin. 19 U.S.C. § 1677(35)(B).

on the merits of their claim and, on the basis of that conclusion, denies the motion for an injunction against liquidation.

II. Background

On June 24, 2009, Commerce initiated administrative reviews of antidumping duty orders on ball bearings and parts thereof, for the period from May 1, 2008 through April 30, 2009 ("period of review"). *Initiation of Antidumping & Countervailing Duty Administrative Reviews & Requests for Revocation in Part*, 74 Fed. Reg. 30,052 (June 24, 2009). On April 28, 2010, the Department published preliminary results of the administrative reviews. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews, Preliminary Results of Changed-Circumstances Review, Rescission of Antidumping Duty Administrative Reviews in Part, & Intent to Revoke Order in Part*, 75 Fed. Reg. 22,384 (Apr. 28, 2010). The Department published the Final Results on September 1, 2010, determining an antidumping duty margin of 8.48% for NSK Ltd. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, & Revocation of an Order in Part*, 75 Fed. Reg. 53,661, 53,662 (Sept. 1, 2010) ("*Final Results* "). On September 17, 2010, plaintiffs filed their summons, and on September 23, 2010, their complaint, motion for preliminary injunction and memorandum in support thereof. Summons; Compl.; Pls. Mot.; Mem. in Supp. of Mot. of NSK, Ltd., NSK Corp. & NSK Precision America, Inc. for Prelim. Inj. ("Pls. Mem."). Defendant and defendant-intervenor filed their oppositions to plaintiffs' injunction motion on September 29, 2010 and October 4, 2010, respectively. Def.'s Opp'n; Def.-Intervenor's Opp'n. On October 8, 2010, plaintiffs moved for leave to file a reply. Mot. for Leave to File a Reply in Supp. of Mot. for Prelim. Inj.

III. Discussion

The court is granted subject matter jurisdiction by Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), to adjudicate plaintiffs' claim contesting the Final Results.

In ruling on plaintiffs' motion for preliminary injunctive relief, the court must consider as factors whether the movant is likely to succeed on the merits, whether the movant will suffer irreparable harm if the relief is not granted, whether the balance of the hardships tips in the movant's favor, and whether a preliminary injunction will not be contrary to the public interest. *See Belgium v. United States*, 452 F.3d

1289, 1292 (Fed. Cir. 2006) (quoting *U.S. Ass'n of Importers of Textiles & Apparel v. U.S. Dep't of Commerce*, 413 F.3d 1344, 1346 (Fed. Cir. 2005). "No one factor, taken individually, is necessarily dispositive." *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993).

Defendant and defendant-intervenor argue that plaintiffs have no likelihood of succeeding on the merits of their claim because the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") repeatedly has sustained Commerce's application of the zeroing methodology in administrative reviews. Def.'s Opp'n 3 (citing *Koyo Seiko Co. v. United States*, 551 F.3d 1286 (Fed. Cir. 2008); *SKF USA, Inc. v. United States*, 537 F.3d 1373 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007)); Def.-Intervenor's Opp'n 5 ("As NSK appears to acknowledge, however, the Court of Appeals for the Federal Circuit has indicated that it will affirm the Department's zeroing practice 'until Commerce officially abandons the practice pursuant to the specified statutory scheme.'") (citing Pls. Mem. 6 (citing *NSK Ltd.*, 510 F.3d at 1380)). According to the argument defendant and defendant-intervenor make in opposing the injunction, plaintiffs are unable to distinguish the issue presented in this case from the binding precedent established and repeatedly reaffirmed by the Court of Appeals.

