

COURT OF INTERNATIONAL TRADE DECISIONS DURING 2010 UNDER 28 U.S.C. § 1581(i) RESIDUAL JURISDICTION

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CIT decisions under its § 1581(i) residual jurisdiction during 2010, as in past years, are noteworthy for presenting particularly arcane legal issues. One group of cases addresses the availability of judicial review under residual jurisdiction, encountering new factual patterns and requiring probing analysis of complex statutory frameworks. Other cases under the court's residual jurisdiction reach the merits, but remain arcane because they arise in obscure corners of customs and international trade law. In 2010 these decisions on the merits address issues in customs bond law and the liquidation of antidumping entries. In its most noteworthy residual jurisdiction case during the year, the CIT held that it possesses supplemental jurisdiction to hear a private plaintiff's claims against private defendants, as long as those claims are within the same case or controversy as the plaintiff's claims against the government.

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I. INTRODUCTION

The residual jurisdiction of the United States Court of International Trade (CIT) under § 1581(i) of title 28, U.S. Code, is “one of those receptacles for old and curious things which seem to crouch in odd corners of this town and to hide their musty treasures from the public in jealousy and mistrust.”¹ What calls to mind the old curiosity shop is that CIT decisions under § 1581(i) jurisdiction during 2010, as in past years, are noteworthy for presenting particularly arcane legal issues.² Some cases address the threshold issue of whether or when residual jurisdiction is available, encountering new factual patterns and requiring probing analysis of complex statutory frameworks and procedural settings. Other cases under the court’s residual jurisdiction reach the merits, but remain arcane because they inevitably arise in obscure corners of customs and international trade law, whereas other CIT jurisdictional grants cover the core of the practice area. Still, the

1. CHARLES DICKENS, *THE OLD CURIOSITY SHOP* 13 (Norman Page ed., Penguin Books 2000) (1841); *cf.* HONOR É DE BALZAC, *LA PEAU DE CHAGRIN* 42 (Gallimard 1974) (1831) (saying in reference to the esoteric merchandise in a Parisian store that “[c]et océan de meubles, d’inventions, de modes, d’œuvres, de ruines, lui composait un poème sans fin.”). The CIT’s § 1581(i) jurisdiction is residual because the statute states that this jurisdiction is “in addition to” the court’s specific jurisdictional grants in subsections (a) through (h) of the section. *See* 28 U.S.C. § 1581(i) (2006). For a judicial example of the term “residual jurisdiction,” see *Thomson Consumer Elec., Inc. v. United States*, 247 F.3d 1210, 1214 (Fed. Cir. 2001) (“Section 1581(i) is known as the residual jurisdiction provision of the Court of International Trade.”).

2. The arcane nature of the CIT’s residual jurisdiction cases is consistent with past experience. For previous articles on § 1581(i) cases in this journal’s annual surveys of the CIT, see Michael J. Coursey, *Developments During 2009 Concerning the U.S. Court of International Trade’s Residual Jurisdiction under 28 U.S.C. § 1581(i)*, 42 GEO. J. INT’L L. 169 (2010); James R. Cannon, Jr., *2008 Year in Review of Decisions Issued by the U.S. Court of International Trade: Clarifying the Scope of § 1581(i)*, 41 GEO. J. INT’L L. 83 (2009); Donald B. Cameron & Brady W. Mills, *28 U.S.C. § 1581(i) Residual Jurisdiction: 2007 Year in Review of Decisions Issued by the U.S. Court of International Trade*, 40 GEO. J. INT’L L. 123 (2008); Jeanne E. Davidson & Zachary D. Hale, *Developments During 2006 Concerning 28 U.S.C. § 1581(i)*, 39 GEO. J. INT’L L. 127 (2007); Richard O. Cunningham & Susan R. Gihring, *Cases Under 28 U.S.C. § 1581(i)*, 38 GEO. J. INT’L L. 137 (2006).

analogy to the old curiosity shop may be imprecise, for CIT decisions under its residual jurisdiction are more likely to be treasures and curiosities of the avant-garde than antiques.

Part I of this article provides an overview of § 1581(i) subject-matter jurisdiction and its purposes. Part II discusses CIT decisions during 2010 on the availability of judicial review in residual jurisdiction cases. One such case considered the allocation of jurisdiction between the CIT and district courts to review an international agreement resolving a dispute with a U.S. trading partner. A number of decisions on availability of review apply the established principle that a plaintiff may not invoke residual jurisdiction where one of the CIT's other jurisdictional grants is also available, unless the administrative remedy leading to the other jurisdictional grant is manifestly inadequate. Other prerequisites to judicial review appear as well, such as the existence of a non-moot case or controversy. Part III of the article addresses decisions in which the CIT finds that it possesses jurisdiction and reaches the merits. In 2010, the two substantive areas addressed in decisions under § 1581(i) jurisdiction were customs bond law and liquidation of entries subject to antidumping and countervailing duties. The decisions include, notably, a case of first impression in which the CIT held that it possesses supplemental jurisdiction to hear a plaintiff's claims against non-government defendants based on a theory of third-party beneficiary contracts. This case represents a fascinating exception to the CIT's usual role as a forum for litigation between the government and private parties.

II. OVERVIEW OF § 1581(i)

Section 1581(i) provides that, in addition to the jurisdictional grants set out in subsections (a) through (h), the CIT has

exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

- (1) revenue from imports or tonnage;
- (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
- (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
- (4) administration and enforcement with respect to the mat-

ters referred to in paragraphs (1)-(3) of this subsection and subsections (a) through (h) of this section.³

In § 1581(i) cases, the CIT conducts general statutory review, applying the scope and standard of review set out in § 706 of the Administrative Procedure Act (APA).⁴ In contrast, subsections (a) through (h) provide the jurisdiction to conduct specific statutory review under particular statutory rights of action.⁵ Section 1581(i) cases are subject to a two-year statute of limitations,⁶ and the court “shall, where appropriate, require the exhaustion of administrative remedies.”⁷

Section 1581(i) residual jurisdiction “serves three distinct purposes.”⁸ First, it gives the CIT jurisdiction to hear customs and international trade cases that are not within any of the court’s specific statutory rights of action corresponding to its jurisdictional grants in subsections (a)-(h) of § 1581.⁹ Second, it allocates jurisdiction between the CIT and federal district courts.¹⁰ “Third, in certain cases, § 1581(i) . . . allows the CIT to assume jurisdiction in cases which are also potentially within one of its jurisdictional grants [in subsections (a) through (h)] corresponding to specific statutory rights of action.”¹¹

The intersection of these three purposes leads to two limitations on subject-matter jurisdiction under § 1581(i). First, to give effect to congressional intention on allocating jurisdiction between the CIT and district courts, courts have ruled that § 1581(i) is strictly limited to cases that are within the four categories set out in paragraphs (1) through

3. 28 U.S.C. § 1581(i). The CIT’s residual jurisdiction is subject to the limitation that the court lacks jurisdiction in cases pertaining to the prohibition on importation of immoral articles. *Id.* § 1581(j) (cross-referencing 19 U.S.C. § 1305). Section 1581(i) does not confer jurisdiction over antidumping or countervailing duty determinations for which statutory rights of action exist and which are reviewable in the Court of International Trade under § 1581(c) (or, if applicable, in a bi-national panel under the North American Free Trade Agreement). *Id.* § 1581(i) (cross-referencing 19 U.S.C. § 1516(a)).

4. *Id.* § 2640(e) (cross-referencing 5 U.S.C. § 706). *See generally* PATRICK C. REED, *THE ROLE OF FEDERAL COURTS IN U.S. CUSTOMS & INTERNATIONAL TRADE LAW* 18-19, 187 (1997) (discussing the distinction between general and specific statutory rights of review); PETER L. STRAUSS, *ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 298-303 (2d ed. 2002) (same).

5. *See* REED, *supra* note 4, at 187.

6. *See* 28 U.S.C. § 2636(i).

7. *Id.* § 2637(d).

8. REED, *supra* note 4, at 187.

9. *Id.*

10. *Id.* at 187-88.

11. *Id.* at 188.

(4) of § 1581(i).¹² For example, in *K Mart Corp. v. Cartier, Inc.*,¹³ the Supreme Court held that district courts and not the CIT had jurisdiction in a lawsuit arising under a statutory prohibition on importation of articles infringing U.S. trademarks.¹⁴ According to the Supreme Court, the import prohibition was neither an “embargo” nor a “quantitative restriction” within the meaning of § 1581(i)(3).¹⁵

Second, in cases that are potentially within one of the CIT’s other jurisdictional grants, case law since 1980 establishes the principle that § 1581(i) residual jurisdiction “may not be invoked when jurisdiction under another subsection of 1581 is or could be available, unless the remedy provided under that other subsection would be manifestly inadequate.”¹⁶ In many cases, therefore, whether the CIT has jurisdiction under § 1581(i) is intertwined with whether the administrative remedy leading to judicial review based on another jurisdictional grant in § 1581 is manifestly inadequate.¹⁷ For example, the Court of Appeals for the Federal Circuit ruled in one case that § 1581(i) jurisdiction is available where the relevant administrative agency, U.S. Customs and Border Protection, lacked the power to grant the relief being sought and, therefore, the administrative remedy of filing a protest leading to jurisdiction under § 1581(a) “would have been an utter futility.”¹⁸

III. AVAILABILITY OF JUDICIAL REVIEW

The preceding overview of § 1581(i) reflected two general limitations on subject-matter jurisdiction under the CIT’s residual jurisdiction. First, the case must be properly in the CIT instead of a district court, because it arises under a federal law described in paragraphs (1) through (4) of subsection (i). The CIT’s one decision in 2010 on this

12. *E.g.*, Coursey, *supra* note 2, at 175; Davidson & Hale, *supra* note 2, at 128.

