MARK K. NEVILLE, JR.

Reliquidation in Trade Cases

In many respects the most consequential litigation in the history of the Court of International Trade, the challenge to the levy of additional tariffs on a multitude of Chinese-origin products under Lists 3 and 4A[1] has created a severe administrative challenge for the court. With a 2-1 decision, the three-judge panel issued a preliminary injunction (PI) that would stop liquidation of the entries in the cases—all 3,700 plus—on July 6, 2021.[2] That Order triggered a tendentious debate that centered on the mundane, i.e., the exact procedures that should be promulgated under the preliminary injunction, including whether plaintiffs would need to submit lists of individual entries and the precise rubric for such submissions to a repository to be set up by U.S. Customs and Border Protection. On September 8, the Court issued a revised Order, one that reflected the concession that CBP would not be able to meet its PI obligations and as a result had agreed to stipulate to reliquidation if plaintiffs were victorious. (Order, Court No. 21-00052, Dkt. No. 402). The Order removed the knotty problem of the obligation of CBP repository.

To be clear, the stipulation and the Order extended only to those entries that remained unliquidated as of July 6. Thus, this latest Order does not affect previously liquidated entries, the question of their reliquidation remaining open and to be confronted at the end of this litigation should plaintiffs prevail. Nor does the Order reach entries made after July. Even with the Government's stipulation on this reliquidation point, therefore, the legal question about the court's authority to order reliquidation remains an open point. We think it is worthwhile to examine this question.

Injunctive Relief

One of the four criteria for the issuance of an injunction is whether there would be irreparable harm in the absence of the injunction.[3] In granting the preliminary injunction, the CIT finding of irreparable harm was based on a perceived uncertainty whether the court had the authority to order reliquidations following a plaintiffs' victory. As the argument went, it was an open question or "uncertain" whether the CIT had the authority to grant full relief—in this case, including the reliquidation of entries—and without such reliquidation the plaintiffs would be deprived of judicial review and this equates to irreparable harm (Plaintiffs' Motion for Preliminary Injunction, Court No. 21-00052, Dkt. No. 287 at 6-12 (Plaintiffs' Motion); *see generally* Slip Op. at 10-18).

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For my lay (non-lawyer) readers, the subtle point here is that, in seeking the injunction, the plaintiffs themselves argued that the court's authority to order reliquidations if the plaintiffs won at court was doubtful. Once the preliminary injunction was issued, the interplay between the Government and the plaintiffs for the form of the final Order began in earnest, as the Government sought to shift the logistical burden of filing the requests for suspension of liquidation for each of the perhaps millions of subject entries.

The point I raise here is the question, was it either necessary or prudent for the plaintiffs to seek the preliminary injunction?

The *Section 301 Cases* court cited and relied heavily on several Federal Circuit cases where the antidumping (AD) and countervailing duty (CVD) laws were central to those decisions. As will be more fully recognized below, and as is the normal practice in fully analyzing the bona fides of any court decision, to answer that open question, it is first necessary to properly scrutinize the legal authorities and precedents cited in the *Section 301 Cases* decision. That exercise, in turn, leads us to make an excursion into the hinterlands of the antidumping and countervailing duty laws, and specifically the role of liquidation in AD/CVD-land. Before we buckle up, however, I emphasize that, as the case caption attests, the cases deal with additional tariffs collected pursuant to Section 301,[4] and the relevant actions were taken by the U.S. Trade Representative and were not AD or CVD laws with determinations made by the Secretary of Commerce. Hence, the side trip.

Liquidation in AD and CVD Cases

There is a fixation with liquidation status in antidumping and countervailing duty practice which begins with the dictates of 19 U.S.C. § 1516a, which provides for judicial review of AD and CVD determinations. This provision places liquidation in a central role. Simply put, liquidation confers a finality to the entry in question. This precept was so embedded in the AD/CVD statutory regime that Congress installed steps in the design of the architecture that would forestall liquidation.

First, after the making of an affirmative preliminary determination in AD/CVD investigations, Congress provided that the liquidation of the entries be suspended. I limit this discussion to the protocol for AD cases that is prescribed by 19 U.S.C. § 1673b (d) (2). Note that a negative final determination in the investigation will terminate the suspension of liquidation.[5] The suspension of liquidation[6] will remain in effect through a final positive determination in the investigation and that suspension on new entries will remain in effect through the issuance of the AD Order and until specific liquidation instructions are issued following later annual administrative reviews.[7]

The starring role of liquidation is again revealed in the statutory grant of judicial review after a final determination has been made by the Commerce Department.[8] In back-to-back subsections of 19 U.S.C. § 1516a (c), Congress first expressly provided in subsection (c) (1) that liquidation by CBP would follow upon a determination by the administering authority (the U.S. Department of Commerce) in accordance with the determination of the Secretary.[9] The process for the assessments of the AD and CVD duties, applying the assessment rates found by Commerce, is set forth in the implementing regulations.[10] At the heart of the process is the transmission by Commerce of liquidation instructions to CBP. Immediately after ordaining liquidation with subsection (c) (1), in the very next subsection ((c) (2)), Congress author-

1 Pursuant to the authority of 19 U.S.C. § 2411 (b) (1)-(2).

2 *In Re Section 301 Cases*, Slip Op. 21-81 (CIT 2021) (split 2-1 decision, with forceful dissenting opinion by Chief Judge Barnett) (hereafter "Slip Op.").