Plaintiffs insist that this case is distinguishable from all past cases upholding the Department's zeroing practice because of two recent developments, under which that practice, as applied in antidumping administrative reviews, has been rejected in decisions resulting from dispute resolution proceedings conducted under the North American Free Trade Agreement ("NAFTA") and the World Trade Organization ("WTO"). Pls. Mem. 5–6. Plaintiffs' argument is, essentially, that their claim challenging the use of zeroing in the Final Results presents novel issues not previously considered by the Court of Appeals or this court. Plaintiffs cite, first, a recent NAFTA binational panel decision that predated the issuance of the Final Results, *Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of 2004/2005 Antidumping Review, Decision of the Panel*, USA-MEX-2007–1904–01, at 24 (Apr. 14, 2010) ("Stainless Steel from Mexico"). Pls. Mem 5; Compl. ¶ 11. Plaintiffs describe the panel decision as holding that the Department's zeroing practice violates the U.S. antidumping statute and as remanding a 2004-2005 administrative review for recalculation of a respondent's dumping margin. Pls. Mem 5; Compl. ¶ 11. Plaintiffs argue that, in response to the NAFTA panel decision, "the agency should have similarly recalculated the final results of the 2008–2009 ball bearing reviews to eliminate this practice" and that

"[t]he agency's failure to do so constituted an arbitrary and capricious act as the agency was preparing to unlawfully treat like cases differently." Pls. Mem. 5.

Citing developments in the World Trade Organization ("WTO"), plaintiffs argue, further, that the "Department has acknowledged the WTO's conclusions that the U.S. practice of zeroing in administrative reviews is unlawful, and further has indicated its intent to comply with the WTO's decision." Compl. ¶ 11 (citing Appellate Body Report, *United States — Measures Relating to Zeroing and Sunset Reviews*, ¶¶ 137, 156, 165 and 185, WT/DS322/AB/R (Jan. 9, 2007); Appellate Body Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294 (Apr. 18, 2006). Plaintiffs report that "the U.S. Government recently agreed to fully comply with the WTO's zeroing ruling, as the United States and European Union suspended proceedings before the WTO arbitration panel that had been scheduled to decide on September 8, 2010, how much retaliation the European Union could impose on U.S. trade" and that the "United States plans to begin the process of complying with the WTO's zeroing ruling before the end of the year." Pls. Mem. 5–6 (citing "U.S., EU Reach Deal To Suspend Arbitration Proceedings In Zeroing Case," *Inside US Trade*, Sept. 10, 2010, at 1).

As plaintiffs' NAFTA-related argument assumes, the issue of the effect on U.S. law of a decision of a NAFTA binational panel disallowing zeroing was not before the Court of Appeals in the previous cases upholding the Department's practice of zeroing in administrative reviews. But however novel that issue may be, the court finds no merit in plaintiffs' arguments that, as a result of a remand ordered by the NAFTA panel, Commerce was obligated by law to recalculate the Final Results to eliminate zeroing and is acting contrary to law in arbitrarily and capriciously preparing to treat like cases differently. Section 411 of the North American Free Trade Agreement Implementation Act ("NAFTA Implementation Act"), 19 U.S.C. § 1516a(g), requires Commerce to implement the decision of the NAFTA panel, and neither the panel's decision nor the Department's implementation of it may be reviewed on any question of law or fact by any court of the United States. 19 U.S.C. § 1516a(g)(2)(B), (g)(7)(A). The court fails to *see* how Commerce can be said to be acting unlawfully in preparing to treat like cases differently where, as here, by statute it would appear to lack discretion to do anything but implement Stainless Steel from Mexico and yet unquestionably has statutory authority, recognized repeatedly by the Court of Appeals, to apply its zeroing practice in administrative reviews other than the one that was the subject of the NAFTA panel's decision. The future inconsistency to which plaintiffs

allude would not result from a decision by Commerce to treat like cases differently that, upon judicial review, would be set aside as an arbitrary and capricious agency action. Instead, it would be a consequence of the statutory scheme established by 19 U.S.C. § 1516a(g) and related provisions, under which NAFTA binational panel decisions may reach results inconsistent with those of U.S. courts and yet are not reviewable by U.S. courts.

