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Applying Double Effect in Armed Conflicts: A Crisis of Legitimacy

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THE FEDERAL CIRCUIT STUMBLES: U.S. CUSTOMS GETS “GREEN LIGHT” FOR INDEFINITE INDECISION ON IMPORTER PROTESTS

*Damon V. Pike**

INTRODUCTION

In 2012, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) issued two precedent-setting decisions that essentially removed the obligation of U.S. Customs and Border Protection (CBP or Customs) to make timely decisions on Protests filed by importers challenging the assessment of duty on imported merchandise. Unlike most other federal agencies that are required to make certain decisions within a “reasonable” time period under the Administrative Procedures Act (APA),¹ CBP’s statutory two-year time limit to render a decision is now considered a “directory” obligation—not a mandatory one. As a result, CBP can effectively choose to delay indefinitely any decision with respect to Protests. This “indefinite indecision” extending beyond the two-year statutory period can hardly be considered “reasonable.”²

This outcome stems from the *Hitachi*³ and *Norman G. Jensen*⁴ cases, in which the Federal Circuit affirmed decisions of the U.S. Court of International

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¹ 5 U.S.C. § 706(1) (2012).

² It should be noted that jurisdiction to challenge protest decisions in court is specifically conferred by 28 U.S.C. § 1581(a), and that CBP’s decisions with respect to liquidated entries are final unless challenged via the protest mechanism. 19 U.S.C. § 1514(a) (2012). Thus, the APA does not apply *per se* to duty refund requests via challenges to CBP’s denial of protests. However, the broad mandates of the APA should be followed any federal government agency—including CBP—regardless of whether the APA applies to the specific decision being challenged. *See also* Lawrence M. Friedman & Christine H. Martinez, *The Administrative Procedures Act and Judicial Review in Customs Cases at the Court of International Trade*, 28 U. PA. J. INT’L ECON. L. 1 (2007).

³ *Hitachi Home Elecs., Inc. v. United States*, 661 F.3d 1343 (Fed. Cir. 2011), *reh’g denied*, 676 F.3d 1041 (Fed. Cir. 2012), *cert. denied*, 133 S. Ct. 757 (2012).

Trade (CIT) that ignored the plain language of the Protest statute and misread the corresponding legislative history, including important changes enacted in 1970 to ensure a quicker and less costly option in securing administrative review and decision rather than invoking automatic review by the judiciary. Due to the Federal Circuit rulings, CBP now has an indefinite, unspecified period of time to issue a final decision on a Protest. These rulings ultimately deprive importers of their right to timely administrative review of CBP decisions and instead force importers to follow a useless “expedited appeal” procedure that allows the agency to abdicate its decision-making responsibility and forces the judiciary to make the initial decision instead. In turn, businesses cannot gain the certainty they need to make informed decisions, investments, etc.—which detrimentally impacts global trade and hinders economic growth. This unfortunate state of affairs for importers needs to be addressed, and Congress should act to remedy this unfair approach to “non-decision-making” by the agency that collects more revenue for the federal government than any other, except the IRS.⁵

This Article will begin by reviewing the two cases: *Hitachi* and *Norman G. Jensen*. It will then proceed to evaluate 19 U.S.C. § 1515, which prescribes the time limit for Customs to issue a decision on a Protest. Then, the Article will examine how these rulings fit within the judiciary’s methods of interpreting time limits and the other options to compel CBP to issue a decision. Finally, the remedies for importers post-*Hitachi* will be evaluated, but the Article will conclude that the only real option is legislative intervention and a re-write of the applicable statute.

I. ENTRIES, LIQUIDATION, AND PROTESTS

Before turning to an analysis of the subject cases, some background about the entry process, liquidation, and Protests is required. Protests are filed when an importer challenges an administrative decision by CBP resulting from a liquidated entry.⁶ When a shipment reaches the United States, the importer of

⁴ *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325 (Fed. Cir. 2012).

⁵ In 2012, the U.S. collected \$30.3 billion dollars in customs duties. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2014, at 171 (2013).

The other larger revenue sources were individual income taxes (\$1,132 billion), corporate income taxes (\$242.3 billion), social insurance and retirement receipts (\$854.3 billion) and excise taxes (\$79.1 billion). *Id.* These taxes are collected by the IRS. *Id.*

⁶ See e.g., *Importers—Protesting or Petitioning a Decision by CBP*, U.S. CUSTOMS AND BORDER PROT., https://help.cbp.gov/app/answers/detail/a_id/296 (last updated July 31, 2013 4:10 PM).

record must complete the entry process for CBP to authorize the release of the imported goods into the United States.⁷ Broadly, the entry process consists of the filing of forms and documents that allow CBP officials to determine whether the merchandise is admissible into the United States and, if so, to assess the proper amount of duties owed, collect trade statistics, and verify whether the laws and regulations of other governmental agencies have been met.⁸ Entry documents that must be filed within fifteen calendar days of the arrival of a shipment at a U.S. port of entry include: (1) CPB entry forms,⁹ (2) evidence of the right to make entry including a bill of lading, a carrier's certificate, or shipping receipt, commercial or a *pro forma* invoice, (3) packing lists, (4) any other documents required to determine the admissibility of merchandise including documents required by CBP, federal, state, or local agencies, and (5) an appropriate customs bond.¹⁰ Upon entry, the importer must declare the tariff classification of the merchandise pursuant to the Harmonized Tariff Schedule of the United States (HTSUS), the value of the subject merchandise, and the country of origin, which largely determine the calculation of duties owed to CBP for each shipment.¹¹

Once an Entry Summary is filed, CBP (at the local port of entry) generally has 314 calendar days to examine the information reported and determine the correctness of that information.¹² CBP can either: (1) make no changes to the reported information; (2) make changes on its own initiative; or (3) propose changes and allow the importer the opportunity to respond. Once the entry information has been finalized, CBP performs the ministerial act of "liquidation" that closes out the entry and determines the final assessment of duties, fees, and other import-related taxes.¹³

⁷ 19 U.S.C. § 1484 (2012).

⁸ See generally U.S. CUSTOMS AND BORDER PROTECTION, WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: ENTRY (2004).