3 In deciding whether to grant or deny a motion for a preliminary injunction, the court must consider the following four factors: 1) that the movant is likely to succeed on the merits at trial; 2) that it will suffer irreparable harm if preliminary relief is not granted; 3) that the balance of the hardship tips in the movant's favor; and 4) that a preliminary injunction will not be contrary to the public interest.

4 This is not a matter of first impression, as USTR actions under Section 301 have been the subject of prior trade court review. *See, e.g., Gilda Indus., Inc. v. United States*, 622 F.3d 1358 (Fed. Cir. 2010) and *Almond Bros. Lumber Co. v. United States*, 721 F.3d 1320 (Fed. Cir. 2013).

5 Title 19 U.S.C. § 1673d (c) (2) (A) in an AD case.

6 Effected by CBP pursuant to the authority of 19 CFR § 159.58

7 Title 19 U.S.C. § § 1675 (a) (1) and (3) (B).

8 Interested parties have the right to contest final determinations made after investigations and subsequent annual reviews. 19 U.S.C. § 1516a (2) (B).

9 In the case of an annual review, the final determination will be the basis for the assessment of the CVD or AD duties (19 U.S.C. § 1675 (a) (2) (C)) and must be promptly followed by liquidation. 19 U.S.C. § 1675 (a) (3) (B).

10 19 CFR § § 351.212 (b) (1) and (2), (c).

11 While the statute expressly provides for preliminary injunctions, and motions for such are regularly granted, a preliminary injunction is an extraordinary interim remedy and not a matter of right. The movant must demonstrate that it is warranted. Although "preliminary injunctions against liquidation have become almost automatic" in antidumping and countervailing duty cases, they are "an extraordinary remedy never awarded as of right." *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed.

ized importers and other interested parties who were seeking judicial review of Commerce determinations to seek and obtain an injunction against liquidation.[11]

> 19 U.S.C. § 1516a
>
> Judicial review in countervailing duty and antidumping duty proceedings
>
> (c) Liquidation of entries
>
> (1) Liquidation in accordance with determination
>
> Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a of the Secretary, the administering authority, or the Commission contested under subsection (a) shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.
>
> (2) Injunctive relief
>
> In the case of a determination described in paragraph (2) of subsection (a) by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

This takes us to two seminal Federal Circuit decisions which actually emit bright lines to guide us in our task.

Zenith and *Shinyei* Decisions

Taken together, the two subsections of this judicial review scheme suggest that, once an entry in an AD/CVD case has been liquidated by CBP, and even if the interested party has sought judicial review of the Commerce determination, there is *no* opportunity for reliquidation. This was central to the holding in *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983), where, as cited in *Shinyei v. United States*, 355 F.3d 1297 (Fed. Cir. 2004) the Federal Circuit reversed the trial court's denial of a motion for a preliminary injunction. The CIT's reasoning in *Zenith* was described by the later *Shinyei* court:

> The court based its decision on two statutory provisions: sections 516A(e) and 516A(c) (1), each of which is excerpted above. This court found that " [t]he statutory scheme has no provision permitting reliquidation in this case or imposition of higher dumping duties after liquidation if Zenith is successful on the merits" and that " [t]he court would be powerless to grant the only effective remedy in response to Zenith's request for review: assessment of correct dumping duties on entries occurring during the '79-'80 review period." [*Zenith*, 710 F.2d at 810.] Accordingly, the court found that Zenith would suffer irreparable harm if liquidation was not enjoined, and reversed the trial court's denial of a preliminary injunction on that basis.

The *Shinyei* court zeroed in on the nature of the underlying action. If there is a strict statutory regime with an outright ban on reliquidation, then the question that cannot be avoided is, "what are the precise metes and bounds of that reliquidation ban?" The *Shinyei* court tackled this head- on, rejecting entirely the Government argument that there was a wider ban on reliquidation, one not limited to Commerce Department determinations in AD/CVD cases:

> Shinyei argues that *Zenith* does not apply to the case at bar because Commerce liquidation instructions are not antidumping duty determinations reviewable under section 516A. Shinyei argues that "the amount of any antidumping duty" for each subject entry is "determined" in the final review results under 19 U.S.C. § 1675(a) (1) (B) and (a) (2) (A), and that "determinations" in the final review results "shall be the basis for" the antidumping duty assessment rates set forth in the subsequently-issued liquidation instructions. *Id.* § 1675(a) (2) (C). Thus, liquidation instructions, the only agency action at issue in this case, are not "determinations" under section 1675, and are thus not reviewable under section 516A. Shinyei argues that *Zenith* is distinguishable from the present case because *Zenith* involved Commerce error in antidumping duty determinations — which are reviewable under section 516A(a), and are therefore subject to the liquidation/injunction provisions of section 516A(c) (1) — while here, the rates set forth in the Amended Review Results are not challenged, but are conceded to be correct.
>
> We agree with Shinyei that *Zenith* is inapplicable to the present case, and that the trial court's "engrafting" of that holding, limited to section 516A actions, onto this case, an action under the APA, constitutes error. As we have recently held, a challenge to Commerce instructions on the ground that they do not correctly implement the published, amended administrative review results, "is not an action defined under section 516A of the Tariff Act." *Consolidated*, 348 F.3d at 1002.[12] Section 516A is limited on its face to the judicial review of "determinations"