Nor can it plausibly be argued that the NAFTA panel's decision will require this court to conclude that Commerce lacked the discretion under the antidumping law to apply zeroing in the Final Results. The NAFTA Implementation Act provides that a final decision of a NAFTA binational panel is not binding precedent in an action brought in the Court of International Trade under 19 U.S.C. § 1516a(a), although the court "may take" such panel decision "into consideration." 19 U.S.C. § 1516a(b)(3). In this case, the court's taking the NAFTA binational panel decision into consideration could be of no avail to plaintiffs. Any "consideration" of the panel decision could not overcome the precedent binding on the court, under which Commerce has statutory authority to apply the zeroing methodology when conducting an administrative review under 19 U.S.C. § 1675. *See*, *e.g.*, *NSK Ltd. v. United States*, 510 F.3d at 1380 (stating that "Commerce's zeroing practice is in accordance with our well-established precedent.").

Plaintiffs' citation to a press report that the United States will comply with the WTO's zeroing ruling and plans to begin the process of complying with that ruling before the end of this year is also unavailing. The salient point is that the United States, as of the September 1, 2010 publication date of the Final Results, had not begun the process of discontinuing Commerce's practice of zeroing in response to the actions taken by the WTO. That process is governed generally by the Uruguay Round Agreements Act ("URAA"), which in Section 123 established a procedure for implementing in U.S. law a WTO decision that a regulation or practice of a U.S. agency is inconsistent with one of the agreements implemented by the URAA. *See* 19 U.S.C. § 3533(g); *Corus Staal BV*, 395 F.3d at 1349. To effectuate a change of agency regulation or practice due to an adverse WTO ruling, Section 123 provides for a process involving the United States Trade Representative, Congress, the relevant agency, private sector advisory committees, and the public, a process that culminates in a final rule or other modification. *See* 19 U.S.C. § 3533(g)(1). By statute, any action the United States takes to comply with the WTO's decision on zeroing in administrative reviews will not apply retroactively to the Final Results. Among other procedures, the statute directs that

the agency regulation or practice not be rescinded or modified before the agency has published its proposed modification for public comment. *Id.* § 3533(g)(1)(C).[2]

In summary, plaintiffs have instituted this action in reliance on NAFTA- and WTO-related developments that fail to support their claim that Commerce unlawfully applied zeroing in the administrative review that was completed by the Final Results on September 1, 2010. As of that date, it was well established in U.S. law, through repeated and consistent holdings of the Court of Appeals, that the practice of zeroing is statutorily permissible in administrative reviews, and neither of the international developments to which plaintiffs direct the court's attention can result in a change in U.S. law that will apply retroactively. The court concludes that plaintiffs have not demonstrated any likelihood that they can succeed on the merits of their claim.

The irreparable harm factor is strongly in plaintiffs' favor. Plaintiffs have shown that they will be immediately and irreparably harmed absent the injunctive relief they seek. As they correctly argue, "because liquidation of the entries at issue would deprive NSK of its right to meaningful judicial review of the Department's Final Results, NSK is faced with immediate and irreparably [sic] injury absent injunctive relief." Pls. Mem. 3. Liquidation of the entries at issue in this litigation in accordance with the Final Results would preclude any relief plaintiffs might obtain with respect to those entries, and, in so doing, might moot entirely the claim plaintiffs assert in this litigation.

The "balance of the hardships" factor also favors plaintiffs. While the denial of an injunction prevents plaintiffs from obtaining any favorable result of judicial review as to the affected entries and may well moot the entire case, defendant suffers no hardship from the grant of the injunction. If the injunction is granted, the government, which already is in possession of security in the form of antidumping duty cash deposits, would be in a position to collect, with interest, any additional duties determined to be owing, once a judicial decision in this litigation is final and conclusive.