13. 485 U.S. 176 (1988).

14. *Id.* at 183.

15. *Id.* at 185-88.

16. *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987).

17. *See REED*, *supra* note 4, at 188, 221-36 (reviewing exhaustion of administrative remedies in the CIT).

18. *See Thomson Consumer Elec., Inc. v. United States*, 247 F.3d 1210, 1215 (Fed. Cir. 2001) (explaining that the remedy of filing a customs protest would have been futile because the plaintiff contested the constitutionality of a statute and “Customs is powerless . . . since it cannot rule on the validity of an Act of Congress.”); *cf. United States v. U.S. Shoe Corp.*, 523 U.S. 360, 365 (1998) (ruling that filing a protest is “not pivotal” in a case of an allegedly unconstitutional tax because U.S. Customs and Border Protection performs no active role and merely passively collects the tax payments). In this article, “Customs” refers specifically to U.S. Customs and Border Protection, whereas “customs” is an adjective as in “customs duties” or “customs regulations.”

issue is discussed in part A below. Second, if the case is also potentially within one of the CIT's specific jurisdictional grants, the administrative remedy potentially leading to the specific jurisdictional grant must be manifestly inadequate. This topic is discussed in part B below.

Besides these two limitations on § 1581(i) subject-matter jurisdiction, the usual prerequisites to the availability of judicial review of administrative actions remain applicable in cases brought under the CIT's residual jurisdiction: no preclusion of review, standing by the plaintiff, no defendant immunity, and proper timing (although as noted above timing often merges with subject-matter jurisdiction in § 1581(i) litigation).¹⁹ Part C below discusses two 2010 cases that illustrate contrasting approaches to the proper timing of judicial review under residual jurisdiction, one turning on whether the dispute was ripe for review and the other turning on whether the dispute was moot.

A. Allocation of Jurisdiction between the CIT and District Courts

The only CIT decision in 2010 that considered whether the matter was within the CIT's residual jurisdiction rather than a district court's jurisdiction was *Almond Brothers Lumber Co. v. United States*.²⁰ That decision was not a new case, but a reconsideration of the court's 2009 decision in the case.²¹ The court nevertheless adhered to its ruling that an action by U.S. lumber companies to contest provisions of the 2006 U.S.-Canada Softwood Lumber Agreement (SLA) was not within the CIT's residual jurisdiction because the statute authorizing the SLA was not within any of the categories set out in the four paragraphs of § 1581(i).²²

In 2011, however, the Federal Circuit reversed the CIT's decision and remanded the case for further proceedings, holding that the case was within § 1581(i) subject-matter jurisdiction because the CIT had misinterpreted the statutory authority underlying the SLA.²³ Although this article is intended to be a survey of CIT decisions during the year

19. See generally REED, *supra* note 4, at 199-250 (availability of judicial review in customs and international trade law); STRAUSS, *supra* note 4, at 303-30 (general principles of administrative law on availability of judicial review).

20. (*Almond Bros. II*), 32 I.T.R.D. (BNA) 1359 (Ct. Int'l Trade 2010), *aff'g* (*Almond Bros. I*), 31 I.T.R.D. (BNA) 1493 (Ct. Int'l Trade 2009), *rev'd*, (*Almond Bros. III*), 651 F.3d 1343, 33 I.T.R.D. (BNA) 1161 (Fed. Cir. 2011).

21. See *Almond Bros. II*, 32 I.T.R.D. (BNA) at 1362. See generally Coursey, *supra* note 2, at 181-82 (reviewing *Almond Bros. I*).

22. See *Almond Bros. II*, 32 I.T.R.D. (BNA) at 1365.

23. See *Almond Bros. III*, 33 I.T.R.D. (BNA) at 1166-69.

2010, the Federal Circuit's reversal of the CIT's decision and the likelihood of further proceedings in the CIT on remand make it appropriate for the article to include developments in 2011.

The SLA settled a long dispute between the United States and Canada over U.S. imports of softwood lumber from Canada and, more fundamentally, over whether the Canadian government subsidized the Canadian lumber industry through the regulatory regime for timber harvesting.²⁴ Under the terms of the SLA, the United States revoked existing countervailing duty and antidumping duty orders against softwood lumber from Canada. In exchange, the Canadian government imposed export quotas or export taxes on shipments of softwood lumber to the United States and agreed to distribute \$500 million to U.S. lumber producers who were members of the Coalition for Fair Lumber Imports that had petitioned for and participated in the U.S. investigations of subsidized and dumped softwood lumber imports.

The plaintiffs in *Almond Brothers* were U.S. lumber producers who objected to the SLA because they were not members of the Coalition and, therefore, were not entitled to the money being distributed.²⁵ Plaintiffs argued that the CIT had subject-matter jurisdiction under § 1581(i) because, according to the plaintiffs, the Office of the U.S. Trade Representative (USTR) had negotiated and entered into the SLA under § 301 of the Trade Act of 1974 (19 U.S.C. § 2411).²⁶ Section 301 gives USTR authority to take a variety of actions in response to unfair trading practices of a foreign country, including imposing retaliatory import duties or entering into an agreement to eliminate the unfair practice.²⁷ The plaintiffs argued that USTR's authority to impose retaliatory duties under § 301 brought the case within either clause (2) of § 1581(i) ("tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue") or clause (4) ("administration and enforcement" with respect to matters within the CIT's jurisdiction).²⁸

The CIT dismissed the case for lack of subject-matter jurisdiction under 28 U.S.C. § 1581(i) on the ground that § 301 did not provide the statutory authority for the SLA and, therefore, the action did not arise

24. See *Almond Bros. II*, 32 I.T.R.D. (BNA) at 1360-61.

25. See *id.* at 1360.

26. *Id.*

27. See 19 U.S.C. § 2411(c) (2006).

28. See *Almond Bros. II*, 32 I.T.R.D. (BNA) at 1364-66; *Almond Bros. I*, 31 I.T.R.D. (BNA) 1493, 1496-97 (Ct. Int'l Trade 2009).

out of § 301.²⁹ Instead, it concluded that USTR had negotiated and entered into the SLA under its general statutory authority under § 141 of the Trade Act of 1974 (19 U.S.C. § 2171), which includes developing and coordinating the implementation of U.S. international trade policy.³⁰ On appeal, the Federal Circuit reversed this conclusion and held that § 301 did indeed provide statutory authority for the SLA.³¹ Therefore, the case was properly in the CIT under § 1581(i).

Although the plaintiffs in *Almond Brothers* won the appeal on subject-matter jurisdiction, ultimately it may well be in vain. At the Federal Circuit, the government urged as an alternative basis for affirmance that the case presented a nonjusticiable political question.³² Since the CIT had not addressed this argument, the Federal Circuit “decline[d] to decide this issue in the first instance and leaves the question for the CIT’s consideration on remand.”³³ The government appears to have a strong argument that substance of the settlement of the trade dispute embodied in the SLA is a matter committed to unreviewable agency discretion.³⁴

The Federal Circuit’s approach to *Almond Brothers* appears to be more logical than the CIT’s. It seems odd that a lawsuit challenging provisions of an international agreement such as the SLA that settles U.S. antidumping and countervailing duty proceedings would not be within the CIT’s jurisdiction when the CIT has exclusive jurisdiction for judicial review in antidumping and countervailing duty cases. The

29. *Almond Bros. II*, 32 I.T.R.D. (BNA) at 1364-66.

30. See 19 U.S.C. § 2171(c)(1)(A); *Almond Bros. II*, 32 I.T.R.D. (BNA) at 1366 (discussing the USTR’s authority under 19 U.S.C. § 2171); *Almond Bros. I*, 31 I.T.R.D. (BNA) at 1497-50.

31. See *Almond Brothers III*, 651 F.3d 1343, 33 I.T.R.D. (BNA) 1161, 1166-69 (Fed. Cir. 2011). In the authors’ opinions, an additional flaw in the CIT’s reasoning was that it did not consider whether USTR’s general statutory authority under section 141 of the Trade Act of 1974 would support a lawsuit under the CIT’s residual jurisdiction. The authors believe it would do so, since implementing trade policy, at least by settling trade disputes through agreements such as the SLA, is inextricably related to administration and enforcement of the trade laws. The Federal Circuit declined to address this issue in its decision. *Id.* at 1169.

