The Intersection of the CIT with the Agencies, the CAFC and the International Tribunals:

CIT in the Middle: Traditional Customs Jurisdiction

"*If you get caught between the moon and New York City, The best that you can do is……*"

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I. Introductory Statement.

All trial courts are "in the middle" of something: *Before trial courts get involved*, parties have concluded they have failed to resolve a dispute --- perhaps because they didn't try to avoid court, but more often because they tried and failed. *After trial courts make decisions* to resolve those disputes, there is virtually always at least one opportunity to appeal to another court… an opportunity which always exists in traditional customs litigation. 28 U.S.C. §1295 (a)(5). Customs issues most often arrive in the U.S. Court of International Trade (CIT) after completion of a robust, time-consuming and costly administrative process, and are filed with the recognition that there is a right to appeal beyond the CIT to an appellate court that has the final word, or the authority to remand for more litigation. The positioning of the Court in the middle of that process poses significant challenges to it and to the parties invoking its jurisdiction.

The scope of "traditional customs litigation" in this paper is confined to the most traditional provisions of the Court's jurisdiction in 28 U.S.C. §1581(a) -– review of decisions such as customs valuation, tariff classification, admissibility country-or-origin marking and similar technical decisions on individual entries of imported goods; 28 U.S.C. §1582 -- the range of "collection actions" available to the government to collect revenue, penalties, et al; and to some degree, to the natural expansion of those traditional issues under 28 U.S.C. §1581(i) -- the "residual jurisdiction" provisions.

Examination of these areas of jurisdiction will focus primarily on situations in which the CIT issued a decision which was appealed but resulted in a remand back to the CIT for further proceedings. It is believed that neither the parties nor the court commence a "traditional customs" case with the ambition of achieving a remand, so the presumably undesired additional litigation involved in remand cases can, upon examination, be expected to sharpen the focus on concerns and issues regarding the role of the "Court in the Middle".

II. Between What? Customs Administrative Process and CAFC Review.

The role of the CIT as the trial court for "traditional customs litigation" has evolved in my professional lifetime from a system in which an Article III federal trial court (the Customs Court) typically sat in the middle of a presumptively-correct, undocumented, port-driven administrative decision-making process -- which it tried *de novo* and without the benefit of formal pleadings and discovery -- and an appellate decision issued by an appeals Court which was obligated to review every trial court decision which the losing party at trial elected to appeal. The Customs Court had its own complications, including a trial court, two-step "appellate" process: litigation challenging "appraisement" decisions would be decided first by a single judge, could be appealed as of right to a panel of three judges, and could then be appealed to the federal appellate court. See generally, Act of July 14, 1956, Ch 589, 70 Stat. 532.

The Customs Court process was a great improvement over the earlier version of traditional customs litigation: a system in which a statutory body (the Board of General Appraisers) sat in the middle of undocumented valuation decisions by customs appraisement officials at ports of entry, or subsequent tariff classification decisions issued by powerful life-time political appointees ("Collectors") at ports of entry, and appellate decisions issued by whichever federal Circuit Court had jurisdiction over the particular port of entry.

Today customs litigation is lodged in an Article III court (CIT) which sits between an administrative agency which has a more robust system for issuing decisions and responding to administrative challenges. Customs Court Act of 1980 (Pub. L. No 96-417, 94 Stat. 1727).

The Customs Administrative Process. The "traditional customs" decisions reviewed by the CIT arise from administrative processes which have become increasingly elaborate over the years. Regarding the most traditional customs dispute areas (tariff classification and valuation), U.S. Customs & Border Protection ("CBP" or "Customs") has built a centralized decision-making office which issues decisions, upon request, in advance of importations or internally after entry and before liquidation. 19 C.F.R. Part 177**.** It decides through a public process providing for publication, comments and republication, whether to revoke or modify those rulings. 19 U.S.C. §1625(c). Protests against its actual liquidation decisions on each entry, are considered by port officials or by headquarters officials where protestants request further review. 19 C.F.R. §174. Liquidation decisions are made based upon an informal administrative process in which Customs may request information or provide notice of an action "proposed" or "taken." 19 C.F.R. §152.2. However, none of these administrative procedures produces an evidentiary record or an administrative procedure that a Court might evaluate against a standard of substantial evidence, of as a action which is arbitrary, capricious or an abuse of discretion.