Cir. 2014), quoted in *Sumecht N.A., Inc. v. United States*, 923 F.3d 1340, 1347 (Fed. Cir. 2019).

12 In *Consolidated Bearings Co. v. United States*, 348 F.3d (Fed. Cir. 2003) the appellate court noted:"Consolidated, however, did not bring this action to challenge the final results of the administrative review. If that were the case, Commerce's position might have more merit. Consolidated does not object to the final results. Rather Consolidated seeks application of those final results to its entries of AFBs manufactured by FAG. This case involves a challenge to the 1998 instructions, which is not an action defined under section 516A of the Tariff Act. Stated otherwise, in this action, Consolidated challenges the 1998 instructions as a violation of 19 U.S.C. § 1675(a) (2) (C) and as a departure from Commerce's well-established past practice of liquidation. Because Consolidated is not challenging the final results, subsection (c) is not and could not have been a source of jurisdiction for this case."

> in countervailing duty and antidumping duty proceedings. Section 516A enumerates specific "reviewable determinations," 19 U.S.C. § 1516a(a) (2) (B) (2000), and provides the injunction and liquidation remedies discussed at length above. The case at bar is an action under the APA challenging Commerce instructions as in violation of section 1675(a) (2) (C); section 516A simply does not apply. This court's ruling in *Zenith*, to the extent it is properly extended outside the preliminary injunction context to jurisdictional rulings, was explicitly based on the liquidation and injunction provisions in section 516A, and those provisions are inapplicable here. Citation omitted

The Federal Circuit in *Shinyei* concluded:

> An APA challenge to Commerce instructions as failing to follow a Court of International Trade order, as duly set forth in published Amended Review Results, is not mooted by liquidation of entries as a result of those instructions. Because Shinyei has pleaded an APA cause of action and the Court of International Trade has jurisdiction pursuant to section 1581(i)(4), we reverse the jurisdictional dismissal and remand the action for further proceedings on the merits.

The holdings of *Zenith* and *Shinyei* are in harmony and they are clear—where a Commerce Department reviewable determination, as defined in 19 U.S.C. § 1516a (a) (2) (B), is being challenged,[13] reliquidation of an entry is not available as a matter of law or equity. For our purposes, however, and for greater clarity, the better way to express that clipping of the court's wings is to state it thusly, "where a Commerce Department determination, as defined in 19 U.S.C. § 1516a (a) (2) (B), is not being challenged, reliquidation of an entry may be available as a matter of law and equity."

This proposition was expressed in the following terms by the *Shinyei* court, which saw that a ban on reliquidation would collide with the general grant of all powers in law and equity that have been vested in the CIT to fashion relief for party litigants:

> The Court of International Trade has been granted broad remedial powers. *See* 28 U.S.C. § 2643. Specifically, the Court of International Trade's relief statute provides for entry of a money judgment "for or against the United States in any civil action commenced under section 1581 or 1582 of this title," *id.* § 2643(a) (1), and also allows the court to "order *any other form of relief that is appropriate* in a civil action...." *Id.* § 2643(c) (1) (emphasis added). The absence of an express reliquidation provision should not be read as a prohibition of such relief when the statute provides the Court of International Trade with such broad remedial powers.