Concerning the "public interest" factor, the court concludes that a

[2] The Uruguay Round Agreements Act ("URAA") also established a procedure in Section 129, providing for the implementation of an adverse WTO panel or Appellate Body report that addresses a particular antidumping determination by Commerce. *See* 19 U.S.C. § 3538. Even were a Section 129 procedure to be initiated now or in the near future, it could not apply to entries made prior to a date on which the United States Trade Representative directs the Department to implement the WTO decision and, therefore, could have no effect on judicial review of the Final Results. *See* id. § 3538(c)(1)(B).

grant of the injunction plaintiffs seek would not be *contrary* to the public interest, but that no public interest consideration is sufficient to outweigh the serious deficiency affecting the claim on the merits. It is, of course, in the public interest that the entries at issue in this litigation be liquidated in accordance with the correct result on the merits, but in this case plaintiffs cannot show any prospect that they could succeed in contesting that result as set forth in the Final Results. The sought injunction would remain in place not only throughout a proceeding conducted according to USCIT Rule 56.2 but also throughout all appeals. Due to plaintiffs' inability to demonstrate any prospect of success, the court concludes that the public interest in this case will be better served if the liquidation process, as it would be conducted in the ordinary course, is not disturbed.

The strong showing plaintiffs are able to make on irreparable harm and balancing of the hardships are not sufficient to overcome the lack of any prospect of success on the merits. In reaching this conclusion, the court is mindful that the denial of the injunction motion may well moot plaintiffs' case. However, the court is guided by the principle that an injunction against liquidation of entries pursuant to 19 U.S.C. § 1516a(c)(2) should not be ordered without at least a showing that the issue presented is not "so clear-cut as to warrant disposing of this appeal," *Belgium*, 432 F.3d at 1295, a showing plaintiffs are unable to make in support of their motion.

IV. Conclusion And Order

The court will deny plaintiffs' motion for a preliminary injunction against liquidation because plaintiffs have failed to demonstrate any likelihood of success on the merits of the sole claim they advance in this litigation.

Order

Upon consideration of plaintiffs' Motion for Preliminary Injunction, plaintiffs' memorandum in support thereof, Defendant's Opposition to Plaintiffs' Motion for a Preliminary Injunction, The Timken Company's Opposition to the Motion of NSK for a Preliminary Injunction, plaintiffs' Motion for Leave to File a Reply in Support of Motion for Preliminary Injunction, and all other papers and proceedings herein, it is hereby

ORDERED that plaintiffs' Motion for Leave to File a Reply in Support of Motion for Preliminary Injunction be, and hereby is, GRANTED; and it is further

ORDERED that plaintiffs' Motion for Preliminary Injunction be, and hereby is, DENIED.

Dated: October 15, 2010
New York, New York

/s/ *Timothy C. Stanceu*
TIMOTHY C. STANCEU
JUDGE

Slip Op. 10–118

NSK BEARINGS EUROPE LTD., et al., Plaintiffs, v. THE UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 10–00289

[Denying plaintiffs' motion for injunction against liquidation of entries subject to administrative review of antidumping duty order]

Dated: October 15, 2010

Crowell & Moring LLP (*Matthew P. Jaffe*, *Alexander H. Schaefer*, *Robert A. Lipstein*) for plaintiffs NSK Bearings Europe Ltd., NSK Europe Ltd., and NSK Corporation.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Misha Preheim*); *Shana Hofstetter*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Stewart and Stewart (*Geert M. De Prest*, *Terence P. Stewart*, *William A. Fennell*, and *Lane S. Hurewitz*) for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

I. Introduction

Plaintiffs NSK Bearings Europe Ltd., NSK Europe Ltd., and NSK Corporation (collectively, "NSK" or "plaintiffs") brought this action to contest a final determination of the U.S. Department of Commerce ("Commerce" or the "Department"), published as *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, & Revocation of an Order in Part*, 75 Fed. Reg. 53,661 (Sept. 1, 2010) ("Final Results"). Plaintiffs bring a single claim challenging as unlawful the use of the Department's "zeroing" methodology to calculate a weighted-average dumping margin for NSK Bearings Europe Ltd., under which U.S. sales of ball bearings and parts thereof from the United Kingdom ("subject merchandise") at prices above normal