32. See *id.*

33. *Id.*

34. See *Montgomery Ward & Co. v. Zenith Radio Corp.*, 673 F.2d 1254, 1265 (C.C.P.A. 1982) (holding that the terms of a settlement in an antidumping case are committed to unreviewable agency discretion, except with respect to any procedural requirements), *cert. denied*, 459 U.S. 943 (1982). The government appears to be less likely, however, to prevail on the broader argument that CIT review is precluded totally by the political question doctrine. See *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (holding that the political question doctrine does not bar a court from reviewing whether an international agreement is within the statutory authority of the Executive Branch).

CIT's decision in *Almond Brothers* creates the impression that lawsuits contesting USTR actions are not within the CIT's jurisdiction, but the Federal Circuit's analysis creates a precedent supporting the CIT's exercise of its residual jurisdiction in a future lawsuit contesting USTR's exercise of import-related administration and enforcement authority. Furthermore, the CIT's decision in *Almond Brothers* seems to allow the plaintiffs to transfer the action to district court, but if the case is ultimately dismissed under the political question doctrine, the claim would be nonjusticiable in any court.

B. *The Choice Between Residual Jurisdiction and Other Subsections of § 1581*

The discussion now turns to cases that are potentially within one of the CIT's specific jurisdictional grants, but the plaintiff seeks to invoke residual jurisdiction by claiming that the administrative remedy is manifestly inadequate. These cases may usefully be divided into customs disputes that are potentially within the CIT's customs protest jurisdiction under § 1581(a), and antidumping and countervailing duty cases that are potentially with the CIT's antidumping and countervailing duty jurisdiction under § 1581(c). Subpart 1 below discusses customs protest cases, and subpart 2 discusses antidumping and countervailing duty cases.

1. Customs Litigation

*Hitachi Home Electronics (America), Inc. v. United States*³⁵ offers a complex example of the interaction between subsection (i) residual jurisdiction and subsection (a) jurisdiction to review denied customs protests. It demonstrates how determining the proper jurisdictional basis in the CIT can sometimes require a probing examination of the administrative process.

The case addresses the situation in which U.S. Customs does not issue a decision on a protest within the two-year period set out in the tariff statute, which states that "the appropriate customs officer, within two years from the date a protest was filed . . . shall review and shall

35. 704 F. Supp. 2d 1315 (Ct. Int'l Trade 2010), *aff'd.*, No. 2010-1345, 2011 WL 5120387 (Fed. Cir. Oct. 31, 2011). For a similar discussion of the *Hitachi* case, see Patrick C. Reed, *What Happens When U.S. Customs Does Not Decide a Protest Within Two Years?*, CUSTOMS & INT'L TRADE BAR ASS'N QUARTERLY NEWSLETTER, Spring 2010, at 4, available at http://www.citba.org/documents/CITBA_Spring_2010.pdf.

allow or deny such protest in whole or in part.”³⁶ At the administrative level, Hitachi had filed a series of protests on the classification of plasma flat-panel televisions from Mexico, claiming that the televisions should be eligible for duty-free treatment under NAFTA.³⁷ After two years, Customs had not issued a decision on any of Hitachi’s protests. Hitachi filed a lawsuit in the CIT, offering two alternative theories of jurisdiction.

In its first theory, Hitachi asserted jurisdiction under § 1581(i). Hitachi argued that the statutory language “shall allow or deny” required Customs to act within two years after the protest was filed, either by allowing or denying the protest. Further, according to Hitachi, if Customs did not expressly deny a protest within that time, the protest was “deemed allowed” by operation of law. To substantiate this conclusion, Hitachi cited the 1970 legislative history of the current version of § 1515. Before 1970, Customs was required to act on a protest within ninety days and, if it did not, the protest was deemed denied and automatically referred to the Customs Court. The 1970 amendment increased the time period for action on a protest to two years and ended automatic referrals to the Customs Court. In the bill as introduced, Congress had also considered a provision under which protests would be deemed denied if not acted on within the two-year period, but Congress ultimately did not enact this provision. Hitachi argued that eliminating deemed denial, while enacting the “shall allow or deny” language, meant that Congress intended to provide for deemed approval.

The CIT disagreed. It invoked the principle that “even a statutory deadline using the word ‘shall’ is ‘directory and not mandatory when no restraint is affirmatively imposed on the doing of the act after the time specified and no adverse consequences are imposed for the delay.”³⁸ Here, since “neither the statute nor the regulations specifies any consequence for the failure to allow or deny a protest within the two-year period,” the “time period is not mandatory, and § 1515(a) does not deprive Customs of power to act on the protest after the two-year period.”³⁹ As for Congress’s decision not to provide that protests would be deemed denied if not acted on, the court’s interpretation was that Congress had decided not to establish any consequences

36. 19 U.S.C. § 1515(a) (2006).

37. *See Hitachi*, 704 F. Supp. 2d at 1315-19 (discussing the background of the litigation).

38. *Id.* at 1319 (citing *Canadian Fur Trappers Corp. v. United States*, 691 F. Supp. 364, 367 (Ct. Int’l Trade 1988)).

39. *Id.*

for a failure to act within the stated time period.

The court then ruled that jurisdiction under § 1581(a) would have been available if Hitachi had used the statutory procedure for accelerated disposition of protests under 19 U.S.C. § 1515(b). Under this provision, an importer may file a request for accelerated disposition of a protest, and then if Customs does not decide the protest within 30 days after receiving the request, the protest is deemed denied. According to the CIT, the accelerated disposition procedure meant that the protest remedy under § 1581(a) jurisdiction was not manifestly inadequate and, therefore, Hitachi could not invoke § 1581(a) residual jurisdiction.⁴⁰

Hitachi's second jurisdictional theory rested on § 1581(a), using either of two arguments. One argument was that, if the protest was not deemed allowed when Customs failed to act within two years, it was deemed denied. The court rejected this theory for the same reasons it had rejected the "deemed allowed" argument. The court said again that Congress did not establish any consequences for a failure to act on a protest within that specified time period.

Hitachi's other argument for § 1581(a) jurisdiction relied on *China Diesel Imports Inc. v. United States*.⁴¹ In *China Diesel*, the CIT had assumed jurisdiction where Customs had failed to act on a protest against the exclusion of merchandise within thirty days, as required under a customs regulation governing protests against exclusions. The CIT took jurisdiction in *China Diesel* even though the regulation did not provide that protests would be deemed denied. But in *Hitachi* the CIT distinguished *China Diesel* because the importer in *China Diesel* had suffered the commercial hardship of having its goods excluded, whereas Hitachi only sought a refund of duties it had paid. In addition, the court said that Customs in *China Diesel* had not offered any reason for the delay, but in *Hitachi* it had explained that it needed time to examine not only Hitachi's imports but also those of another importer.

Having found that it lacked jurisdiction either under § 1581(i) or § 1581(a), the court dismissed Hitachi's case for lack of jurisdiction, without prejudice.

Hitachi represents a valiant attempt by an importer and its attorney to redress what they considered systemic delays at the administrative level in adjudication of customs protests. But since the CIT's distinction between directory and mandatory time limits appears to be entrenched

40. *Id.* at 1320.

41. 17 Ct. Int'l Trade 498 (1993).

in case law, it is not surprising that the Federal Circuit ultimately affirmed the CIT's decision. Still, it transforms the statutory language "within two years"⁴² into "when Customs wishes, if ever" and the statutory language "shall allow or deny"⁴³ into "may allow, deny, or withhold action on." Furthermore, as reflected in the term accelerated, the procedure for accelerated disposition of protests was intended to allow importers who prefer the court to cut off the administrative process well before two years. It was not originally intended as a remedy for delays of more than two years in processing protests at the administrative level. Often, importers do not prefer court, but want the just, timely, and inexpensive determination of their protests at the administrative level. They cannot be assured that this will happen under existing law.

The next two cases this survey discusses, *Ford Motor Co. v. United States*⁴⁴ and *Presitex USA Inc. v. United States*,⁴⁵ illustrate attempts to invoke § 1581(i) residual jurisdiction to obtain declaratory judgments resolving the ultimate substantive issue affecting the imported goods. In both cases, the importer unsuccessfully tried to sweep away applicable procedures at the administrative level.⁴⁶ *Ford* and *Presitex* both appear to be clear examples of cases in which the importer could and should have used the remedy of filing appropriate customs protests and then, if necessary, bringing a lawsuit in the CIT under § 1581(a) jurisdiction.

In *Ford Motor Company v. United States*, the plaintiff sought a declaratory judgment that ten reconciliation entries were deemed liquidated by operation of law.⁴⁷ The facts of the case revealed that the plaintiff was bringing a kind of omnibus lawsuit that would deal with multiple entries at different stages of the administrative process.⁴⁸ The court rejected the attempt and ruled that each entry must be treated in accordance with its proper procedural status.⁴⁹

One entry was a "no change" entry on which the importer had already received the refund it was seeking.⁵⁰ After *Ford* belatedly

42. 19 U.S.C. § 1515(a).