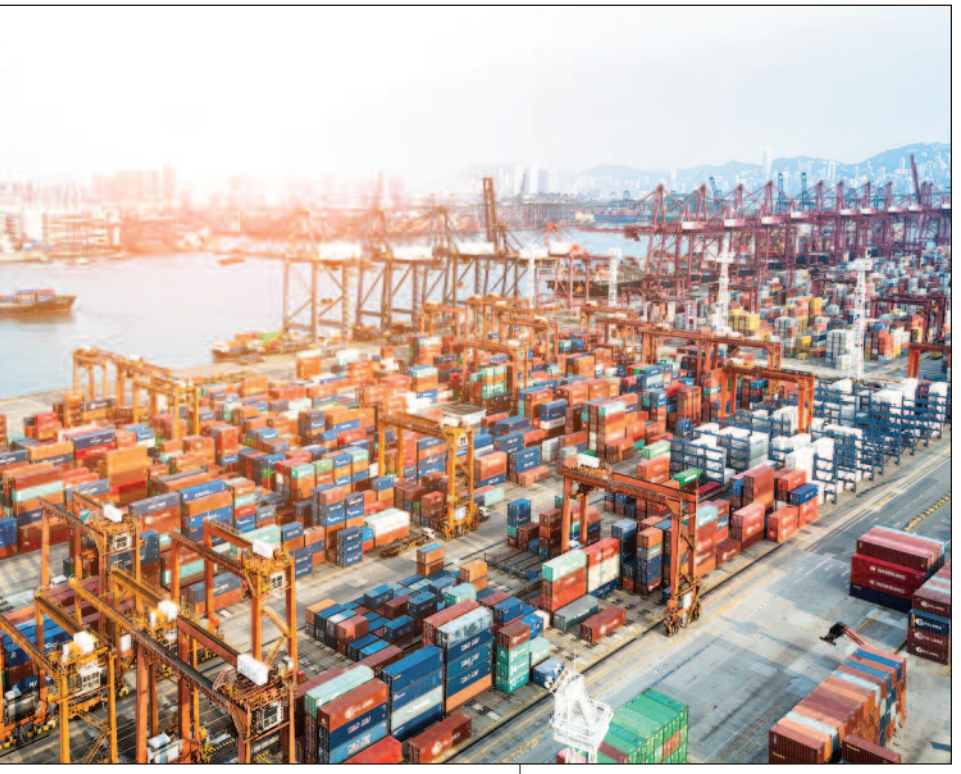
When 19 U.S.C. § 1516a and 28 U.S.C. § 2643 are read *in pari materia*, and giving both statutory provisions equal vigor, one can conclude that Congress has carved out this limited AD/CVD exception to the plenary authority bestowed by Congress on the CIT to grant relief in the form of a reliquidation of entries. In issuing the July 6 PI, the majority in the *Section 301 Cases* panel accepted the argument raised by the plaintiffs. But the CIT's perceived uncertainty about the availability of full equitable relief after a victory at the CIT fades after close scrutiny of the case law.

Why did Plaintiffs Seek a Preliminary Injunction?

Even after a close review of the court papers, a clear answer to this question remains elusive. What is clear is that, for many months, the plaintiffs had sought a commitment by the Government to the principle of the availability of reliquidation if the plaintiffs were victorious. Plaintiffs' Motion for Preliminary Injunction, Court No. 21-00052, Dkt. No. 287 at 6-12; Slip Op. at 3-4. Until an abrupt v*olte-face* in late August, the Government refused to stipulate, i.e., commit to the availability of reliquidation in this Section 1581 (i) case, despite its earlier practice of having done so "unequivocally" and consistently. *Id.* at 8-9. Before that, only in April 2021, after six months of plaintiffs' pushing on the point, did the Government openly reveal its repudiation of past practice, stating, "…The Government maintained that such relief would not be available in the 301 cases, should Plaintiffs ultimately prevail in the merits of their case." Quoted at *Id.*, p. 5. The Government went beyond that, stating that the issue of relief should be resolved only if and when the plaintiffs prevail.

I get the frustration. What I don't get is the drive for a preliminary injunction as a work around solution to the Government's April 2021 refusal to stipulate. The plaintiffs started off the argument for the "protective" preliminary injunction by pointing to "the obvious risk" that they faced irreparable harm without an injunction. This conflicted with the strong precedent of two Federal Circuit decisions that plaintiffs cited, *Shinyei* and *Sumecht N.A., Inc. v. United States*, 923 F.3d 1340, 1347 (Fed. Cir. 2019) for the authority of the trial court to order the Government to reliquidate the affected entries. *Id.* at 6. The plaintiffs then proceeded to invoke other strong authority for the principle that the CIT has the authority to grant plenary relief, including a reliquidation and a refund of duties, this from the CIT itself, in *Gilda Indus., Inc. v. United States*, 622 F.3d 1358 (Fed. Cir. 2010) in *J. Conrad Ltd. v. United States*, 457 F. Sipp. 3d 1365 (CIT 2020) and *PrimeSource Bldg. Prods., Inc. v. United States*, Slip Op. 21- (CIT 2021).

The plaintiffs' brief then followed the lead of President Truman's famous quip about Washington's two-handed lawyers and argued the contrary case. Plaintiffs proceeded to say that, "despite the foregoing precedent…, the significant uncertainty caused by the Government's litigation position entitles Plaintiffs to a preliminary



injunction as to suspension of liquidation regardless of how the Court resolves the issue concerning relief for liquidated entries." Slip Op. at 9. To be clear, at this point, the Government had not put forth any argument, had not cited to any authority to support their naked assertion that reliquidation would not be available. Full stop. Oh, the Government had also refused to stipulate. Full stop. This, then, was the basis for the plaintiffs' setting out to show a preliminary injunction was the only way to avoid irreparable harm. And perhaps we should observe here that "irreparable harm" means harm that cannot be alleviated, that is, well…not capable of being repaired. There would be certain irreparable harm if a liquidation became final and reliquidation were not available to a party litigant in an AD or CVD case even if that party were to prevail at the trial court. That is the lesson of *Zenith.* But outside that narrow AD/CVD valence system, as is the case here, what is the legal authority for asserting that there is a likelihood[14] that the liquidated entries in this section 1581 (i) case[15] are not amenable to reliquidation?

