

DEVELOPMENTS DURING 2006 CONCERNING 28 U.S.C. § 1581(i)

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I. INTRODUCTION

Two thousand and six was an active year for the Court of International Trade (“CIT”) and the Court of Appeals for the Federal Circuit (“Federal Circuit”) with regard to the CIT’s jurisdiction pursuant to 28 U.S.C. § 1581(i). The year gave rise to several interesting holdings concerning the scope of that jurisdiction. The courts also began to illuminate a set of previously cloudy procedural questions—what causes of action may be asserted within the jurisdictional boundaries of § 1581(i), and how central is the Administrative Procedure Act (“APA”) in that regard? Finally, a number of substantive issues arose in cases invoking the CIT’s § 1581(i) jurisdiction. The Continued Dumping and Subsidies Offset Act (“CDSOA”) was the subject of several decisions. Two of those decisions declared one of the CDSOA’s provisions to be unconstitutional, and another held the same provision to be inapplicable to duties collected upon imports from NAFTA countries. Additionally, the Federal Circuit had the opportunity to interpret for the first time several provisions of the statute that permit the United States Trade Representative (“USTR”) to take retaliatory action in response to the violation of United States trade rights by other countries. A number of cases addressed liquidation of entries by the Bureau of Customs and Border Protection (“Customs”), liquidation instructions issued by the Department of Commerce (“Commerce”), and the various forms of administrative review available with regard to duty orders.

II. BASIC JURISDICTIONAL PRINCIPLES OF § 1581(i)

The jurisdiction of the Court of International Trade is governed by 28 U.S.C. § 1581. Subsections 1581(a) through (h) grant jurisdiction to the CIT to hear civil actions seeking review of specific sorts of decisions

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by Customs, Commerce, the Department of Labor (“Labor”), the Department of the Treasury (“Treasury”), and the International Trade Commission (“ITC”).¹ Subsection 1581(i), by contrast, grants jurisdiction to the CIT in more general terms:

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.²

Courts have described § 1581(i) as a “residual” jurisdiction provision, but that description has been qualified in two ways.³

First, § 1581(i)’s grant of exclusive jurisdiction does not extend to all claims involving international trade and customs, but rather is limited to the particular matters described in § 1581(i)(1)-(3) and claims regarding the administration and enforcement of the matters described in §§ 1581 (a) through (h).⁴ Congress adopted § 1581(i) primarily to avoid jurisdictional confusion and overlap between the district courts and the CIT’s predecessor (the Customs Court), and to “ensure . . . uniformity in the judicial decision making process.”⁵ It did so by enumerating the particular matters over which the CIT would

1. See 28 U.S.C. § 1581(a)-(h) (2000).

2. 28 U.S.C. § 1581(i) (2000).

3. See *Int’l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006).

4. See *H & H Wholesale Servs., Inc. v. United States*, 437 F. Supp. 2d 1335, 1347 (Ct. Int’l Trade 2006).

5. *K-Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 188 (1988) (citing H.R. Rep. 96-1235, at 20 (1980)); see *H&H Wholesale*, 437 F. Supp. 2d at 1348-49.

have jurisdiction.⁶ Consequently, courts have been keen to limit the CIT's jurisdiction to those particular matters,⁷ and to maintain a clean division between the jurisdiction of the CIT and that of the district courts.

In 1988, the Supreme Court decided in *K-Mart* that the CIT did not possess § 1581(i) jurisdiction to review a challenge to a Customs Service regulation implementing 19 U.S.C. § 1526(a), which permits seizure of counterfeit goods by Customs.⁸ The Court reasoned that seizure under § 1526(a) was not an “embargo” under § 1581(i)(3) because § 1526(a) only led to seizure if a private party requested it.⁹ The Court remarked that, if it were to “depart from the words Congress chose” (here, “embargoes”) to permit CIT jurisdiction over the import restriction in § 1526(a), that would reinstate the jurisdictional confusion with the district courts that Congress sought to avoid.¹⁰

In 2006, the CIT in *H & H Wholesale Services, Inc. v. United States* decided on related grounds that the CIT did not possess § 1581(i)(4) jurisdiction to review challenges to the administration and enforcement of Customs seizures under 19 U.S.C. § 1526(e).¹¹ The plaintiff alleged that Customs had not provided proper notice of detention of merchandise, as required by 19 U.S.C. § 1499(c)(2) and implemented by 19 C.F.R. § 151.16(b) (2006), but it also challenged Customs's

6. *K-Mart*, 485 U.S. at 188-89.

