In 2013, the United States Court of International Trade rendered 159 decisions. Of those decisions, the Court exercised jurisdiction under 28 U.S.C. § 1581(i), the so-called “residual jurisdiction provision,” over some or all claims in twenty-one decisions. This Article discusses the more substantive decisions rendered in 2013 under § 1581(i). Before addressing the 2013 decisions, the Article first provides a brief background of § 1581(i).

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I. INTRODUCTION

The jurisdiction of the Court of International Trade (the “Court” or the “CIT”) is set forth in Section 1581 of Title 28 of the U.S. Code. Section 1581 has ten subsections, (a) through (j), which combined, establish the parameters of the Court’s jurisdiction. The importance of these sections can be seen in the newly designed “Slip Opinions” page of the Court’s website.¹ The jurisdiction sections are given their own special column in the chart displaying the Court’s rendered opinions.²

This Article reviews those CIT decisions rendered in 2013 that addressed § 1581(i), the Court’s so-called “residual jurisdiction” provision. We first provide a brief overview of § 1581(i). We then review those 2013 decisions in which § 1581(i) played an important part. We have organized our review of the § 1581(i) cases rendered in 2013 in the following manner. Part III describes those cases in which the Court agreed to allow the case to proceed under § 1581(i), over the opposition of the government defendant. Part IV describes those cases in which all parties agreed that the exercise of jurisdiction under § 1581(i) was appropriate, and so the Court proceeded to the merits. Part V describes those cases in which the Court dismissed the case because it agreed with the government defendant that the exercise of § 1581(i) jurisdiction was not appropriate. Finally, Part VI offers a brief conclusion.

². See id.
II. OVERVIEW OF § 1581(i): THE RESIDUAL JURISDICTION PROVISION

Congress passed the Customs Courts Act of 1980 ("the Customs Act") \(^3\) in order to clarify the demarcation of federal jurisdiction over international trade matters between district courts and the United States Customs Court. The Customs Act established the CIT as an Article III court with what was intended to be comprehensive judicial review over litigation involving import transactions. How comprehensive the Court’s jurisdiction actually is, however, depends in large part on how the Court interprets 28 U.S.C. § 1581(i).

For the most part, the Customs Act is rather specific in detailing those types of court cases that can be initiated in the Court. A plaintiff may bring a case before the CIT by commencing a civil action under 28 U.S.C. § 1581. Sub-sections (a) through (h) each grant the Court exclusive jurisdiction to hear a particular type of civil action. The relevant language is as follows:

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—
   (1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;
   (2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act;
   (3) any final determination of the Secretary of Commerce under section 273 of the Trade Act of 1974 with

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respect to the eligibility of a community for adjustment assistance under such Act; and
(4) any final determination of the Secretary of Agriculture under section 293 or 296 of the Trade Act of 1974 (19 U.S.C. 2401b) with respect to the eligibility of a group of agricultural commodity producers for adjustment assistance under such Act.

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—
(1) any decision of the Secretary of the Treasury to deny a customs broker’s license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customs broker’s permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act;
(2) any decision of the Secretary of the Treasury to revoke or suspend a customs broker’s license or permit, or impose a monetary penalty in lieu thereof, under section 641(d)(2)(B) of the Tariff Act of 1930; and
(3) any decision or order of the Customs Service to deny, suspend, or revoke accreditation of a private laboratory under section 499(b) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the Court that he would be
Although prior to 1980, these eight civil actions fell under the Customs Court’s jurisdiction, § 1581(i) now governs the residual, or expanded, jurisdiction of the CIT. The purpose of § 1581(i) has been said to be the expansion of judicial review and the elimination of confusion regarding the demarcation between the jurisdictions of district courts and the Court by allowing the Court to hear cases directly affecting imports. The exact language of § 1581(i) is as follows:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have 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 matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

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The residual jurisdiction provision’s enumeration of the several types of cases over which the Customs Court did not have jurisdiction created significant Congressional debate in producing the final version. Its original form, Senate Bill 2857, stated that in addition to providing “a comprehensive system of judicial review of matters directly affecting imports,” and “prevent[ing] jurisdictional conflicts in civil actions directly affecting imports,” the purpose of § 1581(i) was to “provide expanded opportunities for judicial review [of actions directly affecting imports].” During Senate hearings in 1978, many witnesses expressed approval for broadening the jurisdiction of the Court (and the enumerated questions over which the Court would preside), but there was opposition to the proposed provision’s inclusion of the phrase, “nothing in this section shall be construed to create a cause of action [not previously heard by the Customs Court],” as it could raise doubts about whether the residual jurisdiction provision in fact broadened the jurisdiction of the Court.

In describing its first revision to the residual jurisdiction provision, Senate Bill 1654, the Senate stated in its report that the bill “should make it clear that all suits of the type specified [in the provision] are properly instituted only in the Court of International Trade . . . [and] will ensure that in the future these suits are heard on their merits.” Congressman John F. Seiberling stated about House Resolution 6394, a further revision, that “[t]his bill expands the Customs Court’s substantive jurisdiction and the type of relief it may award.”

The final version, enacted by House Resolution 7540, has been viewed by some as a demonstration of Congressional intent to keep the jurisdiction of the Court broad. The final version used the phrase “arise out of [(i)(1-4)],” rather than “arise under” (found in Senate Bill 1654), implying greater flexibility in determining whether a civil action can be brought under § 1581(i). The final version also dispensed with requirements found in a prior draft of the bill that required that the import transactions in question be entered into

8. Vance, supra note 5, at 794 (citing S. 2857, 95th Cong. 2d Sess. § 302, 124 CONG. REC. 9192 (1978)).
11. See, e.g., Vance, supra note 5.
pursuant to enumerated statutes, the Constitution, treaties, executive agreements, and executive orders.\textsuperscript{13}

To date, the CIT and the Court of Appeals for the Federal Circuit have typically reviewed claims of § 1581(i) jurisdiction with a view toward strict construction of the statute, particularly when new cases potentially fall within the ambit of paragraph (4) of subsection (i), which provides for jurisdiction of “any civil action commenced against the United States, its agencies, or its officers, that arise out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.”\textsuperscript{14}

In particular, the Court of Appeals has held that certain conditions must be satisfied in order for jurisdiction to lie under this provision. First, the contested agency action must be a final agency action.\textsuperscript{15} Second, “[w]here another remedy is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate.”\textsuperscript{16}

These conditions on the Court’s residual jurisdiction resulted in several cases in 2013 being decided on alternate jurisdictional grounds\textsuperscript{17} or dismissed for lack of subject matter jurisdiction.\textsuperscript{18}

\textsuperscript{13} See Vance, supra note 5, at 801 (discussing version of § 1581(i) in House Resolution 6394 as being “far more specific and limited” than the version of § 1581 ultimately enacted); see also 1980 House Hearings, supra note 10, at 357-405 (explaining the specific grounds for the Custom Court’s jurisdiction proposed during House hearings on the bill).