value are deemed to have individual dumping margins of zero rather than negative margins.[1] Compl. ¶¶ 5, 10–13. Plaintiffs claim that the "Department's zeroing methodology by excluding negative margins from offsetting positive comparisons has led to an inaccurate calculation of the weighted-average margin for NSK." *Id.* ¶ 10. They move for a preliminary injunction against liquidation of the entries of merchandise produced or exported by NSK Bearings Europe Ltd. that were affected by the administrative review of the antidumping duty order on subject merchandise from the United Kingdom, as provided in Section 516A(c)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(c)(2) (2006). Mot. for Prelim. Inj. ("Pls. Mot."). Defendant and defendant-intervenor oppose the motion, arguing that plaintiffs' challenge to the Department's zeroing methodology has no likelihood of success on the merits and that the injunction plaintiffs seek would not be in the public interest. Def.'s Opp'n to Pls.' Mot. for a Prelim. Inj. ("Def. Opp'n") 1–5; The Timken Co.'s Opp'n to the Mot. of NSK for a Prelim. Inj. ("Def.-Intervenor's Opp'n") 5–8. The court concludes that plaintiffs have failed to demonstrate any likelihood that they will succeed on the merits of their claim and, on the basis of that conclusion, denies the motion for an injunction against liquidation.

II. Background

On June 24, 2009, Commerce initiated administrative reviews of antidumping duty orders on ball bearings and parts thereof, for the period from May 1, 2008 through April 30, 2009 ("period of review"). *Initiation of Antidumping & Countervailing Duty Administrative Reviews & Requests for Revocation in Part*, 74 Fed. Reg. 30,052 (June 24, 2009). On April 28, 2010, the Department published preliminary results of the administrative reviews. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews, Preliminary Results of Changed-Circumstances Review, Rescission of Antidumping Duty Administrative Reviews in Part, & Intent to Revoke*

[1] To calculate a weighted-average dumping margin in an administrative review, the U.S. Department of Commerce ("Commerce" or the "Department") first determines two values for each entry of subject merchandise falling within the period of review: the normal value and the export price ("EP") (or the constructed export price ("CEP") if the EP cannot be determined). 19 U.S.C. § 1675(a)(2)(A)(i) (2006). Commerce then determines a margin for each entry by taking the amount by which the normal value exceeds the EP or CEP. 19 U.S.C. §§ 1675(a)(2)(A)(ii), 1677(35)(A). If normal value does not exceed EP or CEP, Commerce assigns a value of zero, not a negative value, to the entry. Finally, Commerce aggregates these values to calculate a weighted-average dumping margin. 19 U.S.C. § 1677(35)(B).

Order in Part, 75 Fed. Reg. 22,384 (Apr. 28, 2010). The Department published the Final Results on September 1, 2010, determining an antidumping duty margin of 10.04% for NSK Bearings Europe Ltd. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, & Revocation of an Order in Part*, 75 Fed. Reg. 53,661, 53,662 (Sept. 1, 2010) ("*Final Results*"). On September 17, 2010, plaintiffs filed their summons, and on September 23, 2010, their complaint, motion for preliminary injunction and memorandum in support thereof. Summons; Compl.; Pls. Mot.; Mem. in Supp. of Mot. of NSK Ltd., NSK Corporation, and NSK Precision America, Inc. for Prelim. Inj. ("Pls. Mem.").[2] Defendant and defendant-intervenor filed their oppositions to plaintiffs' injunction motion on September 29, 2010 and October 4, 2010, respectively. Def.'s Opp'n; Def.-Intervenor's Opp'n. On October 8, 2010, plaintiffs moved for leave to file a reply. Mot. for Leave to File a Reply in Supp. of Mot. for Prelim. Inj.

III. Discussion

The court is granted subject matter jurisdiction by Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), to adjudicate plaintiffs' claim contesting the Final Results.

In ruling on plaintiffs' motion for preliminary injunctive relief, the court must consider as factors whether the movant is likely to succeed on the merits, whether the movant will suffer irreparable harm if the relief is not granted, whether the balance of the hardships tips in the movant's favor, and whether a preliminary injunction will not be contrary to the public interest. *See Belgium v. United States*, 452 F.3d 1289, 1292 (Fed. Cir. 2006) (quoting *U.S. Ass'n of Importers of Textiles & Apparel v. U.S. Dep't of Commerce*, 413 F.3d 1344, 1346 (Fed. Cir. 2005). "No one factor, taken individually, is necessarily dispositive." *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993).