7. Two decisions from the Federal Circuit in 2006 demonstrate this point. In *Former Employees of Quality Fabricating, Inc. v. United States Sec'y of Labor*, 448 F.3d 1351, 1356-57 (Fed. Cir. 2006), the Federal Circuit held that the CIT had no jurisdiction under 28 U.S.C. § 1581(i)(4) (2000) over claims regarding the administration and enforcement of the Department of Labor's certification of secondarily-affected worker status under the Trade Act of 2002. Jurisdiction under 28 U.S.C. § 1581(i)(4) (2000) here depends upon the scope of § 1581(d), and the latter only permits review of Labor's determinations under the Trade Act of 1974. *Id.* at 1355. The secondarily-affected worker assistance program, unlike its primarily-affected worker counterpart, was not integrated into the Trade Act of 1974. Therefore it does not fall under the jurisdictional scope provided by § 1581(d) or by § 1581(i)(4) as it relates to § 1581(d). *Id.* at 1355-56.

Similarly, in *Retamal v. United States Customs & Border Protection*, 439 F.3d 1372, 1375-76 (Fed. Cir. 2006), the Federal Circuit held that there is no jurisdiction under § 1581(i)(4) for the CIT to review the administration and enforcement of Customs's suspension of a customhouse broker license due to a broker's failure to file a triennial report on time. Jurisdiction under § 1581(i)(4) here depends on the scope of § 1581(g), and the latter only grants jurisdiction with regard to certain types of license terminations, not including termination for a broker's tardy filing of a triennial report. *Id.*

8. *K-Mart*, 485 U.S. at 190-91.

9. *Id.* at 185.

10. *Id.* at 189.

11. *H & H Wholesale Servs., Inc. v. United States*, 437 F. Supp. 2d 1335, 1348 (Ct. Int'l Trade 2006).

determination that plaintiff's imports were counterfeit.¹² In this instance, the CIT based its denial of jurisdiction *entirely* on the division-of-jurisdiction rationale. First, it cited precedent that the CIT will not assert jurisdiction over a plaintiff's claim to the extent that it "seeks a ruling on a substantive matter of trademark law in connection with an alleged unlawful seizure of the merchandise," since trademark law is purely domestic.¹³ Second, it noted that both § 1581 and 28 U.S.C. § 1356—which gives district courts original jurisdiction over seizures—were enacted as part of the same legislation, for the express purpose of clarifying the boundaries between CIT jurisdiction and the jurisdiction of the district courts.¹⁴ If the CIT exercised "exclusive jurisdiction" under § 1581 (i) over the plaintiff's claim that Customs did not provide proper notice under 19 U.S.C. § 1499(c), that would require the district courts to habitually send portions of their seizure cases to the CIT.¹⁵ That would result in the "piecemeal resolution of challenges to seizures" that "would provide neither comprehensive review nor a clear boundary between this Court and the district court."¹⁶ Therefore, the CIT concluded that it lacks such jurisdiction.¹⁷

But another 2006 decision, currently on appeal, arguably conflicts with the court's holding in *H & H Wholesale* and its use of the division-of-jurisdiction rationale. In *Sakar International, Inc. v. United States*, the court held that it *does* possess § 1581 (i) (4) jurisdiction to entertain challenges to the assessment of fines by Customs under the Tariff Act of 1930, 19 U.S.C. § 1526(f), because those fines are part of the administration and enforcement of Customs's seizure of goods under § 1526(e), which (it held) qualifies as an embargo for the

12. *Id.* at 1347.

13. *Id.* at 1348 (citing CDCOM (U.S.A) Int'l, Inc. v. United States, 21 Ct. Int'l Trade 435, 440 (Ct. Int'l Trade 1997)); *see* Genii Trading Co. v. United States, 21 Ct. Int'l Trade 195, 197 (Ct. Int'l Trade 1997); *Tempco Mktg. v. United States*, 21 Ct. Int'l Trade 191, 194 (Ct. Int'l Trade 1997). A more comprehensive discussion of this rule is found in *International Maven, Inc. v. McCauley*, 12 Ct. Int'l Trade 55, 58-60 (Ct. Int'l Trade 1988), where the CIT held that it did not possess § 1581 (i) jurisdiction to entertain the plaintiff's challenge to Customs's seizure of its goods as counterfeit because that challenge raised substantive trademark issues. The court noted that, although the CIT may possess jurisdiction to entertain "certain actions which relate to the exclusion of merchandise subject to trademark protection," that is only true with regard to a plaintiff's "challenge to the validity of the regulations" not to "a determination of the substantive trademark issue." *Id.* at 59-60. Substantive trademark issues are entirely matters of domestic trademark law, over which the district courts have original jurisdiction. *Id.* at 60.