Plaintiffs answered that proleptic question by referring to two Federal Circuit decisions in which *Shinyei* relief, *i.e.*, reliquidation, was said to be uncertain. First, the underlying action in *American Signature, Inc. v. United States*, 598 F.3d 816, *reh. and reh. en banc den.* (Fed. Cir. 2010), *rev'g Am. Signature, Inc. v. United States*, No. 09-00400 (CIT Oct. 13, 2009), was first filed at the CIT as a Section 1581 (i) case challenging ministerial errors in liquidation instructions in an AD case. The plaintiff had argued at the CIT (Memorandum of Law in Support of Plaintiff's Motion, Court No. 09-00400, Dkt. No. 7-3 at 18):

> Although this case is brought under Section 1581 (i), the considerations that lead this Court to routinely enjoin liquidation pending judicial review apply with equal force in this circumstance. Unless enjoined, ASI's entries will be liquidated… at the rate provided for in the …[erroneous] liquidation instructions and ASI's appeal of those instructions would thus become moot. ASI acknowledges that the Federal Circuit has held that under certain circumstances the Court may order reliquidation of entries where it holds those entries had been liquidated pursuant to unlawful liquidation instructions… Shinyei did not hold, however, that a preliminary injunction against liquidation was not available in an action challenging the lawfulness of liquidation instructions under Section 1581 (i). Rather, the Court merely held that under the specific circumstances presented in that case, where liquidation had already taken place, this Court was not required to dismiss the appeal because authority existed under the Court's general remedial powers to order reliquidation if necessary.

After a review of the briefing at the CIT the logic in plaintiff's argument is hard to follow. It is hard to see how or why a 1581 (i) case should be governed by the rules for § 1581 (c)—*Shinyei* tells us that is a non-starter. It is hard to see how or why an appeal against unlawful liquidation instructions would become moot with liquidation. The opposite conclusion was the precise holding of *Shinyei.* While it is true that *Shinyei* was not concerned with a party seeking a preliminary injunction, the availability of such interim relief will be a function of the familiar four-factor test. Given the availability of *Shinyei* relief to all cases outside 28 U.S.C. § 1581 (c), such as the Administrative Procedure Act claim here, it is hard to see how the circularity here fills the irreparable harm test vacuum.

In any event, on appeal the Federal Circuit paid close attention to the actual dispute in *American Signature*—and so should we. You will recall that the plaintiff had urged, "Although this case is brought under Section 1581 (i), the considerations that lead this Court to routinely enjoin liquidation pending judicial review apply with equal force in this circumstance." In fact, the Federal Circuit held that the appellant was challenging Commerce determinations. *American Signature*, 823-825. That made it an AD case, with judicial review under Section 516A and subject matter jurisdiction at the CIT under Section 1581 (c). See *American Signature, Inc. v. United States,* 710 F. Supp. 2d 1376 (CIT 2010) (granting preliminary injunction after reversal per Federal Circuit di-

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[13] To be clear, reflecting the dual roles of the Commerce Department and the U.S. International Trade Commission (ITC) in AD/CVD cases, the statute includes determinations by the ITC within the purview of reviewable determinations. 19 U.S.C. § 1516a (2) (B).

[14] As the Chief Judge observes in his well-crafted dissent (Slip Op. at 30), the Supreme Court looks to a "likelihood" and not merely a possibility of injury. *Citing to Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

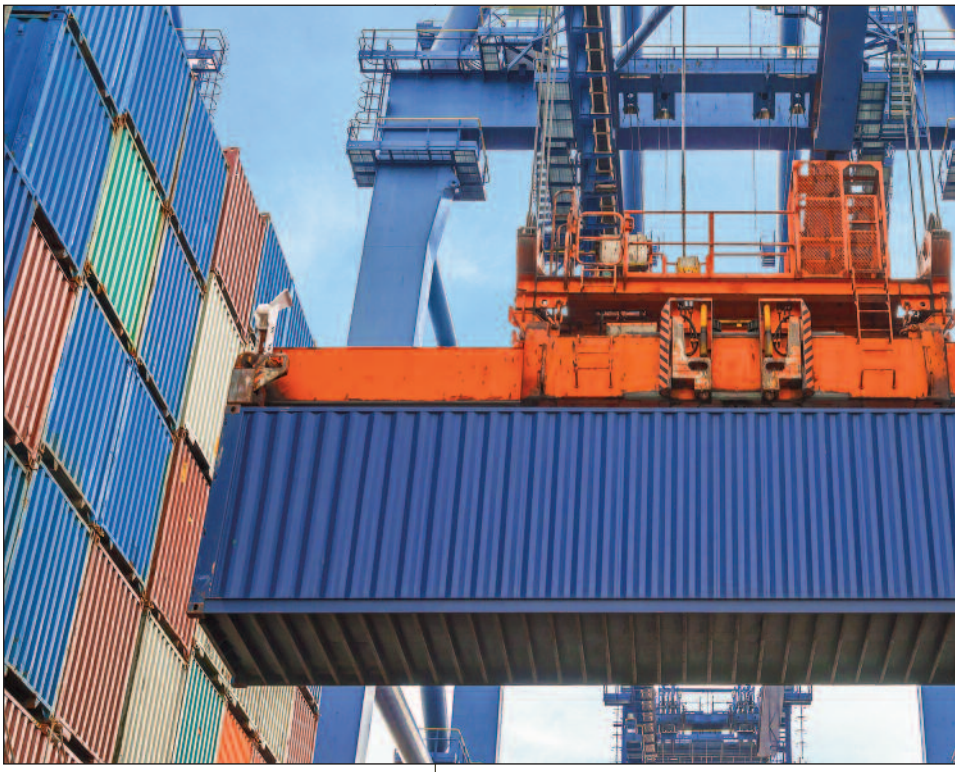
[15] The plaintiffs claimed the CIT had subject matter jurisdiction under the "residual" jurisdiction provision of 18 U.S.C. § 1581 (i). In *In Re Section 301 Cases* the CIT accepted that was correct. Slip Op. at 8. Judicial review of AD and CVD cases lies under 28 U.S.C. § 1581 (c).