⁹ These forms include an Entry/Immediate Delivery Form (CBP form 3461) or an Entry Inward Cargo Manifest (CBP Form 7533). 19 C.F.R. § 142.3(a)(1) (2013).

¹⁰ An Entry Summary (Customs Form 7501) may be filed at the time of entry or within 10 working days of the filing of the entry to have the merchandise released from CBP's custody and entered into the U.S. 19 C.F.R. § 142.16 (2013).

¹¹ 19 U.S.C. § 1484(a)(1)(B) (2012).

¹² Administrative Message 97-0727 (Aug. 3, 1997). Under the statute, CBP has one year to liquidate the entries or these are automatically liquidated by operation of law. 19 U.S.C. § 1504 (a)(1).

¹³ 19 C.F.R. § 159.1 (2013) ("*Liquidation* means the final computation or ascertainment of duties on entries for consumption or drawback entries.")

If an importer is dissatisfied with any CBP administrative decision, then the importer may file a Protest on Customs Form 19.¹⁴ Protests must be filed within 180 days of the date of liquidation or re-liquidation, but not before.¹⁵ Once a Protest is filed, CBP is statutorily obligated under 19 U.S.C. § 1515 to either allow or deny a protest within two years of the date of filing.¹⁶ However, if an importer perceives that CBP intends to deny the Protest and wishes to “force the issue” to a decision sooner than the two-year statutory period, it may request an accelerated disposition procedure under § 1515(b).¹⁷ However, the accelerated disposition mechanism does not normally prompt CBP to actually review the Protest and render a decision; it simply allows CBP to “wait out the clock” for thirty days, after which the statute specifically provides for a “deemed denial” of the Protest.¹⁸ Because a denied Protest is a jurisdictional prerequisite for obtaining jurisdiction in the CIT, the accelerated disposition procedure essentially gives importers a quicker way to get to court than does the normal Protest procedure.¹⁹ If a Protest is denied under the normal, i.e., non-accelerated, procedure, CBP must provide notice of denial with the

¹⁴ 19 U.S.C. § 1514(a), (c) (2012); 19 C.F.R. § 174.11(a) (2013).

¹⁵ 19 U.S.C. § 1514(c)(3) (2013).

¹⁶ The Protest statute states:

Unless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part. Thereafter, any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded and any drawback found due shall be paid. . . . Notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary. Such notice shall include a statement of the reasons for the denial, as well as a statement informing the protesting party of his right to file a civil action contesting the denial of a protest under section 1514 of this title.

¹⁹ U.S.C. § 1515(a) (2012).

¹⁷ The statute provides:

A request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed by certified or registered mail to the appropriate customs officer any time concurrent with or following the filing of such protest. For purposes of section 1581 of title 28, a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request.

¹⁹ U.S.C. § 1515(b) (2012).

¹⁸ See 19 U.S.C. § 1515(b) (2012).

¹⁹ Allowed or approved protests result in the refund of duties to the importer for the correct amount. 19 U.S.C. § 1515(a) (2012).

reasons for denial, as prescribed by statute.²⁰ Denied protests may be appealed to the CIT pursuant to 19 U.S.C. § 1581(a). Without a denied protest, the importer must find another statutory jurisdictional provision to obtain judicial review in the CIT.²¹

A. *Hitachi*

In *Hitachi*, the Federal Circuit determined that an importer had to wait for CBP to issue a decision on a Protest (despite the statutory time limit for issuing such decision having expired) before being able to challenge that decision in court. *Hitachi* began with the importation of plasma flat panel televisions made and/or assembled in Mexico into the United States.²² When the televisions were imported, they were liquidated at the Normal Trade Relations rate of duty under HTSUS subheading 8528.12.72.²³ However, Hitachi filed Protests beginning in May 2005 with supporting documentation to claim duty-free treatment under the North American Free Trade Agreement (NAFTA).²⁴ Hitachi requested an Application for Further Review (AFR) for Hitachi's first Protest to have CBP Headquarters rather than the local port rule on its NAFTA claim.²⁵ The port granted the AFR and sent the Protest to CBP Headquarters, which was designated as the "Lead Protest" for Hitachi's other Protests, i.e., the other Protests were suspended pending the issuance of a response to the AFR, the outcome of which would govern the outcome of all other suspended Protests.²⁶

CBP did not deny or allow any of the Protests nor did it take any other action.²⁷ The Agency and Hitachi differed on the reasons for the inaction; Hitachi claimed that CBP had put Hitachi's Lead Protest on hold pending a final decision on whether to issue a revocation of two prior classification

²⁰ *Id.* Although the statute does not require that notice of *approval* be sent to the importer, in practice this occurs in almost every instance.

²¹ The usual alternative jurisdictional avenue is found in 19 U.S.C. § 1581(i): the "catch-all" residual jurisdiction provision. However, Subsection (i) can only be used if Subsections (a)-(h) is unavailable or the remedy from those jurisdictions provisions is manifestly inadequate. *E.g.*, *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987).

²² *Hitachi Home Elec. v. United States*, 704 F. Supp. 2d 1315, 1315 (2010).

²³ *Id.*

²⁴ *Id.* at 1316.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

rulings.²⁸ Also, CBP replaced its attorney-advisor handling the Protest in January of 2007, who then requested further information from Hitachi.²⁹ The importer responded with the requested information in March 2007.³⁰ CBP claimed that it did not intend to rule on Hitachi's Protest until it had considered all the information submitted by Hitachi and also by Samsung, which had submitted a Protest and AFR for substantially similar or identical merchandise.³¹ Samsung submitted additional information in August of 2007.³² Hitachi then filed summonses in the CIT in November of 2007 while CBP was still assessing the AFRs—over two years since Hitachi's Lead Protest had been filed.³³ Hitachi contended that its Protests were denied by operation of law under § 1515(a) because CBP had not taken action during the two-year period of review. The CIT dismissed the actions, concluding that it lacked jurisdiction under § 1515(a) and finding that the statute neither imposed an automatic denial nor an automatic allowance if the two-year period of review had elapsed without a decision.³⁴

In May of 2009, Hitachi filed another action in the CIT contending that its Protest was denied or deemed denied under § 1515(a) because CBP took more than two years to act on its Protest.³⁵ The importer then argued that jurisdiction was proper under § 1581(i) because Hitachi was entitled to recover the amounts protested via the “deemed allowance” of its Protests by operation of law. CBP moved to dismiss for lack of jurisdiction.