\textsuperscript{15} See Corus Grp. PLC v. Int’l Trade Comm’n., 352 F.3d 1351, 1358-59 (Fed. Cir. 2003).

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

\textsuperscript{17} Best Key Textiles Co. v. United States, 35 I.T.R.D. (BNA) 2340 (Ct. Int’l Trade 2013) (finding no jurisdiction under § 1581(h), therefore the Court also lacked residual jurisdiction), vacated in part by 35 I.T.R.D. (BNA) 2711 (Ct. Int’l Trade 2014); Aluminum Extrusions Fair Trade Comm. v. United States, 896 F. Supp. 2d 1328, 1329 (Ct. Int’l Trade 2013) (Court lacked subject matter jurisdiction over the plaintiff’s claims under § 1581(i), which sought to challenge the scope in antidumping and countervailing duty orders, because jurisdiction was available under § 1581(c)). See also Shah Bros., Inc. v. United States, 953 F. Supp. 2d 1328, 1332 (Ct. Int’l Trade 2013) (dismissing claims for lack of case or controversy, as government agreed to provide all legally available relief).

\textsuperscript{18} See, e.g., Wuxi Seamless Oil Pipe Co. v. United States, 893 F. Supp. 2d 1347, 1357 (Ct. Int’l Trade 2013) (claim dismissed in its entirety for lack of residual jurisdiction where other relief for its claim that Commerce unlawfully denied its request for extension was available and not manifestly inadequate under § 1581(c)); Chemsol, LLC v. United States, 901 F. Supp. 2d 1362, 1363-64 (Ct. Int’l Trade 2013) (rejecting importer’s claim that Customs extension of statutory liquidation period of subject merchandise was unlawful for lack of subject matter jurisdiction, as adequate remedy was available under jurisdictional provision governing denial of protests, § 1581(a)); JSC Acron v. United States, 893 F. Supp. 2d 1337, 1347 (Ct. Int’l Trade 2013)
III. CASES IN WHICH THE COURT AGREED TO EXERCISE § 1581(i) JURISDICTION OVER OPPOSITION OF GOVERNMENT DEFENDANT

In virtually every case that comes before the CIT, the U.S. government is the defendant. Where jurisdiction is contested, it necessarily means that the U.S. government disputes the jurisdiction justification proffered by the plaintiff. The first group of § 1581(i) cases we review are those decisions in which the Court agreed to exercise § 1581(i) jurisdiction over the opposition of the U.S. government defendant.

A. Suntec Industries Co., Ltd. v. United States

In Suntec Industries Co., Ltd. v. United States, plaintiff Suntec challenged the initiation of the third antidumping administrative review on certain steel nails from the People’s Republic of China on the grounds of improper notice under 19 C.F.R. § 351.303(f)(3)(ii). The Court denied Commerce’s motions to dismiss for lack of subject-matter jurisdiction and for failure to state a claim upon which relief could be granted.

The underlying facts were as follows:

- The plaintiff Chinese exporter (Suntec) had participated in the original investigation and two previous administrative reviews and had been granted “separate rate status” by the U.S. Department of Commerce.
- For both the first and second review periods, the U.S. petitioner requested an antidumping administrative review of Suntec, but then withdrew its requests after Suntec had submitted its separate rate certification in each review.

(dissing claim challenging Commerce’s refusal to conduct changed circumstances review in order to obtain reduced cash deposit rate for lack of subject matter jurisdiction, where importer’s participation in first administrative review and subsequent challenge to final results of that review, if necessary, would not have been a manifestly inadequate remedy under § 1581(c)); see also Aluminum Extrusions Fair Trade Comm., 896 F. Supp. 2d at 1328 (declining to exercise residual jurisdiction over claims challenging Commerce’s orders revising the scope of final determination because jurisdiction was available under § 1581(c)).

20. Id. at 1346.
21. Id. at 1346-47.
22. Id. at 1354-55.
23. Id. at 1344.
24. Id.
The petitioner again requested an antidumping (AD) review for the third administrative review period of multiple Chinese exporters, including Suntec. However, Suntec did not participate in this review and so did not file its separate rate certification. And the petitioner did not withdraw its review request.

Consequently, when Commerce published its final AD review determination, it included Suntec as part of the “China-wide entity” and therefore assigned Suntec a new AD rate of 118.04%. Suntec did not formally challenge the results of Commerce’s AD review determination by initiating a court appeal within thirty days of the publication of the AD review determination; rather, Suntec initiated a court case under § 1581(i) to challenge the initiation, as opposed to the results, of the AD review. Suntec alleged that it never received proper notice from the petitioner of its request for the third administrative review as required by 19 C.F.R. § 351.303(f)(3)(ii), and that it first learned of the third administrative review from one of Suntec’s importers several months after the initiation notice was published. Suntec claimed that, because it had not received proper notice of petitioner’s request, Commerce’s initiation was unlawful and therefore Commerce’s imposition of a much higher AD rate had to be terminated.

Commerce vigorously opposed Suntec’s court appeal, and therefore the Court’s decision is essentially its rulings on the various defense arguments presented by Commerce in its motions to dismiss the case. Broadly, Commerce advanced two bases to dismiss the court appeal: (1) the exercise of jurisdiction under § 1581(i) was not appropriate, and (2) even if jurisdiction was appropriate, Suntec had failed to state a claim upon which relief could be granted.

25. After the Department of Commerce undertakes an investigation in which it determines that the foreign exporter has been dumping, or selling subject merchandise at a lower than normal value in the United States, the Department issues an Antidumping Order that remains in place on the subject merchandise until the Department revokes the Order. After the original investigation, the Department conducts periodic administrative reviews in which a dumping margin is calculated for the review period.


27. Id.

28. Id.

29. Id.

30. Id. at 1346.

31. Id.

32. See Def.’s Mot. to Dismiss The Compl. at 6-15, Suntec Indus. Co. v. United States, 951 F. Supp. 2d 1341 (Ct. Int’l Trade 2013) (No. 13-00157); Def.’s Reply to Pl.’s Resp. to Def.’s
1. Contested Jurisdiction Under § 1581(i)

On the issue of whether jurisdiction was appropriate under § 1581(i), Commerce and the petitioner argued that Suntec could have easily challenged Commerce’s final determination under § 1581(c) (the specific provision for challenging AD determinations), and therefore jurisdiction under § 1581(i) was not allowed. In making this argument, Commerce cited well-established precedent of the Court of Appeals for the Federal Circuit (CAFC) that § 1581(i) may not be invoked when jurisdiction “‘is or could have been available’ [under another § 1581 subsection], unless the remedy provided under that other subsection would be ‘manifestly inadequate.’” Commerce then scoffed at Suntec’s assertion that Suntec was not really challenging Commerce’s final determination, but rather only the initiation decision by arguing that the ultimate relief that Suntec sought was a reversal of Commerce’s determination imposing the higher AD rate, the very type of action that is contemplated by § 1581(c).