Defendant and defendant-intervenor argue that plaintiffs have no likelihood of succeeding on the merits of their claim because the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") repeatedly has sustained Commerce's application of the zeroing methodology in administrative reviews. Def.'s Opp'n 3 (citing *Koyo Seiko Co. v. United States*, 551 F.3d 1286 (Fed. Cir. 2008); *SKF USA, Inc. v. United States*, 537 F.3d 1373 (Fed. Cir. 2008); *NSK Ltd. v. United*

[2] Plaintiffs incorrectly titled their memorandum in support of their motion with the wrong party names. The court assumes plaintiffs meant to refer to the parties in this action, NSK Bearings Europe Ltd., NSK Europe Ltd., and NSK Corporation.

States, 510 F.3d 1375 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007)); Def.-Intervenor's Opp'n 5 ("As NSK appears to acknowledge, however, the Court of Appeals for the Federal Circuit has indicated that it will affirm the Department's zeroing practice 'until Commerce officially abandons the practice pursuant to the specified statutory scheme.'") (citing Pls. Mem. 6 (citing *NSK Ltd.*, 510 F.3d at 1380)). According to the argument defendant and defendant-intervenor make in opposing the injunction, plaintiffs are unable to distinguish the issue presented in this case from the binding precedent established and repeatedly reaffirmed by the Court of Appeals.

Plaintiffs insist that this case is distinguishable from all past cases upholding the Department's zeroing practice because of two recent developments, under which that practice, as applied in antidumping administrative reviews, has been rejected in decisions resulting from dispute resolution proceedings conducted under the North American Free Trade Agreement ("NAFTA") and the World Trade Organization ("WTO"). Pls. Mem. 5–6. Plaintiffs' argument is, essentially, that their claim challenging the use of zeroing in the Final Results presents novel issues not previously considered by the Court of Appeals or this court. Plaintiffs cite, first, a recent NAFTA binational panel decision that predated the issuance of the Final Results, *Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of 2004/2005 Antidumping Review, Decision of the Panel*, USA-MEX-2007–1904–01, at 24 (Apr. 14, 2010) ("Stainless Steel from Mexico"). Pls. Mem 5; Compl. ¶ 11. Plaintiffs describe the panel decision as holding that the Department's zeroing practice violates the U.S. antidumping statute and as remanding a 2004–2005 administrative review for recalculation of a respondent's dumping margin. Pls. Mem 5; Compl. ¶ 11. Plaintiffs argue that, in response to the NAFTA panel decision, "the agency should have similarly recalculated the final results of the 2008–2009 ball bearing reviews to eliminate this practice" and that "[t]he agency's failure to do so constituted an arbitrary and capricious act as the agency was preparing to unlawfully treat like cases differently." Pls. Mem. 5.

Citing developments in the World Trade Organization ("WTO"), plaintiffs argue, further, that the "Department has acknowledged the WTO's conclusions that the U.S. practice of zeroing in administrative reviews is unlawful, and further has indicated its intent to comply with the WTO's decision." Compl. ¶ 11 (citing Appellate Body Report, *United States — Measures Relating to Zeroing and Sunset Reviews*, ¶¶ 137, 156, 165 and 185, WT/DS322/AB/R (Jan. 9, 2007); Appellate

Body Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294 (Apr. 18, 2006). Plaintiffs report that "the U.S. Government recently agreed to fully comply with the WTO's zeroing ruling, as the United States and European Union suspended proceedings before the WTO arbitration panel that had been scheduled to decide on September 8, 2010, how much retaliation the European Union could impose on U.S. trade" and that the "United States plans to begin the process of complying with the WTO's zeroing ruling before the end of the year." Pls. Mem. 5–6 (citing "U.S., EU Reach Deal To Suspend Arbitration Proceedings In Zeroing Case," *Inside US Trade*, Sept. 10, 2010, at 1).