rection); *see also Najarian Furniture Co., Inc. v. United States*, F. Supp. 2d 1380 (CIT 2010). As such, a preliminary injunction was perfectly necessary and available, as liquidation would put the plaintiff beyond the reach of *Shinyei* relief. For these reasons, and scrapping any dictum, it is hard for me to see the *American Signature* decision as casting uncertainty on the availability of *Shinyei* relief in a case that is not even remotely tied to the AD statutory construct. It is interesting but facially distinguishable and thus is irrelevant as a matter of law.

To be sure, the review of the *American Signature* cases at the CIT and at the Federal Circuit teaches us that it may be a challenge to wend our way through the marches between AD or CVD proceedings and those implicating the other trade and customs laws. The Section 301 cases do not present the nice challenge of ascertaining whether it is a Commerce determination or an implementation of that determination which is at the center of the controversy as the AD and CVD laws are miles away from here and not in dispute.[16]

That takes us to the *Ugine* case, *Ugine and Alz Belgium v. United States*, 452 3d 1289 (Fed. Cir. 2006), yet another Section 1581 (i) case challenging AD liquidation instructions. The decision merits close study. The plaintiffs cite the case for the proposition that the Federal Circuit had held that it was uncertain whether reliquidation of the entries per *Shinyei* would be available. That broad statement was picked up in the majority opinion (*In Re Section 301 Cases*, Slip Op. 21-81 at 13-14 and n. 9) but it is a gross mischaracterization. The *Ugine* court was concerned with the by-now-familiar question, whether a dispute grounded in the AD statute would be rendered moot through liquidation. This was a narrow question, one that was confined to the AD context and quite irrelevant to a challenge arising under Section 301. Let the *Ugine* court explain:

> Arcelor makes a different argument. In its complaint, Arcelor did not cite section 1675(a) (2) (C), but instead contended that Commerce's instructions for entries imported prior to the fourth administrative review are inconsistent with Commerce's determination in the subsequent fourth administrative review. Arcelor's challenge to Commerce's instructions can thus be distinguished from the challenge at issue in *Shinyei.* The difference between the two cases—and the possibility that *Shinyei* will not be interpreted to encompass the sort of claim at issue here—raises doubt whether Arcelor will have the opportunity to obtain reliquidation once its entries are liquidated, even if it is ultimately found to have a strong case on the merits.
>
> The trial court did not address the question whether *Shinyei* would provide Arcelor with a procedural vehicle for litigating the merits of its claims, and Arcelor did not address that issue in its opening brief. The Government, both in its brief and at oral argument, was unwilling to take a position on that issue. The possibility thus arises that Arcelor could be denied a preliminary injunction to bar liquidation of its entries, only to be met at a later stage with a Government argument that its claim has been rendered moot because *Shinyei* does not permit review of a reliquidation request under the circumstances of this case.



Presumably it is the specific circumstances of that case that call into question whether *Shinyei* relief is available. Many and varied, many and subtle are the factual circumstances and the nature of the claims in the cases which touch upon AD or CVD determinations. That multiplicity of circumstances and resulting claims suggests that there could be a debate whether liquidations of entries subject to an AD or CVD case can be reached by invoking *Shinyei* or whether they are in reality outside the reach of *Shinyei* because, as was the case in *American Signature,* they are

16 This distinction has been relevant to many cases at the CIT. First, Section 516A limits judicial appeal—a day in court—to an interested party challenging a determination in an AD or CVD case only if that party has participated in the proceeding before Commerce and the International Trade Commission. Thus, subject matter jurisdiction at the CIT will not lie under 28 U.S.C. § 1581 (c) for a party challenging a determination that had been a stranger to the administrative proceeding. Second, there will be a question whether the plaintiff is properly in court under 28 U.S.C. § 1581 (a) for a challenge to a determination that a given imported article fell within the scope of an Order. If so, and CBP's role is substantive and not ministerial only, that determination is a protestable event. *See* Neville, "CBP: That's Our Story and We're Sticking To It," 26 JOIT 18 (Nov. 2015).