The CIT granted CBP's motion.³⁶ The Court's decision found that it lacked “residual” jurisdiction under § 1581(i) because Hitachi's protests were not “deemed allow[ed]” by operation of law after the two-year period expired.³⁷ In addition, the Court ruled that Hitachi could have either waited for a decision on its Protest beyond the two-year period or requested accelerated disposition under § 1515(b)—and then protested any denial under § 1581(a).³⁸ Thus, the Court found that another subsection of § 1581 was or could have been

²⁸ *Id.* The revocation was issued in October 2006 and limited the types of plasma flat panel televisions eligible for NAFTA duty-free treatment. *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1322.

³⁵ *Id.* at 1317.

³⁶ *Id.* at 1322.

³⁷ *Id.* at 1319–20.

³⁸ *Id.* at 1320.

available to confer jurisdiction, and that such relief afforded by § 1581(a) would not have been “manifestly inadequate.”³⁹ Because no Protest had yet been denied, the Court found that no jurisdiction under § 1581(a) existed and dismissed Hitachi’s claims.⁴⁰

The Federal Circuit affirmed the CIT’s decision in a divided decision.⁴¹ The majority found that the CIT had no jurisdiction under either § 1581(a) or (i).⁴² The majority first examined Hitachi’s allowance by operation of law claim.⁴³ The Federal Circuit noted that, under Supreme Court precedent,⁴⁴ if the statute does not prescribe a specific consequence for non-compliance, then the Federal Circuit would not prescribe one.⁴⁵ Furthermore, the Court found nothing in the statute to indicate that an allowance by operation of law existed.⁴⁶ The Federal Circuit reasoned that if an allowance by operation of law was applied to CBP, then every statutory provision could be satisfied by operation of law.⁴⁷ The Federal Circuit also noted that §1515(b) sets forth a time limit with a specific consequence within the statute that is absent in subsection (a).⁴⁸ Further, the majority’s reading of the legislative history did not support there being a specific consequence for delay.⁴⁹

Judge Reyna’s dissent noted that that the majority’s opinion renders the two-year limit meaningless.⁵⁰ In examining cases with time limits for government action, he critiqued the majority for using cases not addressing

³⁹ *Id.*

⁴⁰ *Id.* at 1321.

⁴¹ *Hitachi Home Elecs., Inc. v. United States*, 661 F.3d 1344 (Fed. Cir. 2011), *reh’g denied*, 676 F.3d 1041 (Fed. Cir. 2012), *cert. denied*, 133 S. Ct. 757 (2012).

⁴² *Id.* at 1344–45.

⁴³ *Id.* at 1350.

⁴⁴ *Id.* (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63, 114 (1993) (“The failure of Congress to specify a consequence for noncompliance with the timing requirements [of the statute at issue] implies that Congress intended the responsible officials . . . to have discretion to determine what disciplinary measures are appropriate when their subordinates fail to discharge their statutory duties.”); *see also* *United States v. Montalvo-Murillo*, 495 U.S. 711, 719 (1990); *Brock v. Pierce Cnty*, 476 U.S. 253, 260 (1986) (“When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.”)).

⁴⁵ *Hitachi*, 661 F.3d at 1348.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1361 (Reyna, J., dissenting).

§ 1515.⁵¹ The cases used by the majority had statutes involving very short time limits of less than 120 days—in contrast to § 1515’s two-year period.⁵²

In addition, Judge Reyna examined the legislative history of § 1515 and determined that Congress intended for Customs to lose the power to act on Protests after the expiration of the two-year review period.⁵³ Prior to the 1970 amendment of § 1515, Customs had ninety days to review and decide Protests; any undecided Protests were deemed denied and were automatically transferred to the Customs Court, the predecessor of the CIT.⁵⁴ Such a *de facto* transfer of undecided Protests resulted in “thousands” of cases being filed—most of which were never intended to be filed or prosecuted by the plaintiff.⁵⁵ This undesirable and unwanted administrative burden was the major reason prompting the 1970 amendment: the automatic transfer of undecided Protests to the courts. As Judge Reyna noted, the majority’s decision only encourages the re-institution of this practice that was rejected and remedied by Congress in 1970.⁵⁶

The fact that the original version of the Senate bill amending § 1515 contained no time limits for Customs’ review—but was quickly amended to provide for a two-year period—was also highly persuasive of Congressional intent, according to Judge Reyna.⁵⁷

The plain and stated purpose of giving Customs a two-year review period—eight times longer than was typically needed [under the existing ninety-day review period]—was to achieve “meaningful review” and disposition of protests by Customs rather than continue the process of sending “deemed denied” cases to the courts for judicial review.⁵⁸

Judge Reyna concluded his analysis of the legislative history by aptly noting: “While there is ample evidence that Congress intended for Customs to complete its review of protests in no more than two years, there is nothing in

⁵¹ *Id.*

⁵² *Id.* at 1354 (“This period is immensely longer than those relied upon by the majority, and is more like a statute of limitations than a provision to spur Customs to quick action.”).

⁵³ *Id.* at 1355.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1356.

⁵⁸ *Id.*

the legislative history suggesting that Congress intended for review of protests to potentially go on forever.”⁵⁹

Judge Reyna’s dissent then addressed the issue of consequences for non-compliance (upon which the majority so heavily relied). Contrary to the Court’s finding that § 1515(a) provides no consequences for Customs’ failure to act on a Protest within the two-year statutory period to “allow or deny” such Protest, Judge Reyna found that the plain language of the statute indeed provided a consequence: The Protest is either “allowed” or “denied,” and “any denial must be made express with a mailed notice stating the reasons for the denial.”⁶⁰ Because Hitachi’s Protests had not been denied, the statute thus provided for the consequence of Customs’ inaction: allowance, with a refund of duties required.⁶¹

Judge Reyna also focused on the word “shall” in the statute and, contrary to the majority’s view, found that “allow” meant to permit by inaction.⁶² He found support in the legislative history for this conclusion as well, i.e., Congress considered amending § 1515(a) to provide for notification of allowances (in addition to the notification of denials), but declined to so amend the statute.⁶³ As noted in the Committee Reports, “no useful purpose would be served by imposing on customs the burden of mailing separate notices of allowance” since “protest allowances are reflected in the notices of reliquidation and in refund payments”⁶⁴—and because no one appeals an allowance, no purpose would have been served by providing for them in the statute, according to Judge Reyna.⁶⁵ Thus, the legislative history supported a finding that Congress intended Protests to be allowed by inaction.⁶⁶

⁵⁹ *Id.*

⁶⁰ *Id.* at 1357 (citing 19 U.S.C. § 1515(a) (2011)).