43. *Id.*

44. 716 F. Supp. 2d 1302, 1304 (Ct. Int'l Trade 2010), *reconsideration denied*, 751 F. Supp. 2d 1316, 1318 (Ct. Int'l Trade 2010).

45. 674 F. Supp. 2d 1371, 1374 (Ct. Int'l Trade 2010).

46. *See id.* at 1375; *Ford*, 716 F. Supp. 2d at 1308.

47. *Ford*, 716 F. Supp. 2d at 1308.

48. *See id.* at 1306-07.

49. *See id.* at 1309.

50. *Id.* at 1309-10.

admitted receiving the refund, the CIT granted the government's motion to dismiss this entry on the ground that there was no case or controversy.⁵¹

A second group of entries was the subject of a § 1514(a) protest and was the subject of a motion to dismiss on the ground that the two-year statute of limitations found in 28 U.S.C. § 2636(i) barred the claim.⁵² The government further argued that since a protest had been filed, Ford could contest its denial under § 1581(a) and resort to § 1581(i) jurisdiction was improper.⁵³ Two other entries were the subject of the government's motion to dismiss on the ground that their liquidations were properly extended, and therefore Ford's claims were not ripe for judicial decision.⁵⁴ It was further argued that Ford should have protested the deemed liquidations of these entries under § 1514(a) and commenced an action under § 1581(a).⁵⁵ The Court reasoned that since the entries in the second group were the subject of a protest which had by then been denied by Customs, the proper mechanism for challenging Customs' treatment of the entries was to invoke the preferred jurisdictional vehicle of § 1581(a) protest litigation.⁵⁶

With respect to two other entries, the CIT found that one had been liquidated and the second one had been liquidated and was scheduled for reliquidation.⁵⁷ The court opined that "once an entry is liquidated the importer's only remedy is to challenge the denial of the protest the liquidation . . . and challenge the denial of the protest in a § 1581(a) case."⁵⁸ The court dismissed the entries for lack of subject matter jurisdiction.⁵⁹

The final group of entries had a myriad of claims. Insofar as Ford's claims contested the validity of the extension of liquidations, the court found that it had subject matter jurisdiction under § 1581(i).⁶⁰ However, in an exercise of discretion the Court refused to issue the declaratory relief sought.⁶¹ It also declined to exercise jurisdiction since the plaintiff would "be able to obtain meaningful judicial review

51. *Id.*

52. *Id.* at 1308.

53. *Id.*

54. *Id.*

55. *Id.*

56. *See id.* at 1310.

57. *See id.* at 1311.

58. *Id.* (citations omitted).

59. *Id.*

60. *See id.*

61. *Id.* at 1313-14.

over all legitimate legal claims pertaining to these Entries. . . . [O]nce these entries liquidate, that relief will be available to Ford.”⁶² It then dismissed the claims and noted that it was not an adjudication on the merits, thereby preserving the possibility of judicial review of Ford’s claims.⁶³

In *Presitex USA Inc. v. United States*, an importer of apparel from Nicaragua initially entered the goods under a dutiable tariff provision in 2005.⁶⁴ Thereafter, in February 2006, it tried to reclassify the goods under a tariff classification that was eligible for duty-free treatment under the United States-Caribbean Basin Trade Partnership Act (CBTPA).⁶⁵ Customs rejected this attempted reclassification by stating its opinion that the goods were cut and sewn in China.⁶⁶ The importer tried to then protest this decision, but all of its protests were denied as untimely filed.⁶⁷ The importer subsequently submitted a letter to Customs requesting reliquidation and duty-free treatment pursuant to 19 U.S.C. § 1520(d), which allows reliquidation pursuant to a free-trade agreement. Customs returned the letter with an “insufficiency notice.”⁶⁸ Suit was then filed in the CIT invoking the court’s jurisdiction under § 1581(i).⁶⁹ After the lawsuit was filed, the importer requested Customs to grant retroactive application of the Central American-Dominican Republic Free Trade Agreement (CAFTA-DR), asserting that it became effective on January 14, 2009, the date on which the final member country, Costa Rica, was eligible for retroactive duty treatment under the agreement.⁷⁰

The court dismissed the action in its entirety.⁷¹ Although it noted that 19 U.S.C. § 1520(d) permits Customs to refund excessive duties under CAFTA-DR within one year after the date of importation even if a valid protest was not filed, it explained that the refusal to reliquidate was itself a protestable decision.⁷² Thus, the importer was not permitted to file suit under subsection (i) because an alternative avenue to the

62. *Id.* at 1314 (citing U.S. CT. INT’L TRADE R. 41(B)(5)).

63. *See id.*

64. *Presitex USA Inc. v. United States*, 674 F. Supp. 2d 1371, 1373 (Ct. Int’l Trade 2010).

65. *Id.* at 1374.

66. *See id.*

67. *See id.*

68. *Id.* at 1374-75.

69. *Id.* at 1375.

70. *See id.*

71. *Id.* at 1381.

72. *See id.* at 1377.

court existed, namely a protest and jurisdiction under subsection (a).⁷³ Since this remedy was not manifestly inadequate, the importer could not invoke the court's jurisdiction under § 1581(i) to challenge the denial of its 19 U.S.C. § 1520(d) request.⁷⁴ Finally, the court held that the importer's claim for retroactive duty-free treatment under the CAFTA-DR based on the agreement's effective date for Costa Rica was not ripe for judicial review, since Customs had not ruled on this request.⁷⁵

2. Antidumping and Countervailing Duty Litigation

*Nucor Fastener Division v. United States*⁷⁶ provides a relatively straightforward example of a countervailing duty case that was not ripe for judicial review. The case arose from a countervailing duty petition that Nucor, a U.S. manufacturer of steel fasteners, filed against allegedly subsidized imports of steel fasteners from China.⁷⁷ Among other subsidy claims, Nucor claimed that China's alleged currency manipulation constituted a countervailable subsidy.⁷⁸ The Commerce Department decided, however, not to include the alleged currency manipulation when it initiated the investigation of twenty-six other subsidy programs.⁷⁹ Then, in the preliminary injury investigation, the U.S. International Trade Commission (ITC) issued a negative preliminary injury determination and the administrative proceeding against the twenty-six other subsidy programs ended.⁸⁰ Nucor commenced two lawsuits in the Court of International Trade, one challenging the ITC's negative preliminary injury determination under § 1581(c) jurisdiction,⁸¹ and the second challenging Commerce's decision not to initiate an investigation of currency manipulation.⁸² This second lawsuit rested, in the alternative, on § 1581(i) residual jurisdiction or on § 1581(c)

73. *See id.*

74. *See id.* at 1378.

75. *Id.* at 1379-80.

76. 751 F. Supp. 2d 1327, 1328 (Ct. Int'l Trade 2010).

77. *See id.* at 1330-31 (describing the administrative proceedings).

78. *See id.* at 1328.

79. *See id.* at 1330 (citing Certain Standard Steel Fasteners From the People's Republic of China, 74 Fed. Reg. 54,543, 54,546 (Dep't of Commerce Oct. 22, 2009) (CVD initiation)).

80. *See id.* at 1330-31 (citing Certain Standard Steel Fasteners From China and Taiwan 29, USITC Pub. 4109, Inv. Nos. 701-TA472, 731-TA-1171-1172 (Nov. 2009) (prelim. determination)).

81. *Id.* at 1337. *See generally* 28 U.S.C. § 1581(c) (2006). Nucor's lawsuit challenging the ITC determination is not within the topic of this article.

82. *Nucor*, 751 F. Supp. 2d at 1331.

antidumping/countervailing jurisdiction.⁸³

The court dismissed the currency manipulation lawsuit as unripe.⁸⁴ As Nucor's case was presented, § 1581(c) jurisdiction was yet not available because there had been no final Commerce administrative decision. And § 1581(i) residual jurisdiction was not available because § 1581(c) jurisdiction would afford an adequate remedy when and if the administrative proceeding was completed.⁸⁵ The practical implication of the court's decision is that the correct way to challenge the Commerce decision not to initiate an investigation of the currency manipulation claim would be to wait until the Commerce Department reached a final determination in the countervailing duty investigation of the other subsidy programs.⁸⁶ (This way assumed, of course, that the ITC's negative injury would have been reversed, allowing the remainder of the Commerce administrative investigation to go forward.) Commerce's refusal to initiate the requested investigation of currency manipulation would be merged into its final administrative determination. Then Nucor could bring a lawsuit based on § 1581(c) jurisdiction challenging Commerce's final administrative determination, including its contested decision on currency manipulation.

A second case on exhaustion of administrative remedies in antidumping proceedings was much more complex, because the availability of judicial review was intertwined with the substantive law. In *Royal United Corp. v. United States*,⁸⁷ the plaintiff was an importer of merchandise from China subject to antidumping duties. The importer challenged the assessment of antidumping duties at the increased rate determined by the Commerce Department in its most recent administrative review of the current dumping margins, instead of at the previously applicable lower rate.⁸⁸ The importer had not participated in the administrative review, and the Commerce Department had not investigated the dumping margins of the specific Chinese exporters that had shipped the merchandise to the importer.⁸⁹ Therefore, the plaintiff urged that the existing rate should continue in force.⁹⁰

The importer's claim would have been successful in antidumping

83. *Id.*

84. *Id.* at 1333-34.