The Court, however, disagreed, noting first that “Section 1581 confers jurisdiction upon the type of administrative decision that is being challenged and not based upon the ultimate relief sought.” The Court then ruled that “a claim challenging the lawfulness of the decision to initiate an administration review including a particular respondent falls within the administration and enforcement provision of § 1581(i).” The Court rejected Commerce’s argument that the plaintiff was seeking to alter the results of the administrative review, finding that Suntec was not seeking a second opportunity to participate (i.e. change the AD margin), but instead sought to rescind the review with respect to Suntec altogether.

The Court similarly dismissed as hypothetical the defendant’s argument that jurisdiction under § 1581(c) “could have been available” if the plaintiff had participated in proceedings and challenged the final determination. The Court decided that, to the extent that the plaintiff was only challenging “Commerce’s

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33. Def.’s Mot. to Dismiss, supra note 32, at 6-11.
34. Id. at 6 (citing Miller & Co. v. United States, 824 F.2d 961, 963 (Fed. Cir. 1987)).
36. Id.
37. Id. at 1347.
38. Id. at 1348.
decision to initiate review of it in spite of noncompliance with its notice regulation," it possessed jurisdiction under § 1581(i). 39

2. Alleged Failure to State a Claim

Next, the Court addressed Commerce’s motion to dismiss for failure to state a claim. Commerce alleged that Suntec had received adequate notice when Commerce published the initiation notice of its third administrative review in the Federal Register. 40 Additionally, Commerce argued that, as a matter of law, the plaintiff is charged with knowledge of the constructive notice provided by the publication. 41 In response, Suntec contended that Commerce failed to ensure that the plaintiff was accorded due process of law because petitioners did not personally serve the plaintiff with the request for third administrative review as required under 19 C.F.R. § 351.303(f)(3)(ii). According to Suntec, absent proper actual notice, publication of the initiation in the Federal Register did not suffice as constructive notice of the third administrative review. 42

Turning to the applicable regulation, 43 the Court determined that the language of the regulation was unambiguous and entitled the plaintiff to receive “actual notice” of review requests by petitioner, through personal service of notice mechanisms. 44 The regulation further dictated that if the petitioner could locate the exporter or producer but failed to serve it, and provided no indication to Commerce that a reasonable attempt to serve the exporter or producer was made, Commerce could not “lawfully” accept a request for review or initiate a review in response to a request under 19 U.S.C. § 1675(a). 45

Noting that it was required to accept the factual representations set forth in the complaint, the Court held that the plaintiff was not provided the actual notice to which it was entitled under 19 C.F.R. § 351.303(f)(3)(ii), and Commerce’s initiation of the third administra-

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39. Id.
40. Id.
41. Id.
42. Id.
43. A petitioner who files a request for an administrative review of an antidumping order with Commerce “must serve a copy of the request by personal service or first class mail on each exporter or producer specified in the request . . . by the end of the anniversary month or within ten days of filing the request or review, whichever is later.” 19 C.F.R. § 351.303(f)(3)(ii) (2014).
44. Suntec, 951 F. Supp. 2d at 1349.
45. Id.
tive review as to plaintiff was therefore unlawful. The Court noted that the petitioner had filed a facially deficient certificate of service to Commerce claiming that service on “[b]ehalf of Suntec” and several other exporters was made on an attorney in China who was no longer representing the plaintiff. The Court held that Commerce violated its own regulation by initiating a review of the plaintiff after it received a certificate of service indicating that petitioners did not comply with applicable service requirements.

3. Relief

Having ruled that the initiation of the review (as to Suntec) was unlawful, the Court then addressed the appropriate relief. Suntec argued that as a result of the petitioner’s legally deficient service, the constructive notice provision of 44 U.S.C. § 1507 did not become operable when Commerce published its Initiation Notice in the Federal Register because, according to Suntec, such publication could not remedy a failure to enforce the actual notice requirements. Suntec argued that this meant that Commerce’s final determination could not be applied to it.

The Court rejected the first part of Suntec’s argument, finding that Suntec received sufficient constructive notice of the initiation. The Court reasoned that Congress had “directly spoken to the precise question” and unambiguously provided for the mechanism of constructive notice through publication in the Federal Register to notify an interested party that a review is being initiated. Moreover, as Suntec had filed separate rate certifications in the two previous annual review periods, it was under a continuing obligation to monitor the Federal Register for actions that affected its interests. The Court thus held that publication of the initiation of the third administrative review in the Federal Register provided sufficient constructive notice to the plaintiff,
and Suntec could not choose to disclaim such constructive notice
provided through publication.\textsuperscript{53}

4. Discretion to Waive Procedural Requirements

Given that it had ruled that Suntec had sufficient constructive notice
of Commerce’s initiation notice (and therefore Suntec was not barred
from participating in the third administrative review), the Court then
addressed Commerce’s argument that that it had discretion to waive
certain regulatory procedural requirements, and therefore the failure
of petitioner to properly serve Suntec was inconsequential. The Court
analyzed this question by applying a three-part inquiry. The first
question was whether the relevant statute or implementing regulation
states a remedy for failure to comply. If there is no stated remedy, the
second question was whether the rule provides an important proce-
dural benefit and, if so, the third question was whether substantial
prejudice can be demonstrated.\textsuperscript{54}

Marching through this three-part analysis, the Court found that the
regulation at issue, 19 C.F.R. § 351.303(f)(3)(ii), was a service of notice
provision that did not state consequences for Commerce’s failure to
comply. The Court next found that the regulation intended to provide
important procedural benefits to participants and “confers greater
regularity and predictability . . . [and] affords respondents the opportu-
nity for participation in an antidumping duty proceeding before it
begins.”\textsuperscript{55}

Finally, upon analyzing the existence of substantial prejudice by
petitioners’ lack of service, the Court essentially ruled such analysis
“ventures into the merits” of the underlying claim. The Court then
ruled that Suntec should “have its day in court for further exploration
of the claim as a matter of fact.”\textsuperscript{56} And therefore, the Court denied
Commerce’s motion to dismiss.\textsuperscript{57}

The Court’s decision in Suntec illustrates that, in certain cases,
challenges to Commerce’s “administration and enforcement” of AD
proceedings under the Tariff Act may be sufficient for the Court to
assert jurisdiction under § 1581(i) when alternate relief may not be

\textsuperscript{53} The Court also held that Commerce’s constructive notice through publication in the
\textit{Federal Register} was likewise sufficient to rebut the plaintiff’s constitutional claim that it was
deprived of due process under the Fifth Amendment. \textit{Id.}
\textsuperscript{54} \textit{Suntec}, 951 F. Supp. 2d at 1352-53.
\textsuperscript{55} \textit{Id.} at 1353.
\textsuperscript{56} \textit{Id.} at 1355.
\textsuperscript{57} \textit{Id.}
immediately available. 

Suntec is also the only case in 2013 in which the Court allowed the case to proceed to the merits of the dispute on the claim over which it asserted residual jurisdiction.