⁶¹ *Id.*

⁶² *Id.* Unlike the majority, Judge Reyna carefully examined dictionary definitions of the word “allow,” and concluded:

The fact that § 1515(a) requires the refund of money ‘*found* to have been assessed or collected in excess’ does not detract from the passive nature of the allowance itself, but only indicates that an allowance—express or implied by law—is tantamount to a finding of entitlement that triggers Customs’ refund obligations.

Id. at 1358 (alteration in original) (citing 19 U.S.C. § 1515(a) (2011)).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

Turning to the accelerated disposition procedure, Judge Reyna acknowledged that § 1515(b)'s language specifically provided for a "deemed denial" after thirty days of no action by Customs—while § 1515(a)'s did not.⁶⁷ However, he noted that "[c]onsequential language can take many forms,"⁶⁸ and that § 1515(a) indeed provided a consequence for inaction: allowance.⁶⁹ Insightfully, Judge Reyna identified the two different purposes of the two subsections, and noted that "[u]nlike § 1515(a), § 1515(b) does not impose upon Congress any obligation to affirmatively act on a protest. Hence, § 1515(b) is no substitute for actual meaningful administrative review, and its primary purpose is to provide an expedited avenue for judicial review."⁷⁰

In concluding his dissent, Judge Reyna found that "[t]he statutory text makes clear that no protests may be undecided after two years"⁷¹—even for the most complicated Protests such as Hitachi's and Samsung's.⁷² Complicated issues, however, were "no excuse for Customs' inaction in the face of a statute that imposes a mandatory two-year deadline."⁷³ The majority's decision encourages importers to "abandon hope"⁷⁴ that Customs will ever issue a decision—and therefore results in mechanical resort to the accelerated disposition procedure and a deemed denial to have courts render a decision in the first instance.⁷⁵ Judge Reyna concluded that such an outcome (Customs unable to comply with the statutory two-year deadline) calls for a remedy by Congress—and not by the courts.⁷⁶

Upon appeal, Hitachi was denied a rehearing by the Federal Circuit.⁷⁷ Judge Reyna repeated his dissent to allow Customs an indefinite delay and the court "should not permit any more protests to languish in this fashion."⁷⁸

⁶⁷ *Id.* at 1358 (citing 19 U.S.C. § 1515(a) (2011)).

⁶⁸ *Id.* at 1358–59.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1359.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1360.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Hitachi Home Electronics, Inc. v. United States*, 676 F.3d 1041 (Fed. Cir. 2012).

⁷⁸ *Id.* at 1044 (Reyna, J., dissenting).

B. *Norman G. Jensen*

In addition to *Hitachi*, the Federal Circuit also decided a similar case in 2012 involving jurisdiction under § 1581: *Norman G. Jensen, Inc. v. United States*.⁷⁹ In *Norman G. Jensen*, the plaintiff was a licensed customs broker who had filed 308 Protests on behalf of various importers, which Protests sought the re-liquidation of 1529 entries of softwood lumber from Canada.⁸⁰ The Protests were filed on February 15, 21, and 22 of 2007.⁸¹ More than two years later, on March 9, 2009, Jensen contacted Customs Headquarters to inquire about the status of the Protests.⁸² Customs told Jensen that the Protests had been consolidated under a lead Protest and that a decision had been drafted but not finalized or issued.⁸³

After receiving Jensen's request for a listing of which of its 308 Protests had been consolidated under the lead Protest, Customs replied on August 7, 2009.⁸⁴ The agency suggested via email that Jensen contact the Port of Detroit, Michigan for the requested list.⁸⁵ Jensen responded three days later that the Protests had been filed at multiple ports and that the Port of Detroit might not have a full list of Protests.⁸⁶ He further requested from Customs a full list of Protests consolidated under the lead Protest.⁸⁷ After receiving no response to this request, Jensen filed suit on August 13, 2009, claiming that the suit was "for the purpose of preserving its appeal rights in the event [Customs] has issued any decisions regarding some or all of the protests within the statutory deadline and not given notice to Jensen."⁸⁸

Jensen inquired again in October 2009 about its Protests; however, Customs responded that it would not issue any ruling on an issue pending before the CIT.⁸⁹ Thus, because the 308 Protests were the subject of Plaintiff's 2009 action, CBP concluded that it could not issue a ruling.⁹⁰ On April 2, 2010, Jensen brought a claim seeking a writ of mandamus to compel Customs

⁷⁹ *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325 (Fed. Cir. 2012).

⁸⁰ *Id.* at 1326.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 1325.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

to rule on its Protests,⁹¹ asserting jurisdiction under 29 U.S.C. § 1581(i).⁹² The government responded that § 1581(i) jurisdiction was not available because § 1581(b)'s accelerated disposition could still be sought—and then § 1581(a) jurisdiction could be used to contest any subsequent denials of its Protests.⁹³

The Federal Circuit affirmed the CIT's denial of jurisdiction.⁹⁴ Both courts relied on *Hitachi* in issuing their decisions.⁹⁵ The Federal Circuit ruled that Jensen was not entitled to a decision because Customs took longer than two years to issue such decision.⁹⁶ In so ruling, the Federal Circuit reasserted the importance of the existence of § 1581(b)'s accelerated disposition procedure and the lack of a deemed denial clause in § 1581(a).⁹⁷ Furthermore, the court stated that, without a specific consequence set forth in the statute for failure to render a Protest decision, the two-year requirement is directory, not mandatory.⁹⁸ Despite seeking a different remedy, the court found *Hitachi* and *Norman G. Jensen* indistinguishable because both cases sought a remedy where none was specified in § 1581(a).⁹⁹

C. Creation of Sections 1515 (a) and (b)

In both *Hitachi* and *Norman G. Jensen*, the legislative history of the Protest statute (§ 1515) was influential in the courts' analyses. From the first tariff act of 1789 through the mid-1800's, the Protest mechanism did not exist because suits by importers seeking duty refunds were filed personally against the Collector of Customs at each port of entry and not against the federal government. In the Customs Administrative Act of 1890, the Protest mechanism was finally created as a procedure for the importer to challenge the assessment of duty, even though the statute did not explicitly refer to this procedure as "Protest."¹⁰⁰ Before the 1970 Customs Courts Act, it was well understood that if Customs did not issue a decision within ninety days after

⁹¹ *Id.* at 1327.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1331.