85. *See, e.g., id.* at 1332 n.3 (explaining proper use if § 1581(i) jurisdiction).

86. *See id.*

87. 714 F. Supp. 2d. 1307 (Ct. Int'l Trade 2010).

88. *See id.* at 1312.

89. *Id.* at 1310-11.

90. *See id.* at 1312.

cases involving most countries, but failed in *Royal United* because of a special rule used in antidumping cases against non-market-economy countries such as China. Under this special rule, all exporters in the country are deemed to be part of a country-wide entity that has the same dumping margin, unless an individual exporter establishes that it qualifies for a separate rate.⁹¹ The two exporters in *Royal United* did not have separate rates and, therefore, were deemed to be part of the PRC entity whose margin was reevaluated and increased in the administrative review.⁹² Under the Commerce Department's practice, this increased rate was applied to merchandise that the plaintiff imported.⁹³

The government moved to dismiss the action for failure to state a claim on which relief may be granted, apparently urging that the special rule for non-market-economy antidumping cases defeated the importer's claim on the merits as a matter of law.⁹⁴ The court, however, used a different analysis and concluded that the case needed to be dismissed for lack of jurisdiction.⁹⁵ In the court's analysis, since the Commerce Department's notice of initiation of the administrative review included a statement that the special rule in question would be applied, the plaintiff's case would require the court to review the results of the administrative review.⁹⁶ Furthermore, since the notice of initiation was published in the Federal Register, it gave the importer constructive notice of the special rule.⁹⁷ Thus, the importer needed to appear as a party in the administrative review if it wished to contest the rule or seek a company-specific rate for the exporters with whom it dealt.⁹⁸

In sum, the court held that the plaintiff's claim could and should have been raised in an action under the court's specific grant of jurisdiction under 28 U.S.C. § 1581(c) to review agency determinations in antidumping cases. And since a plaintiff cannot invoke § 1581(i) residual jurisdiction unless a remedy under one of the court's specific jurisdictional grants is unavailable or manifestly inadequate, the court held that it lacked jurisdiction in *Royal United*.⁹⁹

91. *See id.* at 1310 n.3.

92. *See id.* at 1312 n.8.

93. *Id.* at 1312.

94. *See id.* at 1309 n.1.

95. *See id.* at 1319.

96. *See id.* at 1317.

97. *Id.* (citing *Deseado Int'l, Ltd. v. United States*, 600 F.3d 1377, 1380 (Fed. Cir. 2010)).

98. *See id.* at 1319.

99. *See id.* at 1313.

C. *Timing of Judicial Review: The Issues of Ripeness and Mootness*

Two CIT decisions in 2010 offer instructively contrasting approaches to the prerequisite to judicial review relating to the proper timing of lawsuits.¹⁰⁰ In each case, after the plaintiff filed the case, the government decided not to defend the immediate dispute before the court and confessed judgment against itself. Then, however, the plaintiff wished to continue the litigation to obtain a judicial decision on the underlying legal issue. In both cases, the CIT held that judicial review was not available, at least not yet. In one case, it ruled that any unresolved issues were not yet ripe for judicial review. In the second case, it ruled that the case was moot.

In *Shah Brothers, Inc. v. United States*, an importer of an imported smokeless tobacco product known as gutkha initially brought the action to challenge the denial of protests against the customs duties and federal tobacco excise taxes assessed on five entries of the product.¹⁰¹ The assessment of the tobacco excise taxes was based on a ruling letter of the Alcohol and Tobacco Tax and Trade Bureau (TTB) of the Treasury Department. For imported tobacco products, these excise taxes are assessed at the time of importation.¹⁰² In court, the government confessed judgment with respect to those five entries.¹⁰³ The importer then sought to continue the litigation to obtain a declaratory judgment holding the underlying TTB ruling letter unlawful.¹⁰⁴

In the branch of the case challenging the TTB ruling, the importer invoked 1581(i) jurisdiction. It argued that the contested TTB ruling constituted TTB's "administration and enforcement" of a law providing for "revenue from imports," namely, the excise tax applicable to imported tobacco products, thereby satisfying clauses (2) and (4) of § 1581(i).¹⁰⁵

The CIT found that it disagreed with the plaintiff's argument and therefore dismissed the case for lack of jurisdiction.¹⁰⁶ The court's decision required analysis of the delegation of administrative authority

100. *Shah Bros., Inc. v. United States*, 751 F. Supp. 2d 1303 (Ct. Int'l Trade 2010); *Lizarraga Customs Broker v. Bureau of Customs & Border Prot.*, 32 I.T.R.D (BNA) 2070 (Ct. Int'l Trade 2010).

101. *Shah Bros.*, 751 F. Supp. 2d at 1305-06.

102. *See id.* at 1306-07.

103. *Id.* at 1308.

104. *See id.*

105. *See id.* at 1310.

106. *See id.* at 1314-15.

under the tobacco excise tax law.¹⁰⁷ Ultimately, the CIT held that “it is Customs, not TTB, that both administers and enforces the excise taxes in issue.”¹⁰⁸ The court reasoned that when Customs was transferred from the Treasury Department to the Department of Homeland Security in 2003, the Treasury Department delegated to Customs the authority for “customs revenue functions,” which were defined to include “[a]ssessing and collecting . . . excise taxes . . . due on imported merchandise.”¹⁰⁹ Since Customs administered and enforced the tobacco excise tax on imported products, the importer could challenge any future excise tax assessment by filing a protest and, if it were denied, bringing a lawsuit in the CIT based on § 1581(a) jurisdiction contesting the denial.¹¹⁰ The court found that potential need to file a series of protests against individual shipments was not enough to make the protest remedy manifestly inadequate, so as to sustain the lawsuit based on § 1581(i) jurisdiction.¹¹¹

The issue of mootness was presented in *Lizarraga Customs Broker v. Bureau of Customs and Border Protection*.¹¹² In that case, the plaintiff was a licensed customhouse broker who brought the lawsuit to challenge the suspension of the broker’s entry filer code, a 3-digit identification that the broker needs to file customs entries using the U.S. Customs computer-based automated filing system.¹¹³ The plaintiff alleged that the suspension violated due process of law because it was done without notice or an opportunity for a hearing or written submission.¹¹⁴ The plaintiff requested a preliminary injunction to prevent Customs from suspending or deactivating the filer code while the litigation was pending, followed by a permanent injunction and declaratory judgment.¹¹⁵ The government did not contest jurisdiction under § 1581(i).¹¹⁶ Then, after preliminary proceedings before the court and a remand to develop the administrative record, the government decided not to defend its case on the merits. Therefore, it filed a confession of judgment in which it requested judgment for the plaintiff and agreed not to suspend or deactivate the plaintiff’s entry filer code

107. *See id.* at 1310-12.

108. *Id.* at 1310 (internal quotation marks omitted).

109. *See id.* at 1311 (quoting 6 U.S.C. § 215(1) (2006)).

110. *See id.* at 1313.

111. *See id.* at 1312-13.

112. 32 I.T.R.D (BNA) 2070 (Ct. Int’l Trade 2010).

113. *See id.* at 2070-71.

114. *See id.* at 2072.

115. *Id.* at 2073.

116. *See id.*

for any past fact or event.¹¹⁷

At this juncture, the issue before the court was whether the case was moot or, instead, the legality of the government's action remained in dispute for purposes of the plaintiff's claim for a declaratory judgment.¹¹⁸ The court ruled the defendant's voluntary cessation of a challenged practice is not sufficient to moot a case, since the defendant might repeat the challenged conduct.¹¹⁹ Instead, the test for mootness is that a case is only moot if the allegedly wrongful behavior could not reasonably be expected to recur.¹²⁰ Under this standard, the court held that the dispute before it was moot. The court noted that the defendant's confession of judgment committed it to not suspend or deactivate the plaintiff's filer code based on past events.¹²¹ In addition, during oral argument, the government attorney acknowledged that Customs was required to follow procedures under the Administrative Procedure Act before suspending any broker's entry code.¹²² For these reasons, the court was satisfied that the allegedly wrongful behavior could not reasonably be expected to recur.¹²³

Shah Brothers and *Lizzaraga* reflect that, if the government decides not to contest the lawsuit addressing an individual administrative action, underlying legal issues may be undecided, but judicial resolution of the issues may be precluded because the issues are moot or unripe. The two cases illustrate a defense litigation tactic of confessing judgment on a narrow dispute to avoid a broader adverse judicial decision.

IV. CIT RESIDUAL JURISDICTION CASES REACHING THE MERITS IN 2010

This survey now turns to cases in 2010 in which the CIT adjudicated the merits of litigation heard under its § 1581(i) residual jurisdiction, having found that it possessed subject-matter jurisdiction and that all prerequisites for judicial review were satisfied. Inevitably, the merits of residual jurisdiction cases tend to involve relatively obscure or atypical areas of customs and international trade law. This is because the CIT's specific jurisdictional grants provide the basis for the core areas of customs and international trade litigation, notably § 1581(c) for anti-dumping and countervailing duty judicial review and § 1581(a) for

117. *Id.* at 2073-74.