The government does arrive in the Court on strong ground, as its "traditional customs decisions" are entitled to a presumption of correctness in court which will sustain its decision in the absence of evidence overcoming the presumption, or its decision must be given an additional level of respect by the Court if based upon an administrative ruling, or must be accorded deference if based upon an administrative regulation. United States v. Mead Corp., 533 U.S. 218 (2001) (holding customs rulings are entitled to respect according to their persuasiveness, i.e., *Skidmore* deference); United States v. Haggar Apparel Co., 526 U.S. 380 (1999) (holding customs regulations are entitled to *Chevron* deference.

CAFC Review. Today's appellate review by the U.S. Court of Appeals for the Federal Circuit ("CAFC") is essentially unchanged since 1910, when its predecessor court was created to eliminate delayed, inconsistent decision-making prior to that date. The situation at that time, and the solution, were described in 1941 by William Futrell in his book "**The History of American Customs Jurisprudence**" in the narrative (at pages 177-79). According to Futrell, the first specialized court to hear appeals from decisions of a customs trial court became operational 100

years ago (in 1910) having been created by the Tariff Act of 1909 (36 Stat. L. 106). Prior to its adoption, Customs decisions (primarily tariff classification and appraisement) were heard by the Board of General Appraisers (subsequently renamed the "Customs Court"). The Board's decisions could be appealed first to the federal district courts (called circuit courts at the time), then the Circuit Court of Appeals of the appropriate circuit, and then by certiorari to the Supreme Court.

The specialized Customs Appellate Court was reportedly created because:

(1) Attorneys would essentially retry their cases in the Circuit courts, presenting new evidence in the Circuit Courts, achieving essentially a trial *de novo* whenever the presentation of less-than-all evidence to the Board didn't result in the desired decision;

(2) The Circuit Courts of Appeal produced conflicting decisions, requiring more cases to be reviewed by the Supreme Court

(3) Decisions by the district (i.e., circuit courts) averaged four to five years due to the overload of cases in those courts.

In 1941, decisions by the U.S. Court of Customs Appeals, according to Futrell, were issued on an average of seven months, sharply reducing the old time frames of four to five years.

The standard of review applied by the CAFC makes the CIT decisions on matters of law highly vulnerable to reversal on appeal as they are subject to *de novo* review, whereas its determination of the facts, whether based upon a bench trial or motions and affidavits, are disturbed or reversed only if clearly erroneous. Volkswagen of America, Inc. v. United States, 540 F.3d 1324 (Fed. Cir. 2008) and Saab Cars USA, Inc. v. United States, 434 F.3d 1359 (Fed Cir. 2006).

III. The Best that You Can Do When Caught between CBP and the Court of Appeals.

The prototype situation in which the CIT stands in the middle of the administrative agencies and the appellate court is the all-to-often-occurring situation in which the issue is whether the CIT has jurisdiction to hear the case under 28 U.S.C. §1581: the Plaintiff (i.e., importer/exporter/carrier/ surety/other private party) files a summons to challenge a customs action and customs moves to dismiss for lack of jurisdiction. The CIT decision to dismiss or accept jurisdiction is a matter of law which both it and the CAFC review *de novo*. Any litigant serious about its position on the merits will want an appellate decision (assuming that cases are brought where the stakes are sufficiently high in dollars or precedential value to justify the cost of litigation in both courts).

The nature of the issues is illustrated by the recent decision in Hitachi Home Electronics v. United States, 704 F. Supp. 2d 1315 (Ct. Int'l Trade 2010). The importer's claim for a reduced duty rate on television panels was brought alternatively under both §1581(a) and §1581(i). The Court dismissed under 1581(a) on the ground that the failure of Customs to act on a protest within 2 years as directed by statute (19 U.S.C. §1515) does not result in a deemed *denial* of the protest, and also dismissed under 1581(i) on the ground that the same failure of Customs to act on a protest within two (2) years does not result in a deemed *approval* of the protest. The dismissal sets a final decision which upon appeal, the CAFC will review and rule on *de novo*. Reversal will require a remand. However, when the CIT accepts jurisdiction, allowing the case to be tried an decided on the merits, the party believing there is no jurisdiction is confronted with several choices: (a) concede jurisdiction and litigate the merits; (b) request authority to pursue an interlocutory appeal to seek dismissal by the CAFC, (knowing that dismissal by the CAFC will lead to a remand to litigate the merits at a much later time, and a later possible appeal on the merits); or (c) continue to challenge jurisdiction but proceed to litigate the case to a final decision, postponing but not abandoning the possibility of appellate review of the jurisdictional issue.