⁹⁵ *Id.* at 1330–31; *Norman G. Jensen, Inc. v. United States*, No. 10-00115, 2011 WL 587174, at *5 (Ct. Int'l Trade Feb. 10, 2011).

⁹⁶ *Norman G. Jensen, Inc.*, 687 F.3d at 1330–31.

⁹⁷ *Id.* at 1329–30.

⁹⁸ *Id.* at 1330.

⁹⁹ *Id.* at 1331.

¹⁰⁰ Customs Administrative Act of 1890, ch. 407, §14, 26 Stat. 131, 137–38 (1890); *see also* *United States v. McCoy*, 5 Ct. Cust. 264, 265 (Ct. Cust. App. 1914).

filing or sending the Protest, it would be deemed denied.¹⁰¹ Neither the statute nor the regulations then in effect specified a specific consequence for inaction, but the Protests were always, in practice, deemed denied.¹⁰² Thereafter, all denied Protest decisions, both deemed and actual, were automatically referred to the Customs Court.¹⁰³ Thus, in 1970, the Customs Court was one of the busiest courts in the nation.¹⁰⁴ The automatic judicial review mechanism, among other issues, prompted the reform of the customs duties statutes.¹⁰⁵

The Customs Courts Act of 1970 brought reforms in the Customs Protest procedures that survived into the current version of 19 U.S.C. § 1515.¹⁰⁶ During the drafting of this legislation, the government had submitted a proposal that Customs “may” act within the two-year protest period and, if the agency did not act, then the protest would be deemed denied.¹⁰⁷ However, Congress changed the directory “may allow or deny” in the statute to the imperative “shall allow or deny.”¹⁰⁸

The legislative history reveals that the government understood Customs to have a duty to rule on Protests within two years; the hearings included both representatives from the Department of Justice and the Bureau of Customs.¹⁰⁹ William Ruskelshaus, then Assistant Attorney General, Civil Division of the U.S. Dept. of Justice, testified that the two-year periods in which Customs had a chance to act on any Protest would provide a time lag in which an importer could have time to decide whether filing a case in the Customs Court was warranted.¹¹⁰ Leonard Lehman, then Deputy Chief Counsel for the Bureau of

¹⁰¹ See *United States v. Straus & Sons*, 5 Ct. Cust. 147, 149–50 (Ct. Cust. App. 1914).

¹⁰² *Id.*

¹⁰³ Paul P. Rao, Comments, *A Primer on Customs Court Practice*, 40 BROOK. L. REV. 581, 595–96 (1974).

¹⁰⁴ *To Improve the Judicial Machinery in Customs Court by Amending the Statutory Provisions Relating to Judicial Actions and Administrative Proceedings in Customs Matters, and for Other Purposes: Hearing on S.2624 Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary* [hereinafter *1970 Act Hearings*], 91st Cong. 1 (1969) (statement of Sen. Roman L. Hruska, Presiding Chairman, Subcomm. on Improvements in Judicial Mach. Of the S. Comm. on the Judiciary).

¹⁰⁵ Compare Customs Courts Act of 1970, Pub.L. 91-271, §1515, 85 Stat. 274 (1970) (amended 1980) with Customs Courts Act of 1980, Pub.L. 96-417, §1515, 94 Stat. 1727 (1980).

¹⁰⁶ Customs Courts Act of 1970, S. 2624 (1970).

¹⁰⁷ See also Brief of Amicus Curiae Hitachi Home Electronics (America), Inc. in Support of Defendant-Appellee and Reversal of the Decision, Order and Judgment of the Court of International Trade at 13, *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325 (Fed. Cir. 2012).

¹⁰⁸ S. REP. NO. 91-576, at 2–3 (1969).

¹⁰⁹ *1970 Act Hearings*, 91st Cong. iii (1969) (statement of Sen. Roman L. Hruska, Presiding Chairman, Subcomm. on Improvements in Judicial Mach. Of the S. Comm. on the Judiciary).

¹¹⁰ *Id.* at 84 (statement of William Ruskelshaus, Assistant Att’y Gen., Civil Division, Department of Justice).

Customs, stated: “[T]he bill provides a 2-year maximum period in which a protest can be held under consideration by the Bureau of Customs.”¹¹¹ He further affirmed: “The most significant change is that, upon final rejection by the Treasury, there will no longer be an automatic referral of the dispute to the customs court.”¹¹² Thus, both the government and the public understood that at the time of the passage of the new statutory scheme, Customs had a mandatory maximum two-year period in which to act. The changing of Customs’ review period provided relief to the Customs Court and provided time for importers to choose whether they wanted to proceed with further proceedings in the Customs Court or end the matter with Customs’ decision on the Protest.¹¹³

The two-year period was also thought to be more than enough time for Customs to issue a decision on Protests. Bradley Colburn, the President of the Association of the Customs Bar at the time of the 1970 revisions, stated during the Senate Judiciary Committee hearings on the bill that even 180 days would have been adequate for Customs to make a decision, which essentially doubled the time period of 90 days then in effect for Customs to render its Protest decision.¹¹⁴

Even today, CBP regards the two-year maximum as more than adequate to resolve most Protests. CBP’s internal policies specifically state that “the vast majority of the protests should be resolved within one year.”¹¹⁵ These policies do contemplate that “some AFRs, AD/CVD [antidumping/countervailing duty] protests sent to the Department of Commerce, or suspensions pending the outcome of court cases would be likely exceptions to the one-year processing requirement.”¹¹⁶ However, even for AFRs, the Office of Regulations and Rulings, which decides AFRs, has 90 days to make a decision unless one of the

¹¹¹ *Id.* at 83. (statement of Leonard Lehman, Deputy Chief Counsel, Bureau of Customs).