17 Mandamus is a judicial remedy in the form of an order from a court to any government, subordinate court, corporation, or public authority, to do some specific act which that body is obliged under law to do, and which is in the nature of public duty, and in certain cases one of a statutory duty.

18 Slip Op. 21-108 (CIT 2021).

really challenges to a Commerce determination and thus out-of-bounds for *Shinyei* relief.

The Federal Circuit in *Ugine* wrote that:

> Moreover, as has been made clear by the intervening decision of the Court of International Trade in *Mukand International, Ltd. v. United States*, 412 F. Supp. 2d 1312 (2005), the question of the scope of *Shinyei* is a difficult one, for which the resolution is not obvious. In sum, it is not clear at this juncture that *Shinyei* would provide an adequate vehicle for Arcelor to litigate its claims before the Court of International Trade. Rather than deciding the scope of *Shinyei* in a preliminary injunction context, without a decision by the trial court or briefing by two of the three parties, we conclude that the issue is sufficiently complex that we should resolve it only in a setting in which it has been litigated by the parties and decided by the trial court.

I interpret the court's decision as being grounded in the uncertainty in classifying the true nature of the dispute at the very start of the case, at the preliminary injunction phase. The uncertainty about the availability of *Shinyei* relief is therefore both limited and derivative in nature, firmly rooted in the *Zenith* v. *Shinyei* binary choice, which is itself a function of the question, is this a challenge to an administrative determination in an AD/CVD case? I would agree that assessing the availability of *Shinyei* relief could be a daunting task, and the *Ugine* decision makes perfect sense when one takes care to place it in its proper AD/CVD context. But that uncertainty should not be packed up and transported into a case such as the Section 301 cases under discussion here.

The foregoing analysis reveals the shadow of uncertainty as faint and primarily arising in an AD or CVD case, and the first dispositive question is whether, as a matter of law, liquidation will be accorded the finality of Section 1516a (c) (1)? There are two answers: the *Zenith* decision tells us, "yes" in those cases for which it is relevant authority and the *Shinyei* decision tells us definitively that, as is the case here, absent any uncertainty whether the case is grounded in an AD or CVD determination, the answer is "no." I characterized that uncertainty as being primarily but not exclusively rooted in the question whether a specific case arises under Section 1516a because *Shinyei* instructs us that a grant of reliquidation would be a function of the court's equity powers.

Equitable Considerations

We must acknowledge that there is a second dispositive area where uncertainty could lurk. The second question raised is whether, on the grounds of equity, liquidation will be accorded the finality of Section 1516a (c) (1)? The answer is "probably." It is beyond cavil that equitable relief is discretionary. Where reliquidation is sought on equitable grounds, it might be denied. In yet another AD case, the Court of International Trade and the Federal Circuit have effectively denied the grant of reliquidation on equitable grounds due to a party's lassitude. *Mukand International, Ltd. v. United States,* 502 F.3d 1366 (Fed. Cir. 2007). The Federal Circuit itself mischaracterized this decision by simply stating that: "However, in *Mukand International, Ltd. v. United States*, 502 F.3d 1366 (Fed. Cir. 2007), we upheld a decision of the Court of International Trade to deny *Shinyei* reliquidation because the plaintiff failed to seek an injunction against liquidation from the Court of International Trade before its entries had liquidated." *American Signature,* at 828, n. 16. This is mischievous. When the underlying facts and the administrative history in *Mukand* are examined closely, the decision should be understood as not casting any doubt or raising any uncertainty in a general way about the availability of post-judgment relief in the form of reliquidation and refunds to a winning party in a Section 1581 (i) case. The immediate relief sought there, a writ of mandamus,[17] was denied on equitable grounds. Naturally, one might conclude that a more alert and active party which had diligently pursued its rights and had sought a preliminary injunction and a more seasonable writ, one not stale by a year, might have succeeded and been granted its writ of mandamus directing reliquidation.

This prediction is supported by a close reading of a more recent CIT decision in a Section 232 exclusion case, *Voestalpine USA Corp. and Bilstein Cold Rolled Steel LP v. United States*,[18] with a forceful opinion by Chief Judge Barnett. There, the court declared that: "Plaintiffs' clear lack of diligence stands in contrast to the plaintiff in *Shinyei*," and "Plaintiffs' failure to pursue its available administrative remedies renders reliquidation an inappropriate form of relief, obviating Plaintiffs' claims against mootness." Another way to interpret the *Voestalpine* case is to regard it as simply another in a long line of cases in which the courts have declined to accept subject matter jurisdiction under Section 1581 (i) where a protest could have been filed and jurisdiction under Section 1581 (a) would have ensued. Of course, jurisdiction in the *Section 301 Cases* has been declared to lie under Section 1581 (i) and would not have been available under Section 1581 (a). For that reason, the *Voestalpine* decision is not directly apposite to these Section 301 cases. Of course, it is always and ever true that a grant of interim relief in the form of a preliminary injunction is necessarily dependent upon a sensitive balancing of the equities. That said, it is difficult to envision any negative equitable considerations that might obstruct the grant of *Shinyei* reliquidation to a victorious plaintiff as an element of relief in a final judgment in a trade case properly brought under Sec-