The need to resolve threshold jurisdictional issues led to a CAFC decision to accept jurisdiction and remand for trial (which was also subsequently appealed) in United States v. Inn Foods, Inc., 560 F.3d 1338 (Fed. Cir. 2009). Customs sued the importer for civil penalties under 19 U.S.C. §1592 which clearly falls within the Court's 1582 jurisdictional grant, but the CIT dismissed the suit as time-barred, and therefore, did not consider the case on the merits. United States v Inn Foods Inc., 264 F. Supp. 2d 1333 (Ct. Int'l Trade 2003), rev'd, 383 F.3d 1319 (Fed. Cir. 2004).

On remand the CIT was required to decide both legal and factual issues for the first time. For example, since the defendant was not the "importer of record," can it be assessed with duty under 1592(d), or is that statutory provision limited to importers? And what was the actual price paid or payable for the goods to satisfy the appraised value adopted by Customs? Thus again, it was the presence of a jurisdictional issue (and not any need to seek additional administrative or evidentiary proceedings) that caused the case to be considered twice by the CIT, As a result of the truncated resolution of cases involving a remand, the CIT also addressed two threshold issues (involving no factual disputes) in decisions issued four years apart: (1) was the suit time-barred; and (2) was the defendant a proper party to a claim under 1592(d).

Of course, in cases in which the CIT accepts jurisdiction, decides the case on the merits and the CAFC thereafter finds there was no jurisdiction, the remand is only for a ministerial action to dismiss the case. For example, in Sakar International Inc. v. United States, 516 F.3d 1340 (Fed. Cir. 2008), the CIT accepted jurisdiction under 1581(i)(4) as related to (i)(2), but dismissed for failure to state a claim upon which relief could be granted based upon the absence of "final agency action." The CAFC reversed the jurisdiction ruling, holding that there was no jurisdiction. The CAFC declined to review the substantive determination of the trial court that a "final" decision on a penalty case in response to a second petition is not "final agency action," holding that the government's final action does not occur until it decides whether or not to sue for the full penalty. This leaves the CIT as the only Court to rule on this issue. Even though it remains "in the middle: of the administrative agency decision and a potential appellate court decision, its opinion set the law; until a new case arises before the appellate court, an event that

might never occur. issue, awaiting a new situation arising from Customs and destined for the CAFC.

The dismissal of a case for lack of jurisdiction continues to be a clear path to a final decision by the CAFC following motion practice in the CIT and without any substantive remand to the agency. See Schick v. US, 554 F.3d 992 (Fed. Cir. 2009), in which the CAFC reversed the decision by the CIT to accept jurisdiction under 1581(i)(4) to review a decision by Customs to revoke the 20-year license of a broker for failure to file a triennial status report by the original due date and the extended grace period provided by Customs.

A. 1581(a) jurisdiction.

Jurisdiction of the CIT under 1581(a) embraces seven categories of traditional customs decisions, the most traditional being the determinations of duty rates (tariff classification) and dutiable value (appraisement). 19 U.S.C. §1581(a)(1) and (2). [1]

1. Classification.

Tariff classification decisions reviewed by the CAFC appear most often to fall into a traditional pattern of becoming final without an appeal, or a single trip to the appellate court which achieves a final decision without the need for a remand. For example, in 2009, the CAFC considered five tariff classification issues (four arising under 1581(a) and the fifth as a threshold issue in a case brought under 1582(b) and none were remanded (at least on that issue). In four of the cases, the CIT affirmed the classification by CBP. The CAFC affirmed two of the decisions – one finding for the government and the other for the importer -- without issuing a remand

[1]The seven protestable categories of decision are (1) the appraised value of merchandise;(2) the classification and rate and amount of duties chargeable;(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title; (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;(6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under subsection (c) or (d) of section 1520 of this title.