¹¹² *Id.*

¹¹³ The Government even argued before the Customs Court in 1977 that Customs could only allow or deny a protest within two years of its filing:

The defendant submits that the denial of its motion to dismiss may lead to an anomalous result of allowing customs to delay the mailing of notices of denial *ad infinitum* despite the fact that customs has the affirmative obligation by statute to allow or deny all protests within a period of two years of their filing.

See Knickerbocker Liquors Corp. v. United States, 432 F. Supp. 1347, 1351 (1977).

¹¹⁴ *1970 Act Hearings*, 91st Cong. 125 (1969) (statement of Bradley Colburn, President, Association of the Customs Bar). He also testifies that “under the present law with a 90-day limitation that something like 97 percent of protests are acted upon.” *Id.*

¹¹⁵ OFF. INT’L TRADE, PROTEST/PETITION PROCESSING HANDBOOK 37 (2007), available at <http://foiarr.cbp.gov/streamingWord.asp?i=182>.

¹¹⁶ *Id.*

Departments of Homeland Security, Treasury, or Justice requests a delay in ruling, another agency's opinion is needed, or when meeting with the requesting party, further submissions or laboratory analysis are necessary.¹¹⁷ AFRs can also be delayed when the Protests concern the same issues that are pending at the CIT, the Federal Circuit, or any court of appeal therefrom.¹¹⁸ Thus, only exceptional circumstances are supposed to delay a Protest and, even in those cases, the delays are usually caused by an agency other than Customs requesting more time. In *Hitachi*, importantly, it was Samsung, an importer with identical and similar merchandise, causing CBP's delay by filing its own protest—and not another government agency.¹¹⁹

In addition, the CIT and the Federal Circuit both pointed to the existence of § 1515(b) as the procedure for Hitachi and other importers to follow in lieu of § 1515(i). To the courts, the accelerated disposition mechanism functioned as the administrative remedy that should be exhausted before suit could be brought in the CIT. However, the § 1515(b) accelerated disposition statute is a chimera and does not promise any type of meaningful review—as Judge Reyna correctly identified.¹²⁰ The accelerated disposition procedure *may*, in rare cases, result in an allowance of the protest—but will much more likely result in a deemed denial of the protest through further inaction by Customs. Because the statute gives Customs only 30 days to respond to a request for accelerated disposition, further delays will also normally result in a deemed denial that allows the protestant to bring action to the court. This outcome is exactly the type of action that importers seek to avoid in the first place. As aptly stated by the plaintiff in *Norman G. Jensen*, “it is clear that an accelerated disposition request for a ‘more rapid decision’ is unquestionably futile and will inevitably result in a deemed denial after three and a half years and all [Jensen’s] entreaties have failed to result in a protest decision and review.”¹²¹ Such “automatic denial” is what Congress intended to do away with—and did so—when it passed the 1970 Customs Court Act.

¹¹⁷ See *id.* at 25.

¹¹⁸ See 19 C.F.R. 177.7(b) (2013); 19 U.S.C. 1515(c) (2012).

¹¹⁹ *Hitachi Home Elecs., Inc. v. United States*, 704 F. Supp.2d 1315, 1316 (Ct. Int'l Trade 2011) (“Customs ‘did not intend to rule on either the Samsung or Hitachi [protests] until it had considered all of the relevant information submitted by both protestants.’”).

¹²⁰ *Hitachi Home Elecs., Inc. v. United States*, 661 F.3d 1343, 1353 (Fed. Cir. 2011) (Reyna, J., dissenting), *reh'g denied*, 676 F.3d 1041 (Fed. Cir. 2012), *cert. denied*, 133 S. Ct. 757 (2012).

¹²¹ *Norman G. Jensen, Inc. v. United States*, 2011 Ct. Int'l Trade LEXIS 14, *16 (Ct. Int'l Trade Feb. 10, 2011) *aff'd*, 687 F.3d 1325 (Fed. Cir. 2012).

Finally, the accelerated disposition statute does not provide the same remedy for importers as does § 1515(a). As Hitachi pointed out in its *amicus curiae* brief for Norman G. Jensen's writ of *certiorari*, Customs has no obligation to do anything when the accelerated disposition is invoked.¹²² Hitachi argued that it was absurd to force a taxpayer to invoke the accelerated disposition statute in order to obtain a review of its protest denials by the CIT when Customs had a statutory obligation to act on the protests in the first instance. Practically, the bypassing of administrative review and decision reverts the protest mechanism back to its pre-1970 "automatic denial" system, i.e., Customs can take no action or make any decision on a protest and thus defer any initial substantive review of the importer's protest to the courts. This is not the administrative review process envisioned by Congress that was granted to importers in 1970.

D. "Reasonable" Decision-Making Deadline

With the two-year time period for deciding a protest now a "directory" guideline rather than a mandated deadline, what other arguments are left for importers to pursue in overturning *Hitachi*? The "plain language of the statute" argument was clearly rejected by the Federal Circuit, although when compared to Supreme Court and other circuit precedent, the basis for this rejection is perhaps understandable. Under a plain meaning reading of the statute, the word "shall" should indicate a mandatory time limit. *Black's Law Dictionary* has defined shall as "[h]as a duty to; more broadly, is required to" and notes that "[t]his is the mandatory sense that drafters typically intend and courts typically uphold."¹²³ The Supreme Court and other circuit courts have made clear that when the word "shall" is used, Congress imposes a mandatory duty. In *United States v. Monsanto*, the Supreme Court described the use of "shall" within a civil forfeiture: "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied . . ."¹²⁴ The Tenth Circuit has gone as far as to state "that the use of the word 'shall' indicates mandatory intent."¹²⁵

¹²² See Brief of Amicus Curiae Hitachi Home Electronics (America), Inc. in Support of Defendant-Appellee and Reversal of the Decision, Order and Judgment of the Court of International Trade, *supra* note 107, at 5.

¹²³ BLACK'S LAW DICTIONARY 1499 (9th ed. 2009).