118. *See id.* at 2074.

119. *See id.*

120. *See id.* (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982)).

121. *See id.* at 2074-75.

122. *See id.* at 2075.

123. *See id.*

customs protest litigation.

Two cases under the CIT's residual jurisdiction in 2010 related to customs bonds. Customs bonds play an important role in import transactions because the law requires all importers to post a bond, guaranteed by a surety company, to secure any potential future liability for increased or additional duties.¹²⁴ In one of the cases decided in 2010, a group of domestic companies sued both the government and private surety companies that had guaranteed bonds because the government had failed to collect large amounts of antidumping duties after the importers of the merchandise failed to pay the duties owed. At the crux of the case was whether the domestic companies were third-party beneficiaries of customs bonds. This litigation produced two lengthy opinions in 2010, which are discussed in part A below. In the second case decided in 2010, a group of importers sued U.S. Customs to challenge the imposition of more onerous bond requirements on the importers. This litigation yielded three opinions in 2010 in the aftermath of an initial decision in 2009. Part B below discusses this litigation.

Another area of the law that represents a continuing substantive area within the CIT's residual jurisdiction involves disputes over liquidation of entries that are subject to antidumping or countervailing duties.¹²⁵ Part C below discusses three cases decided in this area in 2010.

A. *Whether Customs Bonds Have Third-Party Beneficiaries: Sioux Honey*

In *Sioux Honey Association v. United States*,¹²⁶ a coalition of domestic producers of honey, mushrooms, garlic and crawfish sued the United States and a large number of private surety companies engaged in the business of issuing customs bonds. Under the antidumping laws in effect at the time in question, companies that had not previously shipped merchandise to the United States subject to an antidumping duty order (so-called new shippers) were allowed to post a customs bond as security for future payment of antidumping duties, rather than making a cash deposit of estimated duties.¹²⁷

The plaintiffs alleged various violations by the Commerce Depart-

124. See 19 C.F.R. §§ 113.11, 113.62, 141.4 (2011).

125. For surveys of cases in this area in past years, see, for example, Cannon, *supra* note 2, at 89-109; Davidson & Hale, *supra* note 2, at 158-63.

126. (*Sioux Honey I*), 700 F. Supp. 2d 1330, 1334 (Ct. Int'l Trade 2010) (dismissing claims against surety defendants); see also *Sioux Honey Ass'n v. United States (Sioux Honey II)*, 722 F. Supp. 2d 1342, 1347 (Ct. Int'l Trade 2010) (dismissing claims against the United States).

127. See *Sioux Honey I*, 700 F. Supp. 2d at 1335.

ment and Customs affecting the collection of antidumping duties from new shippers, resulting in the failure of Customs to make the full amount of distributions to which the plaintiffs were entitled under the former Continued Dumping and Subsidy Offset Act of 2000 (repealed in 2006).¹²⁸ The problem began because the new shippers failed to pay the increased antidumping duties when they were assessed. Against the defendant surety companies, plaintiffs sought monetary damages and equitable relief on the ground that all surety defendants were negligent when they issued single-transaction customs bonds to importers of the merchandise in issue, or were unjustly enriched by receiving bond premiums from importers who subsequently defaulted.¹²⁹

The CIT issued two separate decisions in the matter. In *Sioux Honey I*, the court limited its decision to the claims against the surety defendants and reserved decision on the claims against the government.¹³⁰ Through the CIT held that it had subject-matter jurisdiction over the surety defendants, it dismissed the claims against them for plaintiff's failure to state a claim upon which relief could be granted.

At the outset, the case presented the novel question of whether the CIT possessed subject-matter jurisdiction over the claims against the private surety companies. The question was not one of subject-matter jurisdiction under § 1581 (i), or indeed under § 1581 at all, since § 1581 is limited to civil actions against the United States, its agencies, and its officers.¹³¹ Nor did the plaintiffs' claims against the sureties fall within the narrow grant of original jurisdiction under 28 U.S.C. § 1583, which gives the CIT jurisdiction over certain claims by private plaintiffs against private defendants.¹³² Rather, the issue was whether the CIT could exercise supplemental jurisdiction over the plaintiffs' claims against the private parties.¹³³ The court held that it lacked jurisdiction under a common law form of supplemental jurisdiction of pendent or ancillary jurisdiction.¹³⁴ Instead, it ruled that it had statutory supplemental jurisdiction over the claims against the surety companies under 28 U.S.C. § 1367(a).¹³⁵ This statute gives district courts supplementary

128. *See id.* at 1334; *see generally* 19 U.S.C. § 1675c (2000) (repealed 2006).

129. *See Sioux Honey I*, 700 F. Supp. 2d at 1334-35.

130. *Id.* at 1338.

131. *Id.* at 1340.

132. *Id.* at 1339. Under 28 U.S.C. § 1583, the CIT has jurisdiction over cross-claims and third-party claims if the claim involves the same imported merchandise and is to recover on a bond or customs duties relating to such merchandise.

133. *See id.* at 1339-42.

134. *See id.* at 1339-40.

135. *See id.* at 1340-45.

jurisdiction over “all other claims that are so related to the claims in the action [within district courts’] original jurisdiction that they form part of the case or controversy under Article III of the United States Constitution.”¹³⁶ Although § 1367 is limited by its terms to district courts, the CIT held that it is nevertheless applicable to the CIT by operation of 28 U.S.C. § 1585, which provides that the CIT “shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.”¹³⁷ In reaching this decision, the court emphasized that plaintiff’s claims against the sureties and the United States arose out of the same case and controversy.¹³⁸

Although the court concluded that it had subject-matter jurisdiction over the claims against the sureties, it then held that the plaintiffs failed to state a claim upon which relief can be granted against those defendants. Therefore, it dismissed all the claims against the surety defendants.¹³⁹ Essentially, the court held that the antidumping statute and regulations, including the Continued Dumping and Subsidy Offset Act, did not change the legal relationship between the parties to the customs bonds, under which the surety companies assume the obligation to U.S. Customs to secure the importers’ obligation for duties. Nothing in the law made U.S. producers third-party beneficiaries of the obligations imposed upon a surety under a customs bond.¹⁴⁰ The principal and surety are jointly liable on a customs bond only to Customs, not a third party, in the event of a default in paying the applicable antidumping duties.¹⁴¹

In *Sioux Honey II*, the CIT dismissed the plaintiffs’ claims against the government. The plaintiffs set out nine separate counts against the government, alleging a series of failures to administer the antidumping laws properly.¹⁴² The alleged administrative inadequacies included failing to liquidate entries in a timely manner, failing to distribute the correct amount of withheld duties under the Continued Dumping and Subsidy Offset Act, failing to demand payment from surety companies under customs bonds, and improperly compromising or writing off uncollected duties.¹⁴³ The CIT held that many of the factual allegations

136. *Id.* at 1345 (citing 28 U.S.C. § 1367(a) (2006)).

137. *Id.* at 1344 (citing 28 U.S.C. § 1585).

138. *See id.* at 1345.

139. *See id.*

140. *See id.* at 1351.

141. *Id.* at 1348.

142. *Sioux Honey II*, 722 F. Supp. 2d 1342, 1349 (Ct. Int’l Trade 2010).

143. *Id.*

pleaded in these counts were too speculative to meet the standard for sufficiency of pleading that the Supreme Court set in *Bell Atlantic Corp. v. Twombly*.¹⁴⁴ Under *Bell Atlantic*, the “[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).”¹⁴⁵ Essentially, the plaintiffs were hoping to conduct discovery to uncover details of the suspected administrative insufficiencies, but the CIT interpreted *Bell Atlantic* to require a plaintiff to have higher threshold of supporting facts before it can obtain discovery.¹⁴⁶ In addition, the CIT held the plaintiffs lacked standing to raise the allegations relating to improper liquidation of duties.¹⁴⁷

B. *Modification of Importers’ Bonding Requirements: National Fisheries Institute*

A different dispute under customs bond law was presented in *National Fisheries Institute, Inc. v. U.S. Bureau of Customs and Border Protection*.¹⁴⁸ In that case, the plaintiffs were a group of U.S. shrimp importers who contested the decision of U.S. Customs to apply a new, more stringent bonding requirement for importers of shrimp subject to antidumping duty liability.¹⁴⁹

Through 2005, Customs used a formula to calculate the amount of the bond required of each importer using a formula in which, essentially, the bond liability was approximately ten percent of the importer’s duty liability in the preceding year.¹⁵⁰ In 2005, Customs adopted a new bonding requirement for importers of shrimp subject to antidumping or countervailing duties. The new formula determined the bond amount based on the current rate of estimated antidumping or counter-

144. *Id.* at 1357, 1358, 1361, 1362 (citing *Bell Atl. Corp. v. Twombly* 550 U.S. 544, 555 (2007)) (dismissing Counts Ten, Eleven, and Fifteen and holding that Counts Twelve and Thirteen, which were otherwise barred, also failed to state a claim).