[Millenium Lumber, infra, for the govt and Value Vinyls Inc. v. United States, 568 F.3d 1374 (Fed. Cir. 2009), for the importer] and reversed two decisions without issuing a remand [Archer Daniels Midland Co. v. United States, 561 F.3d 1308 (Fed. Cir. 2009) and Faus Group Inc. v. United States, 581 F.3d 1369 (Fed. Cir. 2009)]. In the fifth case, the CAFC affirmed the CIT classification decision but remanded for a trial on whether the licensed broker whose misclassification was the basis of a penalty might avoid any penalty for having exercised "responsible supervision and control." United States v. UPS Customhouse Brokerage, Inc., 575 F.3d 1376 (Fed. Cir. 2009).

Contested decisions often arrive in the Court with a minimal administrative decision-making record. For example, in Millenium Lumber Distribution, the importer challenged a customs classification decision made by an import specialist after issuing a Notice of Action (CF-29). Two protests were filed and denied, and the Customs decision was adopted by the CIT on summary judgment motions, and affirmed on appeal by a unanimous panel of the appellate court. Millenium Lumber Distribution Ltd. v. United States, 2007 WL 1116148 (Ct. Int'l Trade 2007), aff'd, 558 F.3d 1326 (Fed. Cir. 2009).

However, even where there is minimal administrative decision-making the Court is often asked to provide deference to the administrative decision. A recent example in which the Court was asked but declined to provide that deference is the decision in BenQ America Corp. v. United States, 683 F. Supp. 2d 1335 (Ct. Int'l Trade 2010). In that case, the court granted summary judgment for the government, affirming its classification decision on liquid crystal displays in a standard 1581(a) classification case. However, the Court was called upon to review a classification decision in liquidation in which Customs requested Skidmore deference for its decision even though it had issued no ruling letter on the issue. Customs relied upon the Explanatory Notes to support its deference claim "in the event [that the Explanatory Note] *is* determined to be relevant." (footnote 14, at Slip Op page 12). The Court held the Note "has no relevance" to the classification issue, leaving unanswered if it would have provided deference where no ruling was issued, but a relevant Explanatory Note was involved.

The challenges faced by the parties and the Court to reach a final decision without incurring the substantial additional costs and delays involved in a remand by the appellate court can be illustrated by the decisions issued in Timber Products Co. v. United States, 341 F. Supp. 2d 1241 (Ct. Int'l Trade 2004), vacated and remanded, 417 F.3d 1198 (Fed. Cir. 2005), on remand, 462 F. Supp. 2d 1342 (Ct. Int'l Trade 2006), aff'd 515 F.3d 1213 (Fed. Cir. 2008).

That case involved two trial court decisions (an initial decision on summary judgment motions and bench trial on remand) and two appellate decisions (the first involving a remand to apply a different legal standard for classification by "commercial designation" and a factual question of whether the imported goods fell within that new legal standard, the second appeal decided the case on the merits). The government classification decision was affirmed in both trial court decisions and in the second appeal – so the concern here is not the merits (ie., the remand, new trial and new appeal did not results in a change from the result of the original CIT decision) . The concern is whether there are lessons to be learned to avoid a remand and second appeal.

In Timber Products, the trial court was asked to rule on legal and evidentiary issues raised by plaintiff's claim that the tariff term "virola" has a commercial meaning or designation within the plywood trade which should be applied to the imported plywood. The Court held, as a matter of law, that commercial meaning of the tariff term could not be established "in one trade or branch of trade" (i.e., the plywood trade). Slip Op, page 14, et seq. This legal determination was reversed on appeal, the CAFC holding that the "plywood trade" was the relevant trade for determinng commercial designation of the tariff term in dispute.. Slip Op pages 6-7.

However, the trial court also made an evidentiary finding with respect to the commercial meaning of "virola" within the "plywood trade:" holding that plaintiff failed "to make an initial showing that its purported commercial designation would apply to the merchandise before the court" (Slip Op page 19). Had this finding of fact been accepted on appeal, the CAFC might have ruled for the government under the legal theory advanced by plaintiff/appellant, perhaps avoiding the need for a remand.