IV. CASES IN WHICH ALL PARTIES AGREED THAT THE EXERCISE OF JURISDICTION UNDER § 1581(i) WAS APPROPRIATE, AND SO THE COURT PROCEEDED TO THE MERITS

The cases in this section stand apart precisely because there was no fight about jurisdiction. Rather, in these cases, all parties agreed that it was proper and acceptable for the CIT to decide the case based on its exercise of § 1581(i) jurisdiction. And so, the Court simply proceeded to the merits in its decisions. We begin this Part by discussing diverse cases in which the Court asserted residual jurisdiction with agreement from both parties. We then address the last remnants of cases brought under the Continued Dumping and Subsidy Offset Act (CDSOA).

A. Diverse Cases Decided Under the Court’s Residual Jurisdiction

1. Michaels Stores, Inc. v. United States

In Michaels Stores, Inc. v. United States, the plaintiff asserted jurisdiction under § 1581(i) and challenged the liquidation and cash deposit instructions issued by Commerce in administering the AD duty order for certain cased pencils from the People’s Republic of China (PRC). This 2013 decision was a ruling on the merits in a 2012 case that the Court had refused to dismiss in response to the government defendant’s motion arguing inappropriate § 1581(i) jurisdiction. The specific issue before the Court in the 2013 case was whether the PRC-wide rate for the PRC-entity served as the appropriate AD rate for liquidation of import entries by the plaintiff-importer under 19 C.F.R.

58. Technically, this case is not one in which the parties agreed that § 1581(i) jurisdiction was appropriate. Rather, the Court previously denied the government’s motion to dismiss for lack of jurisdiction, because plaintiff’s challenge was to the administration and enforcement of the law by Commerce and was therefore properly asserted under 28 U.S.C. § 1581(i). Michaels Stores, Inc. v. United States, 34 I.T.R.D. (BNA) 2391 (2012). Following that decision, the instant case simply addressed the merits of plaintiff’s claim. However, because the issue of whether § 1581(i) jurisdiction was not part of the 2013 decision, we have included this case in the category in which all parties agreed on appropriate jurisdiction.


§ 351.107. Finding no genuine issue of material fact, the Court denied the plaintiff’s motion for summary judgment and entered summary judgment for defendant.\(^\text{61}\)

The 2013 decision has two noteworthy aspects. The first is the Court’s refusal to dismiss the plaintiff’s claim despite alleged defects in the manner in which the claim was described in the complaint. The government defendant alleged that due to the plaintiff’s failure to explicitly reference Commerce’s cash deposit instructions, the Court should not hear any arguments that relied on such cash deposit instructions.\(^\text{62}\) The Court rejected this argument, finding that the plaintiff had plainly indicated that it was challenging the liquidation instructions, and those liquidation instructions referenced an AD rate established by the cash deposit instructions.\(^\text{63}\) The Court found that the government defendant was properly put on notice of what the dispute was about and therefore there was no basis for the government defendant’s argument.\(^\text{64}\)

The second noteworthy aspect of the case is the Court’s affirmation of Commerce’s methodology for assigning AD rates to exporters from non-market economy (NME) countries: namely, the fact that each exporter must demonstrate separate rate status to avoid being subject to the always-higher China-wide entity AD rate. The underlying facts were as follows:

- The plaintiff importer purchased Chinese pencils that were subject to the AD order against Certain Cased Pencils from China.\(^\text{65}\)
- Some of the pencils imported by plaintiff were from Chinese pencil manufacturers who had their own company-specific AD rate.\(^\text{66}\)
- During the particular review period at issue, the plaintiff had imported the Chinese pencils from three different Chinese exporters (Chinese trading companies). That is, instead of exporting the pencils directly to the plaintiff importer themselves, the Chinese pencil producers sold the pencils to other Chinese companies who exported the pencils to the plaintiff importer.\(^\text{67}\)

\(^{61}\) Michaels, 931 F. Supp. 2d at 1319.
\(^{62}\) Id. at 1313.
\(^{63}\) Id. at 1313-14.
\(^{64}\) Id. at 1314.
\(^{65}\) Id. at 1309.
\(^{66}\) Id. at 1310.
\(^{67}\) Id. at 1309-10.
• When it undertook the imports during the review period at issue, the plaintiff importer paid the company-specific AD cash deposit rate that had been assigned to the Chinese pencil manufacturers. 68
• None of the exporters who had actually sold the pencils to the plaintiff importer participated in the underlying administrative reviews. 69
• When Commerce issued its liquidation instructions, Commerce made clear that the exporters who had exported the pencils to the plaintiffs should be assessed the China-wide AD rate of 114.90%, rather than the very low AD rates that had been assigned to the Chinese producers of the pencils. 70
• After the entries were liquidated, Michaels was assessed supplemental duties for the difference between the cash deposits it made at the producer’s rate and the liquidation at the much higher China-wide rate. 71
• The plaintiff importer then initiated the court case challenging the application of the much higher AD rate. 72

In this case, the Court had little trouble ruling for the government defendant. In particular, the Court noted that which AD rate applied to which NME exporter was governed by 19 C.F.R. § 351.107 of Commerce’s AD regulations, 73 and that Commerce’s interpretation and application of this regulation was well established. The Court noted that 19 C.F.R. § 351.107 makes clear that in cases against NME countries, such as China, AD rates were assigned to exporters, not producers (as they are in cases against market economy-countries). 74 The Court also noted that there were sound policy reasons underlying Commerce’s regulation.

Specifically, the Court noted that the language in the applicable regulations, 19 C.F.R. § 351.107(d), when read in conjunction with 19 C.F.R. § 351.107(b)(2), upheld two key policy rationales in the context of non-market economies: “that an exporter’s rate is preferable to a producer’s rate as the exporter is likely the party to set prices and know which goods are destined for the United States, and that each

68. Id. at 1310-11.
69. Id. at 1310.
70. Id. at 1310.
71. Id. at 1311.
72. Id.
74. Michaels, 931 F. Supp. 2d at 1315-16.
exporter has the burden of proving it is eligible for a separate rate.”

The Court also explained that due to the presumption of state control over both producers and exporters in NME countries, Commerce has said that it “intend[s] to continue calculating AD rates for NME export trading companies, and not the manufacturers supplying the trading companies.” Therefore, under Commerce’s present methodology, exporters are required to apply for a separate rate through a formal investigation process in which they must rebut the presumption of state control.

In the present case, although all of the producers of pencils imported by the plaintiff during the reviews in question were individually investigated and assigned their own rates, those rates were not relevant because the regulation calls for the rates of exporters to be used if they exist, prior to looking at the producer’s rates. Because there was no evidence that the exporters used by the plaintiff applied for separate rates, they were presumed by Commerce to be under state control. Accordingly, the Court explained that under 19 C.F.R. § 351.107(d), the PRC-wide rate served as the applicable AD rate for the exporters who had supplied the plaintiff importer.

Because there was no genuine issue as to any material fact, the Court denied the plaintiff’s motion and sua sponte entered judgment as a matter of law in favor of the United States.