¹²⁴ *United States v. Monsanto*, 491 U.S. 600, 607 (1989).

¹²⁵ *United States v. Myers*, 106 F.3d 936, 941 (10th Cir., 1996).

Despite this seemingly mandatory imposition, exceptions have relegated the power of “shall” to being directory. The Supreme Court noted in *Gutierrez de Martinez v. Lamagno* that legal writers sometimes misuse the word “shall” and use it to mean “‘should,’ ‘will,’ or even ‘may.’”¹²⁶ The Fourth Circuit instructs that the word should not be interpreted in a vacuum and the context in which it is used should help “elucidate the overall meaning of the clause” in a contract dispute.¹²⁷ The Fifth Circuit has promoted arguments that “shall” does not always mean mandatory in statutory schemes.¹²⁸ Based on this blurry precedent, then, the Federal Circuit imposed its “directory” standard on § 1515(a)’s use of the word “shall”—leaving CBP free to dawdle indefinitely, even past the two-year deadline.

The only seemingly available remedy in such a scenario was also rejected by the Federal Circuit in *Norman G. Jensen*: seeking a writ of mandamus to compel CBP to act. When the Court decided that “shall” within the statute was directory, it foreclosed the ability of importers to petition the CIT to order CBP to act within the mandatory two-year timeline because of lack of jurisdiction.¹²⁹ A brief review of the history of mandamus actions supports the conclusion that pursuing this avenue further would be futile.

Mandamus writs have long been obtainable throughout the course of U.S. history. According to the Supreme Court in *Wilbur v. United States*,¹³⁰ mandamus is used to “compel the performance . . . of a ministerial duty . . . [and also] to compel action . . . in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.”¹³¹ Judges follow this ministerial/discretionary dichotomy to analyze whether the mandamus writ is appropriate; specifically, three requirements apply: “(1) [T]he defendant must owe the plaintiff a clear, nondiscretionary duty; (2) the plaintiff must have no other adequate remedies;

¹²⁶ *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995) (citations omitted). .

¹²⁷ *Trumbull Investments, Ltd I v. Wachovia Bank, N.A.*, 436 F.3d 443, 447 (4th Cir. 2006). In this case, the court found that the use of the word inside the clause “shall in its discretion” does not enact the mandatory duty. Further, this was the only instance of the phrase, while other parts of the contract had “shall” standing alone in use. *Id.* at 443–48.

¹²⁸ *Sierra Club v. Train*, 557 F.2d 485, 487 (5th Cir. 1977). The Ninth Circuit agrees with the Fifth Circuit when a convincing argument can be made to define shall as not mandatory, but this is dicta. *City of Edmonds v. U.S. Dep’t. of Labor*, 749 F.2d 1419, 1421 (9th Cir. 1984) (citations omitted).

¹²⁹ See also *Jacob E. Gersen & Anne Joseph O’Connell, Deadlines in Administrative Law*, 156 U. PA. L. R. 923, 927 (2008).

¹³⁰ *Wilbur v. United States*, 281 U.S. 206 (1930).

¹³¹ *Id.* at 218.

and (3) the issuing court must be satisfied that the writ is appropriate under the circumstances.”¹³² The Federal Circuit found that the expedited review in § 1515(b) was a remedy available to importers. However, the Federal Circuit failed to address the inadequacy of the expedited review procedure, i.e., it would likely result in a Protest denial—leading to judicial review of the importer’s claim in lieu of any decision by CBP in the first instance. This outcome, as noted above, is exactly the scenario that the 1970 law changing the Protest statute sought to avoid.

Thus, with the mandamus avenue foreclosed, does the law provide any further grounds for importers to challenge *Hitachi* and *Norman G. Jensen*? The APA could conceivably be used to compel action, but it is unclear that courts would impose a deadline on CBP.¹³³ Specifically, § 706(1) of the APA provides courts the authority to review agency decision-making. Courts may review both final agency actions, which includes affirmative action, but also an agency’s failure to act. Section 706(1) allows courts to “compel agency action unlawfully withheld and unreasonably delayed.”¹³⁴ The standard for compelling an agency action is a “reasonableness” standard. Under this approach, courts tend to order agencies to act (and meet deadlines), even despite recognizing other demands on an agency’s resources.¹³⁵

Under the “reasonableness” standard, most courts use a form of the U.S. Court of Appeals for the District of Columbia’s TRAC six-factor test for missed deadlines¹³⁶ to determine whether an agency’s action was unreasonably delayed.¹³⁷ The TRAC test was promulgated with an open-ended deadline

¹³² *Shrimp Alliance v. United States*, 617 F.Supp. 2d. 1334, 1361 (2009) (citing *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004)).

¹³³ As stated before, the APA does not technically apply to CBP protest decisions. *See supra* note 2. Nonetheless, the “spirit” of the APA and its “reasonableness” standard should guide any discussion of the time period that a federal government agency should be allowed to render a decision.

¹³⁴ 5 U.S.C. § 706(1) (2012).

¹³⁵ Gersen & O’Connell, *supra* note 129, at 952.

¹³⁶ Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 27 VA. ENVTL. L.J. 461, 480 (2008).

¹³⁷ The factors are: (1) the time agencies take to make decisions must be governed by a “rule of reason;” (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. *Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

rather than one imposed by statute.¹³⁸ While the second factor looks for statutory deadlines, the other factors limit its importance. For Customs purposes, the TRAC test would make CBP ruling letters and Protests a lesser priority because mainly duties are at stake; delays or failure to act do not endanger the health and safety of U.S. citizens. Protests and ruling requests are issued in high volume by CBP, so they do not have a high priority. In sum, the use of this test could put an APA remedy out of reach for importers—even though it could be an appropriate test for statutory deadlines.¹³⁹

Even if mandamus or the APA could be used to compel CBP to act on a Protest, these remedies would be inadequate and impractical to pursue for every instance of CBP's unreasonable delay because they would force importers to go to court. This defeats the goal of having CBP adhere to the two-year deadline, during which many Protests could be approved—foreclosing the need for judicial involvement in the process at all. Importers could then seek review only of denied Protests. With no real legal arguments left, the only option to redress the outcome of *Hitachi* is for Congress to amend the statute and clearly state that CBP's two-year deadline is mandatory.