tion 1581 (i), apart from the by-now obvious AD/CVD exception. The plaintiffs in the 301 Cases could not have filed a protest nor sought a writ, so it is a strain to come up with an argument that a complaint filed within the two-year statute of limitations speaks to a slumbering plaintiff. It is not too bold to see the availability of such a grant as probable or indeed a near certainty here. This has certainly already been the case with reliquidation following each of the numerous successful challenges brought under Section 1581 (i) to Government actions taken under Sections 301 and 232.[19]

We should look to the Government's position on reliquidation against this background.

Government Arguments. The Government specifically asked the court not to reach the question of the explicit power of the court to order reliquidation. *See* Slip Op. at 12 and n. 7. Presumably the Government is still hoping to conjure up a line of substantive argument, one beyond the merit of those glimpsed in its opposition brief and which might support its departure from the binding precedent of *Shinyei* which it acknowledges. One of the arguments the Government advanced is that the CIT might have the limited authority to order reliquidation of specific entries whose liquidation had been requested so as to enforce the integrity of its orders. What is implied is that the CIT would not have generally been empowered by Congress to effectuate and enforce its judgment should plaintiffs win. Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction, Court No. 21-00052, Dkt. No. 287 at 40-41, *see generally* 35-42; *see also* dissenting opinion, Slip Op. at 44-49.

Conclusion

This was not intended to be a comprehensive review but rather a quick view into one of the more troubling aspects of the case and a survey of the relevant precedents in play for any focused inquiry. After the merits of the legal arguments that the List 3 and List 4A tariffs are invalid, the availability of reliquidation takes second billing in the litigation. After a long delay, the Section 301 cases

are proceeding and the financial implications are staggering. The Government's claims of hundreds of million and perhaps billions of dollars in additional duties at stake are not an exaggeration. Those facts alone, however, do not justify the Government's initial repudiation of past practice (as in stipulating the validity of reliquidation) or of legal precedent. The Government's brief in opposition acknowledged the *Shinyei* precedential authority but it has not proffered any concerted citation of authority for its bold statement that reliquidation is outside of the CIT's reach. Nor have I been able to find any support for this position. I expect that if the CIT follows precedent and makes a faithful reading of the law it will also conclude that the Government position is without merit.

There is a clear line of precedent that supports the notion that *Shinyei* relief continues to be readily available. The authority for any supposed "uncertainty" has been shown to be distinguishable. Cases that arise in the AD or CVD law and which turn on the taxonomy of the judicial review in a close call about Section 1581 (c) jurisdiction are inapposite to Section 301 cases. Lest we forget, since reliquidation may be an equitable remedy, a party seeking reliquidation must be deserving of that remedy. The decision in *Mukand* is a cautionary tale that *Shinyei* relief may be denied on equitable grounds.

For my part, I turn to the Federal Circuit's own ringing endorsement of the CIT's continued broad authority in law and equity: "We certainly, however, do not read *Ugine* and *American Signature* as creating a presumption that, in the preliminary injunction context, *Shinyei* relief is uncertain for purposes of irreparable harm in § 1581(i) actions because such a presumption runs counter to *Shinyei's* holding that the CIT has 'broad remedial powers,' including the ability to order reliquidation." 355 F.3d at 1312. *Sumecht, NA v. United States,* 923 F.3d 1340, 1348 (Fed. Cir. 2019) (quoting *Shinyei*).

And I close with my answer to the question, "After considering all of the foregoing, even in the face of Government intransigence, it was not necessary but, in hindsight only, it was prudent to have sought an injunction against liquidation…in one narrow respect." The filing of the motion for the PI led to the initial PI as embodied in the July 6 Order. The terms of that initial Order triggered the need for a CBP-designed and managed repository. The practical challenges in that task then led to nearly two months' wrangling and the Government finally agreed to a limited stipulation. This, then, was the practical result of the effort to secure the PI. This stipulation could not have been the plaintiffs' intended result, however, because it was only the specific repository burden of the July 6 Order which imposed the burden on CBP, and such a repository had not been sought by the plaintiffs' proposed order and, frankly, could not have been foreseen by the parties. *See* Plaintiffs' Motion at 17-18. Still, while some entries are obviously the subject of the Government's stipulation, other entries are outside the scope of the September 8 Order. In the event of a plaintiffs' victory on the merits, the issue of reliquidation of those untouched entries awaits. Perhaps the foregoing survey, fully as much as Chief Judge Barnett's dissent, will assist in guiding the necessary legal analysis through the ambient lights and shadows. ●

[19] Section 232 of the Trade Expansion Act of 1962 is codified at 19 U.S.C. § 1862. This is the trade law that sanctions trade restrictions or duty increases against foreign products whose continued imports pose a national security risk.