The CAFC did not take that route, but instead, called for a remand, stating "we decline to affirm the judgment of the trial court on this alternative ground; that issue will have to be more fully developed on remand." (Slip Op at page 8). This choice led the trial court to set a bench trial rather than revisit the issue already-decided on affidavits and motion papers. The second decision of the trial court again affirmed the government's classification, and that decision was affirmed (without remand) upon appeal of the decision.

It is not clear that the trial court, nor the parties, could have done more to avoid the remand, bench trial and second appeal. The trial court found for the government on both grounds, i.e., commercial designation within all industries or within the plywood industry only. However, the CAFC was not comfortable with the "plywood industry" finding, perhaps because it was offered as an alternative which might not be a true decision on a case or controversy, or perhaps because it was not comfortable allowing the case to be decided for lack of evidence, rather than on an actual finding the correct interpretation of the term as applied to these goods. It might also be an expression of deference to the CIT primary role on establishing an evidentiary record and deciding evidentiary issues, or it might be a signal from the CAFC to the CIT to rethink its volunteered decision on commercial meaning within the "plywood trade" It is clear that the parties and the trial court addressed the merits under both legal standards, and the appellate court still saw fit to order a remand; its rationale for requiring a remand is not explained (other than the simple statement of a need for further development of the issue), leaving it to speculation.

2. Appraisement

Recent experience with appraisement issues suggests that remands occur more often than in classification cases. An example is Volkswagen of America, Inc. v. United States, 484 F. Supp. 2d 1314 (Ct. Int'l Trade 2007), aff'd in part, reversed in part, 540 F.3d 1324 (Fed. Cir. 2008), on remand, 614 F. Supp. 2d 1335 (Ct. Int'l Trade 2009), vacated in part, 2008 WL 5263402 (Ct. Int'l Trade 2008) ("VW"). In that case the importer had the burden to prove that automobile defects existed at the times of importation in order to reduce the appraised values. The CIT twice ruled that VW failed to sustain that burden (in its original decision and on

rehearing, a decision issued three years after the summons was filed). Key to the VW decision, was the decision by the Court not to make a factual determination whether the repaired defect was present at the time of importation because it held that fact to be irrelevant, ie., the "defect" was a design specification (albeit a bad one) which was part of the bargain paid for by the importer. Whenever the defect arose, it did not give rise to a reduction in the value of the imported automobiles.

On appeal, the VW decision was affirmed in part, reversed in part and remanded. Why was there a remand? Further trial proceedings were required by the CAFC to examine repairs done to comply with recalls and government-mandated recalls other than those for federal safety issues. The CAFC held that the CIT was wrong in saying that the existence of "recall" defects involved delivery of the design bargained-for rather than repairs that reduced dutiable value. Therefore, the case was remanded to the CIT to determine if the recall issues reflected latent defects which existed at the times of importation. Eight months later, the Court ruled that they did exist at import, granting allowance claims based on federal emissions-based recalls. Slip Op 09-31.

The consequences of the remand in VW are that a case filed in 1996 did not reach a final decision until April 15, 2009. That long time frame was at least in part caused by suspension of the original trial court activity while the Court awaited decision in another case on the same legal issue which was moving faster to the appellate court (Saab Cars USA, Inc. v. US, 434 F.3d 1359 (Fed. Cir. 2006)). Nonetheless, the nature of the initial decision led to an appeal which in turn led to a remand.

In VW, the trial court, in its initial decision, did not determine whether the "defects" existed at the times of importations, nor the impact on appraisement arising from any such defect. Absent stipulation of the parties, it is not likely that the Court could have decided those issues to avoid the remand. These issues were moot and no longer relevant to the decision of the case in light of the Court's opinion on design defects. Moreover, even if the issues were justiciable in the first case, litigation of those issues would have increased the cost of litigation

and delayed the decision. In any event, it is not clear that a decision on those issues would led to a remand for a fuller examination of the evidence as occurred in the Timber Products case.