145. *Id.* at 1350 (quoting *Bell Atlantic*, 550 U.S. at 555).

146. *See id.* at 1366-71.

147. *See id.* at 1357.

148. (*National Fisheries IV*), 714 F. Supp. 2d 1231 (Ct. Int’l Trade 2010) (ordering second remand), *amended determination aff’d*, (*National Fisheries V*), 751 F. Supp. 2d 1318 (Ct. Int’l Trade 2010), and *stay pending appeal denied*, (*National Fisheries VI*), 32 I.T.R.D. (BNA) 2226 (Ct. Int’l Trade 2010). The litigation had produced three decisions during 2009. For consistency with the CIT’s opinions, the three decisions in 2010 are labeled IV, V, and VI. For a discussion of decisions in 2009, notably including the CIT’s first decision remanding the matter to U.S. Customs, *see* Coursey, *supra* note 2, at 204.

149. *National Fisheries IV*, 714 F. Supp. 2d at 1233.

150. *Id.*

vailing duties multiplied by the value of the individual importer's merchandise during the preceding year.¹⁵¹ The new formula gave many importers significantly higher levels of liability on their bonds.¹⁵²

In 2009, the CIT had held that the new bonding requirement was unlawful in that it was arbitrary, capricious, and an abuse of discretion. The court set aside the individual bond sufficiency determinations as contrary to law and remanded the proceedings to Customs for new determinations.¹⁵³

In 2010, the CIT considered Customs' decision after remand. In its first opinion in 2010 the CIT addressed the plaintiffs' request for an order directing Customs to cancel each of plaintiffs' bonds that had a liability limit determined according to the unlawful enhanced bonding requirements, without requiring any superseding bonds.¹⁵⁴ The plaintiffs claimed that Customs exceeded its authority by imposing the ten percent formula on antidumping duty liability in addition to liability for duties, taxes, and fees.¹⁵⁵ Plaintiffs saw Customs' power to establish security beyond that set by Commerce as very limited.¹⁵⁶ The CIT disagreed with the plaintiffs' finding that Customs has the power to consider potential antidumping duty liability when setting amounts for continuous entry bonds. The CIT did not see it as unreasonable that Customs might find that the final antidumping duty might exceed ten percent.¹⁵⁷

The plaintiffs also argued that Customs erred by including in its formula entries that had already been liquidated.¹⁵⁸ In the normal case Customs determines a bond prospectively, and therefore liquidation is not an issue.¹⁵⁹ In this case, however, a significant period of time had passed between the calculation and the end of the relevant bond period and thus some of the entries had already liquidated. While including the liquidated entries might result in a bond amount equal to what would be imposed if the calculation were made prospectively, doing so after the fact "results in an actual level of security that could

151. *Id.* at 1233-34.

152. *See id.* at 1234.

153. *See id.* (citing Nat'l Fisheries Inst., v. U.S. Bureau of Customs & Border Prot. (*National Fisheries II*), 637 F. Supp. 2d 1270, 1304-05 (Ct. Int'l Trade 2009)). Regarding the 2009 decision, see Coursey, *supra* note 2, at 204.

154. *Id.* at 1236.

155. *Id.* at 1238.

156. *See id.*

157. *See id.* at 1238-39.

158. *Id.* at 1239-40.

159. *See id.* at 1240.

exceed substantially the guideline level of 10% . . .”¹⁶⁰ Such a result would not be reasonable.

Last, the CIT addressed the plaintiffs’ arguments that Customs could not change the liability limits for certain of plaintiffs’ bonds that were determined before the enhanced bonding requirement was applied.¹⁶¹ Customs claimed that a review of the matter indicated that the limits of liability *should have been higher*.¹⁶² But the plaintiffs complained that Customs did not consider either any importer’s ability to pay or the liquidation status of any entries covered by the bonds.¹⁶³ In addition to noting the total absence of any explanation for the decision, other than that the amounts should have been higher, the CIT ruled that the modification exceeded the scope of the court’s remand order.¹⁶⁴ Therefore, the CIT remanded the matter to Customs for further modification of its decision.

The CIT considered Customs’ second remand determination in *National Fisheries V*. In that decision, the CIT affirmed Customs’ recalculated bond determination that, as instructed, eliminated amounts that would have imposed liability upon entries that had already liquidated, even though Customs redetermined the bond amounts under protest.¹⁶⁵

The court also granted the plaintiffs permanent injunctive relief cancelling the bonds. Plaintiffs had requested the CIT to set a date by which Customs must cancel the inappropriate bonds.¹⁶⁶ Customs sought an order instructing it to take no action until thirty days from the date on which the judgment became final and conclusive, i.e., after all appeals had been exhausted.¹⁶⁷ The plaintiffs wanted permanent injunctive relief cancelling the bonds and enjoining any further action on them by Customs.¹⁶⁸ The CIT found sufficient facts warranting such equitable relief. Each of the plaintiffs had incurred and would continue to incur adverse effects without the relief requested (i.e., decreased import activity, posting collateral); Customs would still have the security of cash deposits and standard bond formulas and the public

160. *Id.* at 1240.

161. *Id.* at 1241-42.

162. *Id.* at 1241.

163. *Id.* at 1242.

164. *See id.*

165. *National Fisheries V*, 751 F. Supp. 2d 1318, 1322 (Ct. Int’l Trade 2010).

166. *Id.* at 1323.

167. *Id.* at 1322-23.

168. *See id.* at 1323.

interest was not served by the discriminatory, arbitrary, and capricious continuation of an onerous and unlawful requirement against a single group of importers.¹⁶⁹ The CIT reached this holding even though doing so was likely to render any appeal by the government moot. The CIT did give Customs sixty days from entry of the judgment to implement the Amended Second Remand Redetermination so that Customs could pursue a stay of judgment under CIT Rule 62(c).¹⁷⁰

When Customs subsequently moved for a stay of judgment, the CIT denied it in *National Fisheries Institute VI*.¹⁷¹ The CIT considered the four factors regarding stays of judgments pending appeals: the likelihood of success; the likelihood of irreparable hardship; the possibility of injury to other parties, and the public interest.¹⁷² The CIT rejected once again the defendant's argument that its prior decision should not have been based on the arbitrary and capricious standard of review and affirmed its decision that Customs did not act reasonably.¹⁷³ Concerning the possible irreparable injury to the government caused by the effective mooting of any appeal, the CIT found that this harm was not outweighed by the continued harm to the plaintiffs.¹⁷⁴ Once again, the court found that the public interest would not be served by the continued unlawful requirement against a single group of importers.¹⁷⁵

C. *Liquidation Issues in Antidumping and Countervailing Duty Cases*

Disputes over liquidation of entries that are subject to antidumping or countervailing duties represent a continuing substantive area within the CIT's residual jurisdiction.¹⁷⁶ Three cases in 2010 illustrate problems that have arisen in this area: an erroneous computer-generated notice of premature deemed liquidation; a governmental failure to liquidate within the six-month time period required by statute; and the issuance of an amended administrative decision after the six-month time period has started.

The problems reflect gaps between the theory and the reality of duty assessment in antidumping and countervailing duty cases. In theory,

169. *Id.* at 1325.

170. *Id.* at 1326.

171. *National Fisheries VI*, 32 I.T.R.D. (BNA) 2226, 2227 (Ct. Int'l Trade 2010).

172. *Id.*

173. *See id.* at 2228.

174. *See id.* at 2228-29.

175. *Id.* at 2229.

176. *See supra* note 124 and accompanying text.

when the importer deposits estimated duties at the time of entry, liquidation of the entry is suspended by statute during the administrative proceedings.¹⁷⁷ If judicial review occurs, the court may enjoin liquidation during judicial review.¹⁷⁸ At the conclusion of the proceedings including judicial review, the statute requires the entries to be liquidated within six months after Customs receives notice of the results of the administrative determination or, if applicable, judicial decision.¹⁷⁹ If judicial review has sustained a plaintiff's challenge to the administrative determination, any entries whose liquidation has been enjoined are required by statute to be liquidated in accordance with the court's decision.¹⁸⁰ If an antidumping or countervailing duty entry is not liquidated within six months after notice of Commerce's decision or the court's decision (if judicial review occurred), the statute provides that entry is deemed liquidated at the rate and amount of estimated duties deposited at the time of entry.¹⁸¹ In addition, where antidumping or countervailing duties are not involved, entries are deemed liquidated as entered one year after entry (subject to certain exceptions under which the period may be extended for up to four years).¹⁸² While the preceding statements explain what is supposed to happen under the law, in reality a number of problems have arisen.