2. Snap-On, Inc. v. United States

The Court’s jurisdiction under § 1581(i) was undisputed in Snap-On, Inc. v. United States. In this case, the importer filed suit seeking an order to enjoin Commerce from requiring U.S Customs and Border Protection to collect a countervailing duty (CVD) rate of 374.15% for

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75. Id. at 1318.
76. Id. at 1316 (quoting 62 Fed. Reg. at 27,305 (Dep’t Commerce May 19, 1997)).
77. 19 C.F.R § 351.107(b)(2).
78. Michaels, 931 F. Supp. 2d at 1317.
79. Id. at 1319.
80. Snap-On, Inc. v. United States, 949 F. Supp. 2d 1346 (Ct. Int’l Trade 2013); see also SKF USA, Inc. v. United States, 35 I.T.R.D. (BNA) 2072 (2013) (exercising undisputed jurisdiction under § 1581(i) to grant declaratory judgment on claim that Commerce’s practice of issuing liquidation instructions to Customs fifteen days after the date of publication of final results in a review was contrary to law as applied to the plaintiffs in implementation of final results, based on doctrine prior adjudication); SKF USA, Inc. v. United States, 35 I.T.R.D. (BNA) 2144 (Ct. Int’l Trade 2013) (exercising residual jurisdiction to hold that the doctrine of collateral estoppel prevents lawful application of fifteen-day rule in twentieth administrative review, as Court had previously found it unlawful as applied to nineteenth administrative review).
the importers entries of goods containing aluminum extrusions from the PRC.81 The Court held that the importer waived any right to a lower CVD as revised by the Court and granted the defendant’s motion for summary judgment.82

The plaintiff’s merchandise entered after Commerce’s final CVD determination in Aluminum Extrusions from the People’s Republic of China, in which Commerce rendered an “all others” rate of 374.15%.83 The plaintiff had not participated in the investigation and had not posted deposits of estimated duties on their entries.84 As part of Commerce’s first administrative review, in which the plaintiff also did not participate, Commerce instructed liquidation of all entries of merchandise for all firms not under review at the cash deposit rate in effect on the date of entry of 374.15%.85 Prior to any liquidation, however, Commerce issued an amended final determination consistent with the Court’s ruling in Maclean-Fogg v. United States, which found the original “all others” rate of 374.15% to be unlawful,86 and instructed Customs to collect an all others cash deposit rate of 137.65% for all subject merchandise entered on or after the date of the amended final determination.87 Thereafter, the plaintiff received a Notice of Action from Customs regarding duties owed at a rate of 374.15%, which indicated that the revised rate of 137.65% affirmed by the Court would not be applied to entries entered prior to the effective date.88

The plaintiff claimed that under 19 U.S.C. § 1516a(c)(2), injunctive relief from the liquidation of entries, and (e)(2), liquidation in accordance with a final decision of the Court, the “all others” rate applicable to its entries should have been the revised rate of 137.65%.89 The plaintiff asserted that jurisdiction under § 1581(i) was proper because it challenged the manner in which Commerce administered the final results, namely Commerce’s failure to instruct Customs to collect cash deposits at a rate of 137.65% for entries entered prior to the amended final determination.90

82. Id. at 1355-56.
84. Snap-On, 949 F. Supp. 2d at 1348-49.
85. Id. at 1349-50.
88. Id. at 1351.
89. Id.
90. Id. at 1352.
The Court reviewed its prior decisions in *Laclede Steel Co. v. United States*, superscript 91, *Jilin*, superscript 92 and *Tembec, Inc. v. United States*, superscript 93 in which the Court consistently held that “when a party secures a right to a revised rate through judicial review, all unliquidated entries of that party which are subject to the revised rate must be liquidated at that rate regardless of whether entry occurred before or after judicial review.” superscript 94 In addition, a determination that is found to be unlawful cannot be the basis of a duty assessment with respect to the prevailing litigant. superscript 95

In *Snap-On* however, the Court found that this line of case law was of no assistance to the plaintiff. Before applying the *Laclede* reasoning, the Court stated, the plaintiff must show that it has a right to the revised rate. superscript 96 The *Laclede* line of cases “turned on the fact that the Court had adjudicated the rights of the plaintiff in a prior case, and Commerce was bound to uphold those rights,” the Court explained. superscript 97 The specific issue, the Court explained, was the “threshold question of whether a recipient of the all others rate should receive the retrospective benefit of a judgment rendered in a case to which the recipient was not a party.” superscript 98 In addition, 19 U.S.C. § 1516a(c)(1) provides that Commerce will liquidate entries at the cash deposit rate in effect at the time of entry for those entries entered prior to notice of a decision, if such entries are not suspended by court order. superscript 99

The Court reasoned that, on these facts, the plaintiff had waived any right to the revised rate because it did not participate in the litigation challenging the investigation rate or any subsequent administrative reviews, or assert a private right of action in any manner contemplated by the statute. superscript 100 Therefore, the plaintiff’s entries could be liquidated pursuant to 19 C.F.R. § 351.212(c), providing for automatic assessment of countervailing duties if no review is requested, in accordance with the instructions that are not affected by a revised rate pursuant to a court decision. superscript 101

95. Id. at 1354.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id. at 1355.
101. Id. at 1356.
The Court exercised residual jurisdiction over a single claim in *International Custom Products, Inc. v. United States*, but after considering the importer’s constitutional challenge, dismissed the count for failure to state a claim on which relief could be granted.102

The plaintiff filed its claim before the CIT after Customs reclassified and liquidated thirteen entries of the plaintiff’s imported product known as “white sauce.”103 The reclassification had the effect of increasing the duties owed on the plaintiff’s entries by approximately 2400%.104 After reclassification, the plaintiff protested the reclassification of a single entry of “white sauce.”105 After the protest was deemed denied, the plaintiff paid the duties on that single entry and filed a complaint in court.106 Immediately after commencing that case, the plaintiff filed a new protest covering the thirteen entries of subject merchandise.107 The second protest was denied, and as a result the plaintiff owed the government approximately $28 million in duties on these thirteen entries.108 Thereafter, the plaintiff filed eight additional protests covering the balance of its entries of subject merchandise affected by the reclassification.109 Customs did not rule on these protests, but rather placed them all into a “suspended protest status” pending the outcome of the first court case.110

The plaintiff then filed a new complaint contesting the treatment of the thirteen entries. The plaintiff alleged that the requirement under 28 U.S.C. § 2637(a)—that it pay duties prior to filing suit—had the effect of depriving the plaintiff of its First Amendment right to petition the government via access to the Courts, with the consequent effect of depriving the plaintiff of property without due process of law in violation of the Fifth Amendment.111

102. *Int’l Custom Prods., Inc. v. United States*, 931 F. Supp. 2d 1338, 1342, 1345 (Ct. Int’l Trade 2013). We exclude discussion of the eight counts that were dismissed pursuant to CIT Rule 12(b)(1) for lack of subject matter jurisdiction under 28 U.S.C. § 1581(a).
103. *Int’l Custom Prods., Inc. v. United States*, 931 F. Supp. 2d at 1340.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 1343.
In determining whether it had subject matter jurisdiction over the plaintiff’s claim, the Court first declined jurisdiction under § 1581(a), which conferred jurisdiction to hear “appeals from denials of valid protests,” because the importer did not appeal the denial of a valid protest. Instead, the Court determined jurisdiction under § 1581(i) was appropriate because it confers power over a civil action brought against the United States that “arises out of any law of the United States providing for—(1) revenue from imports . . .,” or the “administration and enforcement” with respect to revenue from imports. The Court had also previously stated that “[w]hen seeking to challenge a provision over which Customs has no authority or discretion, a plaintiff need not file a protest and then invoke jurisdiction under § 1581(a); such a plaintiff may instead rely on § 1581(i).” Because the plaintiff brought a constitutional challenge to 28 U.S.C. § 2637(a), under which Customs has no authority or discretion, and because the plaintiff advanced a claim against the United States arising out of a law providing for the administration and enforcement of revenue from imports, the Court exercised jurisdiction under § 1581(i).