As plaintiffs' NAFTA-related argument assumes, the issue of the effect on U.S. law of a decision of a NAFTA binational panel disallowing zeroing was not before the Court of Appeals in the previous cases upholding the Department's practice of zeroing in administrative reviews. But however novel that issue may be, the court finds no merit in plaintiffs' arguments that, as a result of a remand ordered by the NAFTA panel, Commerce was obligated by law to recalculate the Final Results to eliminate zeroing and is acting contrary to law in arbitrarily and capriciously preparing to treat like cases differently. Section 411 of the North American Free Trade Agreement Implementation Act ("NAFTA Implementation Act"), 19 U.S.C. § 1516a(g), requires Commerce to implement the decision of the NAFTA panel, and neither the panel's decision nor the Department's implementation of it may be reviewed on any question of law or fact by any court of the United States. 19 U.S.C. § 1516a(g)(2)(B), (g)(7)(A). The court fails to *see* how Commerce can be said to be acting unlawfully in preparing to treat like cases differently where, as here, by statute it would appear to lack discretion to do anything but implement Stainless Steel from Mexico and yet unquestionably has statutory authority, recognized repeatedly by the Court of Appeals, to apply its zeroing practice in administrative reviews other than the one that was the subject of the NAFTA panel's decision. The future inconsistency to which plaintiffs allude would not result from a decision by Commerce to treat like cases differently that, upon judicial review, would be set aside as an arbitrary and capricious agency action. Instead, it would be a consequence of the statutory scheme established by 19 U.S.C. § 1516a(g) and related provisions, under which NAFTA binational panel decisions may reach results inconsistent with those of U.S. courts and yet are not reviewable by U.S. courts.

Nor can it plausibly be argued that the NAFTA panel's decision will require this court to conclude that Commerce lacked the discretion under the antidumping law to apply zeroing in the Final Results. The

NAFTA Implementation Act provides that a final decision of a NAFTA binational panel is not binding precedent in an action brought in the Court of International Trade under 19 U.S.C. § 1516a(a), although the court "may take" such panel decision "into consideration." 19 U.S.C. § 1516a(b)(3). In this case, the court's taking the NAFTA binational panel decision into consideration could be of no avail to plaintiffs. Any "consideration" of the panel decision could not overcome the precedent binding on the court, under which Commerce has statutory authority to apply the zeroing methodology when conducting an administrative review under 19 U.S.C. § 1675. *See*, *e.g.*, *NSK Ltd. v. United States*, 510 F.3d at 1380 (stating that "Commerce's zeroing practice is in accordance with our well-established precedent.").

Plaintiffs' citation to a press report that the United States will comply with the WTO's zeroing ruling and plans to begin the process of complying with that ruling before the end of this year is also unavailing. The salient point is that the United States, as of the September 1, 2010 publication date of the Final Results, had not begun the process of discontinuing Commerce's practice of zeroing in response to the actions taken by the WTO. That process is governed generally by the Uruguay Round Agreements Act ("URAA"), which in Section 123 established a procedure for implementing in U.S. law a WTO decision that a regulation or practice of a U.S. agency is inconsistent with one of the agreements implemented by the URAA. *See* 19 U.S.C. § 3533(g); *Corus Staal BV*, 395 F.3d at 1349. To effectuate a change of agency regulation or practice due to an adverse WTO ruling, Section 123 provides for a process involving the United States Trade Representative, Congress, the relevant agency, private sector advisory committees, and the public, a process that culminates in a final rule or other modification. *See* 19 U.S.C. § 3533(g)(1). By statute, any action the United States takes to comply with the WTO's decision on zeroing in administrative reviews will not apply retroactively to the Final Results. Among other procedures, the statute directs that the agency regulation or practice not be rescinded or modified before the agency has published its proposed modification for public comment. *Id.* § 3533(g)(1)(C).[3]

[3] The Uruguay Round Agreements Act ("URAA") also established a procedure in Section 129, providing for the implementation of an adverse WTO panel or Appellate Body report that addresses a particular antidumping determination by Commerce. *See* 19 U.S.C. § 3538. Even were a Section 129 procedure to be initiated now or in the near future, it could not apply to entries made prior to a date on which the United States Trade Representative directs the Department to implement the WTO decision and, therefore, could have no effect on judicial review of the Final Results. *See id*. § 3538(c)(1)(B).