CONCLUSION

Future economic growth is clearly tied to international trade. In the U.S. alone, imports in fiscal year 2012 totaled \$2.4 trillion.¹⁴⁰ CBP collected \$39.4 billion in that same year,¹⁴¹ which represented a six percent increase from fiscal year 2011.¹⁴² Sustainable growth in international trade directly corresponds to an increase in revenue collection for CBP. However, while the U.S. still represents the largest economy in the world, China and the other “BRICS” nations have increasing appeal as locations for manufacturing and distribution hubs, which all necessitate imported goods and materials.¹⁴³ Many factors contribute to corporate decision-making in locating these hubs, but transparency and predictable government decision-making are always at the

¹³⁸ See Catherine Zaller, *The Case for Strict Construction of Mandatory Agency Deadlines Under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1570 (2001).

¹³⁹ *Id.* at 1557.

¹⁴⁰ U.S. CUSTOMS & BORDER PROT., IMPORT TRADE TRENDS: FISCAL YEAR 2012 YEAR-END REPORT 2 (2013).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See generally RAYMOND J. AHEARN, CONG. RESEARCH SERV., R41969, RISING ECONOMIC POWERS AND THE GLOBAL ECONOMY: TRENDS AND ISSUES FOR CONGRESS (2011).

top of the list in this regard.¹⁴⁴ Compared to other nations, the U.S. has always been viewed as a model of the transparency and predictability upon which multinational companies base their global investment decisions.¹⁴⁵ Amending § 1515(a) to impose a mandatory two-year timeline for CBP to decide Protests will further contribute to the U.S. maintaining this reputation as a stable and predictable place for international traders to operate and locate those manufacturing and distribution centers that contribute so much to economic growth.

Tied to this “big picture” concern, good policy also favors a re-write of §1515(a). As Judge Reyna’s dissent in *Hitachi* rightly noted, allowing Customs to refuse to act on a protest for more than two years is “inconsistent with today’s business realities.”¹⁴⁶ The National Customs Brokers and Forwarders Association of America stated in its *amicus* brief that customs brokers often advance duties on behalf of their importer clients; if any of those duties relate to issues that have been protested, the broker must often wait for a decision on the Protests to be reimbursed.¹⁴⁷ Importers, which file protests, require a certainty to their liability for duties to plan for the present and future of their businesses.¹⁴⁸ With repeated imports of similar merchandise and continuing Protests on the same issue(s), that uncertainty rises.

It is true that this extended review only affects a small percentage of protests.¹⁴⁹ However, the statistics presented in the *Hitachi* case show that the “indefinite delay” is still an issue. Over 3000 protests were still pending beyond the two-year period in 2009.¹⁵⁰ While many of these Protests (if denied outright) will never be litigated due to the cost, many Protests of the kind that are pending at CBP HQ on further review (such as were in *Hitachi*) involve

¹⁴⁴ See e.g., *IEAP-01: International Trade Policy*, NAT’L ASS’N MANUFACTURERS, <http://www.nam.org/Issues/Official-Policy-Positions/International-Economic-Affairs-Policy/IEAP-01-International-Trade-Policy.aspx> (last visited Feb. 7, 2014); Lorraine Trapani, *Trade risk Management: A Global Approach*, 6 WORLD CUSTOMS J. 101, 103 (2012) (showing IBM’s factors including transparency and predictability of customs law for risk management).

¹⁴⁵ See e.g. CUSTOMS MODERNIZATION HANDBOOK 289 (Luc De Wulf & José B. Sokol, eds. 2005) (showing that the United States along with Chile, Singapore, Mauritius, Great Britain, France, Ireland, New Zealand, and Australia have implemented new measures to increase transparency and faster processing times for customs administration).

¹⁴⁶ *Hitachi Home Electronics, Inc. v. United States*, 676 F.3d 1041, 1042 (Fed. Cir. 2012) (Reyna, J., dissenting).

¹⁴⁷ Brief for National Customs Brokers Ass’n of America as Amici Curiae Supporting Petitioners, *Hitachi Home Electronics, Inc. v. United States* at 4 (No. 12-148) (2012).

¹⁴⁸ *Id.* at 11.

¹⁴⁹ 8.7% of Protests required more than two years of review. *Hitachi*, 676 F.3d at 1044.

¹⁵⁰ *Id.*

significant duty amounts. Importers deserve to know the fate of this money within a reasonable time period, and as Congress set forth in the legislative history of the 1970 amendment, two-years is considered the maximum time period that CBP should be allowed to render a decision. No one would argue that a two-year period is unreasonable, even factoring in the many administrative hurdles that CBP must juggle in tracking the fate of thousands of Protests through the 329 official ports of entry in the United States.¹⁵¹

Despite the concerns of some that imposing a mandatory two-year deadline would result in “automatic denial” of Protests approaching that deadline, importers would hope that the government could manage its “administrative docket” to avoid such an outcome. Just as global businesses must prioritize issues and continually manage deadlines, so too should CBP be able to function in this manner. Thus, as Judge Reyna concluded in his *Hitachi* dissent:

Congress intended for Customs to meaningfully review and decide all protests within two years so that the courts would not be needlessly burdened, so that the trading community could benefit from Customs’ well-reasoned rulings in complex cases. Ultimately, if Customs for whatever reason is unable to comply with the two-year time limit under § 1515(a), then Congress, not this court, is the proper forum for Customs to appeal.¹⁵²

In keeping with this directive, CBP and the importing community should support congressional action. Only a legislative solution can provide ultimate resolution to the dilemma imposed by the Federal Circuit’s decisions in *Hitachi* and *Norman G. Jensen*.

¹⁵¹ Customs also has no incentive to change the existing state of affairs because if Protests must be decided within the two-year statutory deadline, only duty refunds result. As Judge Reyna observed, Protest-processing only results in the flow of money out of the treasury rather than money in through its revenue-collecting and law enforcement activities. *Id.*

¹⁵² *Hitachi Home Elecs., Inc. v. United States*, 661 F.3d 1360, 1361 (Fed. Cir. 2011) (Reyna, J., dissenting), *reh’g denied*, 676 F.3d 1041 (Fed. Cir. 2012), *cert. denied*, 133 S. Ct. 757 (2012).