The plaintiff requested that 28 U.S.C. § 2637(a), which requires payment of customs duties prior to litigating on an important transaction, be “struck down or dispensed with” in this case. Yet, the Court agreed with defendant that 28 U.S.C. § 2637(a) had consistently been upheld as a valid precondition to the government’s waiver of sovereign immunity in § 1581(a). The Court recognized that the plaintiff’s case presented novel facts due to the exceptional amount of duty liability, $28 million, resulting from an allegedly unlawful reclassification and liquidation of the plaintiff’s goods. Yet, there was no precedent departing from the established precondition of payment under 28 U.S.C. § 2637(a) and the Court was not persuaded that “the harshness and unfairness of this result rises to the level of unconstitutionality.”

Due to the importance of the United States’ waiver of sovereign immunity in revenue collection cases, the Court found that “[i]n the
absence of legislative grace,” the Court could not find that 28 U.S.C. § 2637(a) denied the plaintiff fundamental due process required by the Fifth Amendment. As such, the Court granted defendant’s motion to dismiss for failure to state a claim upon which relief could be granted.

4. Hartford Fire Ins. Co. v. United States

In Hartford Fire Ins. Co. v. United States, the plaintiff Hartford Fire Insurance Company sought to void certain bonds securing entry of crawfish from the PRC. The plaintiff’s single claim asserted that Customs abused its discretion by either failing to require a cash deposit in lieu of a bond for the entries in question or rejecting the entries altogether. Exercising jurisdiction under § 1581(i), the Court dismissed the action for failure to state a claim.

The plaintiff acted as the surety for entries of freshwater crawfish tail meat from the PRC, which were subject to an AD duty order. The entries were made following Customs’ approval of eight single entry bonds designating the plaintiff as the surety. Customs liquidated the entries at the 223% China country-wide rate, and when the importer failed to pay the duties owed, Customs sought payment from the plaintiff.

The plaintiff alleged that given the existence of Customs’ investigation of the importer for possible violation of import laws, Customs abused its discretion by accepting the bonds on the subject entries. The Court’s jurisdiction under § 1581(i) was undisputed.

119. Id. at 1345.
120. Id.
122. Id. at 1377.
123. Id.
124. Id. at 1381.
125. Id. at 1377.
126. Id.
127. Id. Hartford’s original complaint alleged that the bonds were voidable because Customs was investigating the importer for possible violation of import laws during the relevant period, and Customs had not informed the plaintiff about its investigation. The Court dismissed the first complaint for failure to state a claim on which relief could be granted, holding that Hartford’s claims were inadequate or barred on various grounds. See generally Hartford Fire Ins. Co. v. United States, 857 F. Supp. 2d 1356 (Ct. Int’l Trade 2012).
128. Hartford, 918 F. Supp. 2d at 1378.
129. Id.
The Court reviewed Customs’ acceptance of the bonds for abuse of discretion. In its defense, Customs relied on 19 U.S.C. § 1675(a)(2)(B)(iii), which provides, “[t]he administering authority shall . . . direct the Customs Service to allow, at the option of the importer, the posting . . . of a bond or security in lieu of a cash deposit for each entry of the subject merchandise.” The Court agreed with Customs that Customs had no discretion to override the importer’s decision to submit bonds rather than cash deposits. Therefore, because Customs had no discretion, there could be no abuse of discretion in its failure to insist on cash deposits rather than bonds.

The Court rejected the plaintiff’s contention that Customs should have required additional bonding in addition to the new shipper bonding rate under 19 U.S.C. § 1623(a), which provides in part that “the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary.” The Court reasoned that § 1623(a) did not require the plaintiff’s expansive interpretation, as the statute could be interpreted to merely require some form of security from an importer, which was in fact provided by the importer in this case. The Court added that there was no basis on which to conclude that Customs abused its discretion by failing to alert the plaintiff of the investigation of the importer and, moreover, there was no basis to suggest that the investigation had proceeded to a stage where Customs had reason to believe that the shipper bonds would be insufficient security for the subject entries. On these grounds, the Court granted the defendant’s motion to dismiss for failure to state a claim.

The Court did not see as many challenges to the Continued Dumping and Subsidy Offset Act (CDSOA) in 2013 as it had in prior years, due to the precedents established by the Federal Circuit in SKF USA, Inc. v. United States (SKF USA II) and more recently in PS Chez Sidney, L.L.C. v. U.S. Int’l Trade Comm’n. As a result, the next three cases

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130. Id. at 1379.
131. Id.
133. Hartford, 918 F. Supp. 2d at 1380.
134. Id. at 1380-81.
135. Id. at 1381.
137. SKF USA, Inc. v. United States, 556 F.3d 1337 (Fed. Cir. 2009).
discussed, which all challenged the statute’s petitioner support requirement, were largely disposed of based on binding precedent. The Court’s jurisdiction over cases arising out of challenges to the CDSOA lies in § 1581(i)(4), which confers jurisdiction over civil actions arising out of any law of the United States providing for administration with respect to duties on the importation of merchandise for reasons other than raising revenue.139

5. Nan Ya Plastics Corp., Am. v. United States

In Nan Ya Plastics Corp., Am. v. United States,140 the plaintiff moved for an order vacating the judgment entered the prior year in Nan Ya Plastics Corp., Am. v. United States, and for leave to amend the second amended complaint.141 The Court had previously entered a judgment in this case dismissing the plaintiff’s action for failure to state a claim upon which relief can be granted.142 Based principally on an intervening change in the controlling law, the three-judge panel comprised of Judges Carman, Stanceu, and Gordon, vacated the judgment dismissing the action, and issued a new judgment under CIT Rule 54(b) dismissing only the plaintiff’s constitutional claims and allowing the plaintiff’s statutory claims to proceed upon a third amended complaint.143