In summary, plaintiffs have instituted this action in reliance on NAFTA- and WTO-related developments that fail to support their claim that Commerce unlawfully applied zeroing in the administrative review that was completed by the Final Results on September 1, 2010. As of that date, it was well established in U.S. law, through repeated and consistent holdings of the Court of Appeals, that the practice of zeroing is statutorily permissible in administrative reviews, and neither of the international developments to which plaintiffs direct the court's attention can result in a change in U.S. law that will apply retroactively. The court concludes that plaintiffs have not demonstrated any likelihood that they can succeed on the merits of their claim.

The irreparable harm factor is strongly in plaintiffs' favor. Plaintiffs have shown that they will be immediately and irreparably harmed absent the injunctive relief they seek. As they correctly argue, "because liquidation of the entries at issue would deprive NSK of its right to meaningful judicial review of the Department's Final Results, NSK is faced with immediate and irreparably [sic] injury absent injunctive relief." Pls. Mem. 3. Liquidation of the entries at issue in this litigation in accordance with the Final Results would preclude any relief plaintiffs might obtain with respect to those entries, and, in so doing, might moot entirely the claim plaintiffs assert in this litigation.

The "balance of the hardships" factor also favors plaintiffs. While the denial of an injunction prevents plaintiffs from obtaining any favorable result of judicial review as to the affected entries and may well moot the entire case, defendant suffers no hardship from the grant of the injunction. If the injunction is granted, the government, which already is in possession of security in the form of antidumping duty cash deposits, would be in a position to collect, with interest, any additional duties determined to be owing, once a judicial decision in this litigation is final and conclusive.

Concerning the "public interest" factor, the court concludes that a grant of the injunction plaintiffs seek would not be *contrary* to the public interest, but that no public interest consideration is sufficient to outweigh the serious deficiency affecting the claim on the merits. It is, of course, in the public interest that the entries at issue in this litigation be liquidated in accordance with the correct result on the merits, but in this case plaintiffs cannot show any prospect that they could succeed in contesting that result as set forth in the Final Results. The sought injunction would remain in place not only throughout a proceeding conducted according to USCIT Rule 56.2 but also throughout all appeals. Due to plaintiffs' inability to demonstrate

any prospect of success, the court concludes that the public interest in this case will be better served if the liquidation process, as it would be conducted in the ordinary course, is not disturbed.

The strong showing plaintiffs are able to make on irreparable harm and balancing of the hardships are not sufficient to overcome the lack of any prospect of success on the merits. In reaching this conclusion, the court is mindful that the denial of the injunction motion may well moot plaintiffs' case. However, the court is guided by the principle that an injunction against liquidation of entries pursuant to 19 U.S.C. § 1516a(c)(2) should not be ordered without at least a showing that the issue presented is not "so clear-cut as to warrant disposing of this appeal," *Belgium*, 432 F.3d at 1295, a showing plaintiffs are unable to make in support of their motion.

IV. Conclusion And Order

The court will deny plaintiffs' motion for a preliminary injunction against liquidation because plaintiffs have failed to demonstrate any likelihood of success on the merits of the sole claim they advance in this litigation.

ORDER

Upon consideration of plaintiffs' Motion for Preliminary Injunction, plaintiffs' memorandum in support thereof, Defendant's Opposition to Plaintiffs' Motion for a Preliminary Injunction, The Timken Company's Opposition to the Motion of NSK for a Preliminary Injunction, plaintiffs' Motion for Leave to File a Reply in Support of Motion for Preliminary Injunction, and all other papers and proceedings herein, it is hereby

ORDERED that plaintiffs' Motion for Leave to File a Reply in Support of Motion for Preliminary Injunction be, and hereby is, GRANTED; and it is further

ORDERED that plaintiffs' Motion for Preliminary Injunction be, and hereby is, DENIED.

Dated: October 15, 2010
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
JUDGE