B. 1582 jurisdiction

The government as plaintiff in the CIT is a different form of "traditional customs litigation": the "collection action cases brought by the government under § 1582, which provides jurisdiction: (1) to recover a civil penalty under § 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930; (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or (3) to recover customs duties.

Cases brought by the government to recover civil penalties under § 592 of the Tariff Act provide an example of the robust administrative process which proceeds action in the Court. Customs is required to issue a reasoned pre-penalty and penalty notices, as well as decisions in response to petitions filed against both pre-penalty and penalty notices. 19 U.S.C. § 159 and 19 CFR 162.77 and Part 177. It is common for three petitions to be filed prior to litigation (one against the pre-penalty notice and two against the penalty and the decision on a first petition).

A picture of the administrative process and record the Court expects (and the regulations require) for 592 penalty cases arriving in the CIT as 1582 collection actions in found in the recent case of United States v. Tip Top Pants, Inc. and Saad Nigri, 2010 WL 167952 (CIT 2010). That case noted that "Congress directed that Customs adjudicate the penalty claim in an administrative proceedings conducted under 19 U.S.C. §1618 and issue a written decision concluding that proceeding before any recovery action is brought into the Court of International Trade. 19 U.S.C. §1592(b)(2) (requiring Customs to issue a "written penalty claim" and conduct a proceeding under 19 U.S.C. §1618)." The case was dismissed against the corporate official because customs failed to show that the 1618 proceeding had taken place or a decision issued." (Slip Op. 10-5 at page 10).

The administrative process in Tip Top Pants spanned four to five years (depending on whether measured from a Customs Request for Information -- that specifically stated that prior

disclosure right were already cut off based upon a determination that the importer had made "invalid claims" -- or the later issuance of the pre-penalty notice). Court proceedings had been pending an additional three years when the Court issued its decision dismissing the claim against a corporate officer and setting a deadline for a scheduling order to begin adjudication of the claim against the importer of record.

The vulnerability of 1582 cases to remand by the appellate court can be examined in the recent decisions in United States v. UPS Customhouse Brokerage, Inc., 558 F. Supp. 2d 1331 (Ct. Int'l Trade 2008), aff'd in part, vacated in part 575 F.3d 1376 (Fed. Cir. 2009), on remand, 686 F. Supp. 2d 1337 (Ct. Int'l Trade 2010), reconsideration denied 714 F. Supp. 2d 1296 (CIT 2010). That case involved challenges by UPS to the findings that its classification of goods could be penalized under broker penalty regulations, and alternatively whether the statutory $30,000 maximum capped all penalties or could be applied to each alleged violation. Customs assessed a penalty of $75,000.

The interpretation of the statutory $30,000 maximum was so significant to UPS that it sought an interlocutory appeal when the CIT ruled against it. However, the CAFC declined to accept jurisdiction. On appeal of the CIT's final decision, the CAFC again declined to rule on the statutory $30,000 maximum issue, holding that it was not ripe for consideration since the entire case must be remanded to the CIT because Customs did not follow its own regulations in issuing the penalty: its regulations required consideration of each of ten (10) factors and CBP did not consider all ten.

Thus, the CIT ruling (rejecting UP's claim that penalties are capped at $30,000) remains the only controlling precedent until a ripe case arrives at the CAFC (which might never happen). Customs might accede to the CIT position, might be reluctant to impose penalties greater than $30,000 for fear of a poor test case, or the penalized party may elect not to go to Court at all.

The remand raises a different issue regarding the role of the CIT in the middle. Customs completed its administrative process and issued the penalties it believed were appropriate ($75,000). Its decision was affirmed after trial in the CIT. However, the CAFC remanded to the

CIT to make new findings of fact on the elements of the regulations that had not been addressed in the administrative proceeding or in the trial. Thus, the CIT became the forum for the effort to apply the law, as determined by the CAFC, to either the existing evidentiary record or to a new record.

On remand the CIT twice refused to allow the introduction of new evidence, holding that the legal determinations of the CAFC should have been anticipated the record presented before appeal should not be supplemented. UPS Slip Op. 10-70 denying rehearing Slip Op. 10-11. This result stands in contrast to the approach adopted in Timber Products (i.e., expand the original summary judgment record through evidence presented at a bench trial) as well as in the VW case (i.e., where the Court decided the alternative issues in the original litigation).