The Court agreed that an intervening change in the controlling law was one of the recognized grounds on which motions for rehearing may be granted under CIT Rule 59.144 In PS Chez Sidney,145 the Court of Appeals for the Federal Circuit held that the plaintiff qualified as an “affected domestic producer” (ADP) under the Byrd Amendment to the CDSOA, 19 U.S.C. § 1675c(b)(1)(A), (d)(1), by taking certain actions in support of the relevant AD petition, including expressing support for the petition in the response to the ITC’s questionnaire in the preliminary phase of the ITC’s investigation, yet in its final response checking the “take no position” box.146

141. Id. at 1377-78; see Nan Ya Plastics Corp., Am. v. United States, 853 F. Supp. 2d 1300 (Ct. Int’l Trade 2012).
142. Nan Ya, 916 F. Supp. 2d at 1377.
143. Id. at 1380, 1382.
144. Id. at 1378.
145. PS Chez Sidney, 684 F.3d at 1384.
146. Nan Ya, 916 F. Supp. 2d at 1379 (citing PS Chez Sidney, 684 F.3d at 1381).
Applying CIT Rule 15(a)(2) under which “[t]he court should freely give leave when justice so requires,”147 and because the significance of the intervening appellate decision became apparent to the plaintiff only after the Court of Appeals for the Federal Circuit issued its decision, the CIT vacated its prior judgment and granted the plaintiff leave to amend its complaint to allege that it expressed support for the AD petition in its preliminary response to the ITC questionnaire.148 Accordingly, the CIT allowed the plaintiff to amend its complaint to make its statutory claim that Customs and the ITC violated the CDSOA in denying the plaintiff eligibility as an ADP.149 In doing so, the Court reaffirmed its prior decision to dismiss the constitutional claims contained within the plaintiff’s third amended complaint, as it saw no just reason for delay.150

6. Koyo Corp. of U.S.A. v. United States

The plaintiff in Koyo Corp. of U.S.A. v. United States filed its claim after the U.S. ITC and Customs denied the plaintiff certain monetary benefits under the CDSOA.151 The plaintiff alleged facial and as-applied constitutional challenges to the CDSOA under the First Amendment and the equal protection and due process guarantees of the Fifth Amendment.152 Exercising undisputed residual jurisdiction, the Court disposed of all counts for failure to state a claim on which relief can be granted.153

The plaintiff, a domestic manufacturer of tapered roller bearings and ball bearings, did not support the underlying AD investigations. Neither the ITC nor Customs considered the plaintiff eligible for CDSOA distributions as an ADP.154

The plaintiff launched a series of constitutional claims challenging the petition support requirement to become ADP-eligible. The plaintiff claimed the requirement violated the First Amendment guarantees of freedom of speech and belief, and the violation engaged in viewpoint discrimination by conditioning receipt of a government benefit

147. PS Chez Sidney, 684 F.3d at 1380.
148. See id. at 1380-81.
149. Id. at 1381.
150. Id. at 1380-81; Ct. Int’l Trade R. 54(b).
152. Id. at 1369.
153. Id.
154. Id.
on a private speaker’s specific viewpoint. The plaintiff alleged the petition support requirement also violated the Fifth Amendment on equal protection grounds because it impermissibly created classifications that implicate fundamental speech rights. Finally, the plaintiff challenged the requirement as impermissibly retroactive under the Fifth Amendment due process guarantee because eligibility for ADP status was based on past conduct.

The Court rejected each claim as being foreclosed by identical claims that the Court had previously rejected in *Pat Huval Restaurant & Oyster Bar, Inc. v. United States* or not viable due to binding precedent. In *SKF USA II*, the Court of Appeals for the Federal Circuit upheld the CDSOA against constitutional challenges brought on First and Fifth Amendment equal protection grounds. The Court rejected the plaintiff’s argument that recent Supreme Court jurisprudence, including the decision in *Citizens United v. FEC*, overturned or altered the results in *SKF USA II*. Further, the Court found no factual distinctions that would justify departure from those pled and rejected in *SKF USA II*. Because the plaintiff’s claims were foreclosed by the holding in *SKF USA II* and in *Pat Huval*, the Court dismissed the complaint under Rule 12(b)(5) for failure to state a claim.

7. **Giorgio Foods v. United States**

In *Giorgio Foods v. United States*, the plaintiff sought judicial review of decisions of the ITC and Customs denying benefits under the CDSOA. The Court dismissed the plaintiff’s constitutional claims for

155. *Id.* at 1371.
156. *Id.*
157. *Id.* at 1372. *Koyo* raised its constitutional challenges regarding other fiscal years in Court No. 06-00324. These claims were rejected in *Pat Huval Rest. & Oyster Bar, Inc. v. United States*, 823 F. Supp. 2d 1365 (Ct. Int’l Trade 2012).
158. *SKF USA, Inc. v. United States*, 556 F.3d 1337, 1337 (Fed. Cir. 2009).
162. *Id.* at 1372.
163. *Giorgio Foods, Inc. v. United States*, 898 F. Supp. 2d 1370 (Ct. Int’l Trade 2013). Exercising its jurisdiction under § 1581(i)(4), the Court had previously denied a stay in this case because it found that it was speculative whether outcomes in relevant cases pending before the Court of Appeals for the Federal Circuit would provide any support for the plaintiff’s claim for denial of benefits under the CDSOA. See *Giorgio Foods v. United States*, No. 03-00286, 2013 WL 363312 (Ct. Int’l Trade Jan. 13, 2013).
failure to state a claim on which relief can be granted under CIT Rule 12(b)(5), and concluded that it lacked subject matter jurisdiction over the plaintiff’s unjust enrichment claims and therefore dismissed that claim under CIT Rule 12(b)(1).

As in Koyo Corp., the plaintiff challenged the petition support requirement of the CDSOA. Because the plaintiff had indicated to the ITC in its questionnaire responses that it did not support the petition that resulted in the AD duty orders, it was disqualified as an ADP. The plaintiff asserted constitutional free speech and equal protection claims under the First and Fifth Amendment, respectively, and raised unjust enrichment claims against the defendant-interveners, whom the plaintiff alleged to have received its share of the CDSOA distributions.

The Court held that both of the plaintiff’s constitutional claims were foreclosed by the holding of SKF USA II, which upheld the petition support requirement of the CDSOA on both First Amendment and equal protection grounds. In SKF II, the Court of Appeals for the Federal Circuit stated that “the Byrd Amendment is within the constitutional power of Congress to enact, furthers the government’s substantial interest in enforcing trade laws, and is not overly broad. We hold that the Byrd Amendment is valid under the First Amendment.” The Court of Appeals also found that equal protection was not infringed, as the Byrd Amendment served a substantial government interest.

The CIT concluded that the plaintiff had failed to allege facts sufficient to demonstrate that the binding precedent in SKF USA II did not foreclose its constitutional claims, and accordingly dismissed these claims under CIT Rule 12(b)(5). Additionally, finding no basis for subject matter jurisdiction, the Court dismissed the plaintiff’s unjust enrichment claims under CIT Rule 12(b)(1).