One case in which a problem occurred involved an erroneous notice of deemed liquidation. In that case, *Alden Leeds, Inc. v. United States*,¹⁸³ U.S. Customs posted a notice stating that twelve entries of Alden's goods had been deemed liquidated, but it posted the notice at a time when liquidation was suspended by statute because the administrative proceedings were still pending.¹⁸⁴ Subsequently, the Commerce Department issued the final results of the antidumping administrative review, finding that the rate of duties owed was much lower than the estimated duties Alden had deposited at the time of entry.¹⁸⁵ U.S. Customs, however, refused to refund the difference because the entries had been

177. See 19 U.S.C. § 1673b(d)(2) (2006) (initial suspension of liquidation in investigation); *id.* § 1673e (providing for issuance of antidumping order requiring deposit of estimated duties pending liquidation); *id.* § 1675(a)(1) (providing for antidumping duty assessment after period administrative review); see also 19 C.F.R. §§ 351.205, 351.210-12 (2011).

178. 19 U.S.C. § 1516a(c)(2).

179. *Id.* § 1504(d).

180. *Id.* § 1516a(e).

181. *Id.* § 1504(d).

182. *Id.* § 1504(a).

183. 721 F. Supp. 2d 1322 (Ct. Int'l Trade 2010).

184. *Id.* at 1326.

185. *Id.* at 1326-27.

deemed liquidated and Alden had not filed a timely protest challenging the deemed liquidation.¹⁸⁶

Alden commenced a lawsuit under § 1581(i) jurisdiction.¹⁸⁷ It sought a judgment ordering U.S. Customs to refund the difference between the estimated duties and the final duties based on the administrative review.¹⁸⁸ The government moved to dismiss the case for lack of jurisdiction because Alden had failed to file a timely protest against the deemed liquidation. According to the government, § 1581(i) was not available because § 1581(a) would have afforded an adequate remedy if the importer had filed a timely protest.¹⁸⁹

The court held in favor of the importer, relying on a 1997 decision with almost identical facts, *LG Electronics U.S.A., Inc. v. United States*.¹⁹⁰ In both *LG Electronics* and *Alden*, the key point was that the entries were not and could not have been deemed liquidated. Deemed liquidation occurs by operation of law except in cases where liquidation was suspended. In *LG Electronics* and *Alden* liquidation was suspended, so that liquidation by operation of law was impossible.¹⁹¹ Therefore, U.S. Customs' notices of deemed liquidation were erroneous computer-generated notices that did not conform to reality. *LG Electronics* and *Alden* both hold that where an entry is not really deemed liquidated as provided by the statute, an erroneous computer-generated liquidation notice does not trigger the limitations period for filing a protest.¹⁹²

A second problematic case involved an erroneous government failure to meet the six-month deadline for liquidating entries. That case, *Ames True Temper v. United States*,¹⁹³ arose from an antidumping case involving hand tools from China. In the underlying administrative proceedings, the Commerce Department's administrative review gave several foreign producers/exporters substantially higher rates of antidumping duties than had been deposited at the time of entry.¹⁹⁴ The producers/exporters commenced judicial review in a case entitled *Shandong Huarong Machinery Co. v. United States*,¹⁹⁵ and obtained a

186. *Id.* at 1327.

187. *Id.* at 1327-28.

188. *See id.* at 1327.

189. *See id.* at 1327-28.

190. *See id.* at 1331 (citing *LG Elecs. U.S.A., Inc. v. United States*, 21 Ct. Int'l Trade 1421, 1421-23, 1429 (1997)).

191. *See id.*

192. *See id.*

193. 700 F. Supp. 2d 1352 (Ct. Int'l Trade 2010).

194. *See id.* at 1355.

195. 30 I.T.R.D. (BNA) 2436 (Ct. Int'l Trade 2008).

preliminary injunction against liquidation of their entries pending a final court decision.¹⁹⁶ The injunction order did not take effect until it was served on U.S. Customs officials, and the producers/exporters delayed serving it for more than six months. In the meantime, the entries of these companies' products were deemed liquidated after six months at the much lower rate for estimated duties, instead of the rate Commerce determined in its administrative review.¹⁹⁷ This happened because U.S. Customs did not liquidate the entries in accordance with Commerce's administrative review, as they should have done in the absence of being served with the injunction against liquidation. But after the expiration of six months, since the entries were deemed liquidated and the law contains no procedure for reliquidating entries in this kind of situation, the court in *Shandong* dismissed the action as moot.¹⁹⁸

The interested domestic manufacturer, Ames True Temper, had been an intervenor in *Shandong* and had objected in vain to dismissal of the lawsuit. Afterward Ames commenced a new action based on § 1581(i) jurisdiction seeking an order directing U.S. Customs to reliquidate the entries in accordance with Commerce's final determination.¹⁹⁹

The court dismissed the case for two related reasons, both based on established precedent. First, Ames's lawsuit was moot because the subject entries were deemed liquidated and the law contains no mechanism for setting aside such a liquidation.²⁰⁰ Second, domestic interested parties such as Ames lack standing to challenge a deemed liquidation of importers' entries.²⁰¹

A third problem case involved starting and restarting the six-month clock for liquidation of entries. In *American Furniture Manufacturers Committee for Legal Trade v. United States*,²⁰² an antidumping petitioner brought an action to forestall the potential deemed liquidation after six months.²⁰³ Unlike the typical case, Commerce had discovered an

196. *Ames True Temper*, 700 F. Supp. 2d at 1355.

197. *Id.*

198. *See id.* at 1357.

199. *See id.* at 1355.

200. *Id.* at 1357 (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983), and its progeny, *Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187, 1191 (Fed. Cir. 2009), and *SKF USA, Inc. v. United States*, 512 F.3d 1326, 1329 (Fed. Cir. 2008)).

201. *Id.* at 1359-60 (citing *Cemex, S.A. v. United States*, 384 F.3d 1314 (Fed. Cir. 2004)); *see also supra* note 147 (discussing dismissal of certain claims in *Sioux Honey II* based on domestic industry's lack of standing to challenge liquidations).

202. 683 F. Supp. 2d 1330 (Ct. Int'l Trade 2010).

203. *Id.* at 1331.

arithmetic error in the results of an antidumping administrative review issued in August 2009. Therefore, it issued an amended determination in October 2009.²⁰⁴ The petitioner was concerned that the entries would be deemed liquidated as entered in February 2010, six months after the original August 2009 determination, before Customs could implement the amended October 2009 determination. The petitioner, as plaintiff in the CIT, therefore sought a preliminary injunction to prevent deemed liquidation from occurring in February 2010.²⁰⁵

The court held, however, that the issuance of amended results restarts the six-month period allowed for liquidation.²⁰⁶ As a result, the plaintiff was not at risk of seeing the entries deemed liquidated as entered in February 2010, and the date for deemed liquidation would move to April 2010.²⁰⁷ The court denied the requested preliminary injunction and dismissed the case, while noting that “[i]n losing its battle, however, Plaintiff in fact wins its war.”²⁰⁸

V. CONCLUSION: A VISIT TO THE OLD CURIOSITY SHOP

The introduction to this article suggested that § 1581(i) residual jurisdiction is the CIT’s old curiosity shop, a receptacle for odd and curious legal issues, although more often avant-garde than antique.²⁰⁹

The most significant residual jurisdiction decision during 2010 was *Sioux Honey*, not because of its interpretation of § 1581(i) itself, but its holding that the CIT can exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) to hear a private plaintiff’s claims against private defendants, as long as those claims are within the same case or controversy as the plaintiff’s claims against the government. This holding serves well the mission of the CIT as the court exercising specialized jurisdiction under the customs and international trade laws. Otherwise, the *Sioux Honey* litigation would have had to be bifurcated between the claims against the government heard in the CIT and the claims against the private parties heard in federal district court and possibly state court.

Among other § 1581(i) cases decided during 2010, a number illustrate procedural prerequisites to judicial review. The Federal Circuit

204. *Id.* at 1332.

205. *Id.*

206. *Id.* at 1333.

207. *Id.* at 1333-34.

208. *Id.* at 1331.

209. *See supra* note 1 and accompanying text.

properly reversed the CIT's interpretation of its subject-matter jurisdiction in *Almond Brothers* in 2011. Now the litigation will continue and the CIT will consider whether the challenged Softwood Lumber Agreement constitutes an unreviewable administrative action. *Hitachi* addresses the important issue of whether the ostensible period of two years for deciding protests is illusory. Cases such as *Presitex*, *Ford*, and *Nucor* all illustrate premature attempts to obtain judicial decisions on the merits of the dispute, since the plaintiffs uniformly failed to exhaust the available administrative remedies. *Royal United*, although treated as a failure to exhaust administrative remedies, is as a practical matter a decision on the merits under the rule governing all other exporters in non-market-economy antidumping cases. In *Shah Brothers* and *Lizzaraga*, after the government conceded on the immediate dispute, judicial review was no longer available, either because the dispute was moot as in *Lizzaraga* or because any undecided issues were not yet ripe for review in *Shah Brothers*.

Where cases reach the merits, the substantive issues involve arcane corners of customs and international trade law, such as the different aspects of customs bond law in *Sioux Honey* and *National Fisheries Institute* or problems with liquidation in antidumping and countervailing duty cases in *Alden*, *Ames*, and *American Furniture*.