C. 1581(i) jurisdiction

The "residual jurisdiction of the Court provided under § 1581(i) is a mix of both traditional and non-traditional areas of CIT litigation, and offers the most challenging examples for the Court to issue definitive, timely and precedential decision from its position in the middle of the administrative and appellate process. The challenge to the Court is predictable from the perspective of the bar, as this is the jurisdictional basis looked to by the private bar in most instances in which clients wish to pursue a claim against Customs for any of the activities it engages in outside the most traditional areas of duty and penalty assessment and collection.

The nature of the actions embraced by subsection (i) are those brought against the United States which do not fall under subsections (a)–(h) and arise under any law of the United States which provides 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 matters referred to in paragraphs the other jurisdictional provisions in 1581(a) through (i). The case studies examined here, as in the discussions of 1581(i) and 1582 cases, are limited to

"traditional customs" cases and do not include the cases involving antidumping and countervailing duty cases, an area warranting independent study and covered by others.

The challenges to the effectiveness as the Court in the middle can be illustrated by the recent decisions in the ongoing litigation chalnneging gender and age classification provision as in violatin of the US constitution Totes-Isotoner Corp. v. United States, 569 F. Supp. 2d 1315 (Ct. Int'l Trade 2008), aff'd, 594 F.3d 1346 (Fed. Cir. 2010), cert. denied, 2010 WL 1848221 (Oct. 4, 2010).

First, the case raises threshold questions typical of 1581(i) cases (i.e., 1581(i) is the remedy for bringing novel claims against the government and are often met with motions to dismiss for lack of jurisdiction on ground that a 1581(a) remedy was available) and a few not so typical in the CIT (i.e., do importers have standing to raise discrimination claims for the men, women, children and non-children who ultimately buy the imported goods, that the case raised a non-justiciable political question). The CIT accepted jurisdiction after considering each of those issues, but dismissed the case for failure to state a claim for which relief could be granted. This finding, based upon pleadings and legal argument, sends the case to the appellate court with the expectation that it will be affirmed or remanded: if the pleadings are not sufficient to state a claim, then perhaps an amendment, the presentation of new evidence or the noticing of another case for trial, could bring the case back before the CIT.

However, both the CIT and the CAFC couched their decisions in terms which narrowed or eliminated the possibility of futher litigation…..a possibility which will either occur or not sometime in the future.

Presitex USA Inc. v. United States, 674 F. Supp. 2d 1371 (Ct. Int'l Trade 2010) involved a claim for retroactive application of duty-free treatment under CAFTA-DR in which the administrative process consumed 2 years and 4 months, and the court decision, dismissing the claim for lack of jurisdiction was entered 2 years after the summons was filed.

The case actually involved two claims of jurisdiction (1581(i) and 19 U.S.C. §4034), both of which the Court rejected for different reasons. The rejection of the 1581(i) claim involved a

remarkable analysis which asserted the strongest possible role of the CIT in making the decision final and avoiding remand. It held that there was no jurisdiction under (i) because 1581(a) protest was possible and the importer did not use that remedy. However, rather than stop at that dispositive determination, the Court went on to decide that Plaintiff could not have prevailed in a case properly filed under 1581(a): The court found that the record established the goods did not meet the origin requirements for duty-free treatment under CAFTA-DR.

Why did the Court offer the substantive decision when other recent examples (and standard judicial practices) avoid offering such opinions. Perhaps it was to avoid a remand that might make the merits the subject of further litigation.

In sharp contrast to Presitex, in Lizarraga Customs Broker v. Bureau of CBP., et al., 2010 WL 3859766 (Ct. Int'l Trade 2010) (Slip Op 10-113), the administrative process was completed in only twenty-one days. The process began on October 21, 2008, when a CBP Field Operations official recommended to a CBP Headquarters official to "deactivate" the broker's entry filer code and ended on November 14, 2008, the effective date of the Headquarters decision to "indefinitely and immediately suspend" the broker's entry filer code stated in a letter dated November 10, 2008. Customs did not provide the broker with a notice of its internal administrative review or an opportunity for the broker to submit a written or oral response or have a hearing of any kind.