166. Id. at 1381-82.
167. Id. at 1373-74.
168. Id. at 1372.
169. Id. at 1378.
170. Id. (citing SKF USA, Inc. v. United States, 556 F.3d 1337, 1360 (Fed. Cir. 2009)).
171. Giorgio Foods, 898 F. Supp. 2d at 1378; see SKF USA, Inc. v. United States, 556 F.3d 1337, 1360 (Fed. Cir. 2009).
173. Id. at 1381-82.
V. CASES IN WHICH THE COURT DISMISSED THE CASE BECAUSE IT AGREED WITH THE GOVERNMENT DEFENDANT THAT THE EXERCISE OF § 1581(i) JURISDICTION WAS NOT APPROPRIATE

The cases in this Part represent the flip side of the cases in Part III—namely, a fight about whether § 1581(i) jurisdiction was appropriate in which the U.S. government defendant won. And so, the Court dismisses the case.

A. Wuxi Seamless Oil Pipe Co., Ltd. v. United States

The plaintiff in Wuxi Seamless Oil Pipe Co., Ltd. v. United States challenged Commerce’s decision not to rescind, as to the plaintiff, an ongoing administrative review of a CVD order. Because the review was ongoing, the plaintiff’s only plausible basis for jurisdiction was pursuant to § 1581(i). Asserting jurisdiction on this basis, plaintiff challenged Commerce’s denial of the plaintiff’s request for an extension of the ninety-day deadline in which to withdraw its request for review, and sought injunctive relief to halt Commerce from continuing its review. The government argued that the Court lacked subject matter jurisdiction because Commerce’s decision denying the extension of time for the plaintiff to rescind its request for administrative review was not an absolutely final decision, as Commerce had yet to issue final results of the administrative review. The possibility remained that Commerce would exercise its discretion to rescind the review as to the plaintiff, the government argued. While recognizing that the “action would appear to fall within the literal terms of the jurisdictional grant of § 1581(i)(4),” the Court held that plaintiff had not shown the inadequacy of the alternate remedy available in an action brought under § 1516A of the Tariff Act upon publication of the final results of the administrative review. The Court would have exclusive jurisdiction according to § 1581(c) over such claim for relief. On that ground, the Court dismissed the plaintiff’s claims for lack of subject matter jurisdiction under § 1581(i)(4).

175. Id. at 1351.
176. Id. at 1352.
179. Id. at 1357.
In *JSC Acron v. United States*, the plaintiff asserted jurisdiction under § 1581(i) to challenge Commerce’s refusal to conduct a changed circumstances review of an AD order under § 751(b) of the Tariff Act of 1930. The government moved to dismiss for lack of subject matter jurisdiction under § 1581(i). While the plaintiff did not assert an alternate jurisdictional basis, the Court considered whether residual jurisdiction could be invoked in circumstances where the remedy of participating in an administrative review, and contesting final results of such review under § 1581(c), was available to the plaintiff at the time it filed its complaint before the Court. Looking at the factual circumstances existing as of the date the plaintiff filed its action, the Court noted that, by that date, the plaintiff was on notice of the dates that the period of review would begin and end, but had not participated in the review.

The Court reasoned that exercise of residual jurisdiction was only available if the other available relief was “manifestly inadequate.” To demonstrate what was a “manifestly adequate” remedy, the plaintiff would have to show “as a factual matter, either that (1) it was precluded from pursuing that remedy; or (2) even if it had participated in the first review, the remedy resulting from such a review would have been inadequate.” The Court held that because the plaintiff had not made such showing, the Court could not exercise jurisdiction under § 1581(i) and dismissed plaintiff’s action in its entirety.

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183. *Id.* at 1343.
184. *Id.* at 1344. In this case, the Department published a Termination Notice on April 27, 2011, which established an AD order that would enter into force on May 2, 2011 and announced a suspension of liquidation of entries of subject merchandise to begin and end on that date. *JSC*, 893 F. Supp. 2d at 1344; see Termination of the Suspension Agreement on Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation & Notice of Antidumping Duty Order, 76 Fed. Reg. 23569 (Apr. 27, 2011).
186. *Id.* at 1344.
187. *Id.* at 1347.
C. Chemsol, LLC v. United States

In Chemsol, LLC v. United States, the plaintiffs invoked the Court’s residual jurisdiction to challenge Customs’ extension of the statutory liquidation period for their entries of citric acid. The plaintiffs argued that Customs’ extension beyond the initial one-year statutory period was unlawful and sought that the entries be “deemed” liquidated by operation of law. At this juncture, the plaintiffs had no other basis for jurisdiction, as Customs had not yet liquidated the entries, which would have enabled the plaintiffs to file a protest and subsequently challenge that protest before the Court. The government moved to dismiss for lack of subject matter jurisdiction under § 1581(i), arguing that the plaintiffs had to wait until Customs liquidated the entries and then file a protest and subsequently seek judicial review of any denial of the protest under § 1581(a). The Court agreed, reasoning that the true nature of the plaintiffs’ action was a challenge to Customs’ extensions of time for liquidation, making the exercise of residual jurisdiction improper since relief under another subsection of § 1581 would become available. Customs’ actions were lawfully within the four-year period allowed for extensions and therefore the plaintiffs’ challenge to Customs’ extensions of time for liquidation could be brought, after liquidation, by filing a protest and with Customs and obtaining jurisdiction pursuant to § 1581(a).

D. Aluminum Extrusions Fair Trade Comm. v. United States

In Aluminum Extrusions Fair Trade Comm. v. United States, the plaintiff asserted jurisdiction pursuant to § 1581(i) for declaratory and equitable relief regarding the scope of the AD order issued by Department of Commerce, as well as Commerce’s cash deposit instructions to Customs. The plaintiff challenged Commerce’s revision of the scope of AD and CVD orders in its final determination to exclude finished heat sinks and Commerce’s instructions to suspend liquidation of the same, arguing that it had been wrongly deprived of AD duty remedies.

189. Id. at 1365.
190. Id.
191. Id.
192. Id. at 1366.
193. Id. at 1367-68.
to which it was entitled. The government argued that the Court lacked residual jurisdiction over the plaintiff’s claims, because the claim was unripe because the plaintiff could seek the remedy of a scope ruling, after which it could seek judicial review pursuant to § 1581(c). The Court agreed that the scope revision could be challenged under § 1581(c) as a negative part of Commerce’s final determination, and dismissed the plaintiff’s claims that were asserted under § 1581(i) for lack of subject matter jurisdiction.

VI. CONCLUSION

The volume and diversity of residual jurisdiction cases in 2013 demonstrate, once again, that § 1581(i) jurisdiction can be a viable basis for challenging various aspects of administrative proceedings. In perhaps the most notable case, a plaintiff successfully persuaded the CIT to hear its residual jurisdiction claim on the merits. In balance, however, consistent with prior years, the Court abides by its approach of looking for alternate jurisdictional grounds prior to exercising its residual jurisdiction even if those alternate grounds for relief may no longer be feasible due to the procedural juncture or may yet be unripe.

195. Id. at 1330.
196. Id. at 1329.
197. Id. at 1330.