The proceedings in Court took two years to complete. During that time the Court (on November 14, 2008) issued a temporary restraining order to permit the broker to use its filer code while the case was heard, (on March 26, 2010) remanded the case to CBP to develop a record since the parties had been unable to enter into a settlement agreement as requested by the Court on February 24, 2010, and (on October 4, 2010) entered its final decision essentially enforcing a "confession of judgment" filed by the government under which it would not suspend or deactivate the broker's entry filer code for any past fact or event.

In the response to the proferred "confession of judgment," the plaintiffs pressed for a ruling from the Court on the legality of the government's actions to preclude future use of the

truncated "procedure" in this case. The Court declined to do so as the confession of judgment eliminated any actual case or controversy warranting further adjudication, and noting the government's promise to at least provide some APA due process in the future, i.e., 5 U.S.C. §558. While acknowledging there is an exception to mootness where the agency's wrongful actions can be expected to recur despite a promise to voluntarily cease those actions, the CIT found the "wrongful behavior at issue cannot reasonably be expected to recur." Slip Op. 10-113 at page 16. The Lizarraga court left undecided whether the due process provided under § 558 of the APA would be legally sufficient in any future case of entry filer code deactivation or suspension….leaving the possibility of testing any future modified procedure adopted by Customs.

The CIT was able to remove itself from "the middle" because it forced a solution which is unlikely to be appealed. Its role was enhanced by the fact that there was no significant or substantial administrative record and it did what trial courts are best at: issuing immediate relief (the temporary restraining order issued on the date the suspension was to go into effect), enabling (or forcing) the parties to develop a record where none previously existed, and encouraging a settlement .. all being powers available to a trial court to enhance its effectiveness as the decision-maker with trial court powers, and the expertise and experience of a specialized or limited jurisdiction court, placed between the administrative agency and the appellate court.

IV. Conclusions

The review of recent CIT decisions reconfirmed the power and effectiveness of the CIT as a trial court exercising *de novo* review over "traditional customs" decisions. The standards of review, and the limited evidentiary record underlying Customs decisions, allow it great latitude to determine the facts and the appellate court decisions defer to those findings. The greater authority to review the CIT's legal opinions on appeal – coupled with the fact that there is a right to appeal – obviously puts the CIT in a less powerful position to resolve finally the legal issues involved in disputes.

The review of recent remands by the CAFC to the CIT did not reveal any clear cut approach to avoiding remands, or offer new insights into where the CAFC might defer to the CIT. Remands to determine the facts occur both where they are clearly required (i.e, the VW case where the CIT did not decide the facts under the legal theory adopted by the CAFC) and where they might have been avoided (i.e., the Timber Products case where the CIT did decide the facts under both it chosen legal standard and the standard adopted by the CAFC). Where the CIT is willing to decide issues under alternative theories, it delivers a case to the CAFC which can be decided on the merits without a remand even if it rejects the CIT's legal standard. However, the decision by the CIT under the competing theories does not divest the CAFC of its authority to remand for the record to be "more fully developed" in the trial court. The cases offer no key to avoiding the remand, but suggest that the CAFC must be comfortable that the CIT's decision on the alternative grounds is truly correct. As a minimum, the CAFC must be convinced that the alternative theory has been truly tested and resolved by the trial court as a contested case or controversy.

As a final and instructive example of the ability of the CIT to issue the "final" legal opinion on issues is found in the UPS case, in which the CAFC twice declined to reach the key legal issue in the case (i.e, whether the statutory maximum broker penalty could be multiplied by the number of violations) as unnecessary to the legal issues involved in its final resolution of the case. The CIT's earlier published opinion issued on that issue (which it certified for interlocutory appeal only to have the CAFC decline the appeal), remains the only judicial decision on the legal issue at the heart of the court case. To this writer's knowledge, there is no new case seeking an appellate decision on that issue and none may ever be issued.

The same situation might arise in other cases in which the CIT offers its opinion on alternative claims of fact and/or law. As discussed earlier, this might avoid a remand. However, it might also create the singular precedential opinion on a contested issue, where the CAFC resolves the case on other grounds and without comment on the alternative claim.