14. *H&H Wholesale*, 437 F. Supp. 2d at 1348-49.

15. *Id.* at 1349.

16. *Id.*

17. *Id.*

purposes of § 1581 (i) (3).¹⁸ The court distinguished *K-Mart's* holding as to the interpretation of “embargo” because unlike seizure under § 1526(a), which was at issue in *K-Mart*, seizure under § 1526(e) is mandatory and does not depend upon the will of private parties.¹⁹ But the court did not address the *H & H Wholesale* division-of-jurisdiction rationale, which appears to be equally applicable to *Sakar* as it was to *H & H Wholesale*. First, the plaintiff in *Sakar* asked the court, in part, to review Customs’s determination that the plaintiff’s imports were counterfeit.²⁰ To the extent that it is doing so, the rule that the CIT does not have jurisdiction over claims that raise substantive trademark issues seems to be applicable. Second, as with the § 1499(c) notice issue in *H & H Wholesale*, if the CIT possesses “exclusive jurisdiction” under § 1581(i) to entertain challenges to Customs’s assessment of fines pursuant to § 1526(f), that would mean that district courts will regularly have to send portions of their seizure cases to the CIT. Similarly, 28 U.S.C. § 1355 grants original jurisdiction to the district courts over proceedings to collect fines of the sort at issue in *Sakar*,²¹ and the *Sakar* holding may in effect require district courts hearing cases under that jurisdiction to send defenses challenging the propriety of such fines to the CIT before they can decide whether an order is appropriate. This would lead to exactly the sort of piecemeal decision making that the court criticized in *H & H Wholesale* as being contrary to Congressional intent. Due to this tension, the results of the *Sakar* appeal might be quite interesting, for they pose a test of the extent to which the Federal Circuit will endorse (or limit) the division-of-jurisdiction rationale employed in *H & H Wholesale*.

The second limitation placed upon jurisdiction pursuant to § 1581 (i) is that it is only permitted if jurisdiction is not (and was never) available under another subsection of § 1581, unless the remedy provided under

18. *Sakar Int’l, Inc. v. United States*, 466 F. Supp. 2d 1333, 1341-46 (Ct. Int’l Trade 2006). After finding jurisdiction, the CIT dismissed the case because there was a lack of final agency action and there was no APA cause of action for the claim. *Id.* at 1346-50. See Part III *infra* for a discussion of the role of the APA cause of action in cases falling under the CIT’s § 1581(i) jurisdiction.

19. *Sakar*, 466 F. Supp. 2d at 1342-44. This holding differs from CIT precedent, which has read *K-Mart* more broadly to imply that seizures of counterfeit imports under § 1526(e) also do not qualify as embargoes. See CDCOM (U.S.A.) Int’l, Inc. v. United States, 21 Ct. Int’l Trade 435, 440 (Ct. Int’l Trade 1997).

20. *Sakar*, 466 F. Supp. 2d at 1336-37.

21. 28 U.S.C. § 1355 (2000).

that subsection is “manifestly inadequate.”²² The purpose behind this restriction is to prevent plaintiffs from circumventing the exclusive review processes specified by Congress in other parts of the statute.²³

The “manifestly inadequate” doctrine was created by the courts to provide a standard for determining when jurisdiction pursuant to § 1581(i) may be invoked without disregarding the requirements for establishing jurisdiction pursuant to §§ 1581(a) through (h).²⁴ Although the doctrine was intended to provide clarity in determining when jurisdiction pursuant to § 1581(i) is permissible, in practice, the courts appear to apply it as an equitable tool to allow judicial review (or not) depending upon the circumstances of the case. Nonetheless, there are some general principles that courts use for guidance, and a Federal Circuit case from 2006 provides a good overview of them. In *International Custom Products, Inc. v. United States*, the plaintiff (ICP) had obtained a ruling from Customs in January 1999 concerning the classification for duties purposes of a sauce that ICP then began to import in April 1999.²⁵ In reliance upon the Customs ruling, ICP entered into various contracts with suppliers and customers, and it began to commence a manufacturing operation.²⁶ But in March 2004, Customs notified ICP that it was initiating a tariff rate investigation, which resulted in reclassification of 86 unliquidated entries of ICP’s sauce, significantly increasing the tariff rate.²⁷ Sixty of these entries were subsequently liquidated at this higher rate.²⁸ ICP filed an action at the CIT alleging that Customs failed to follow proper procedure in revoking the previous classification.²⁹ Although jurisdiction would have been available under § 1581(a) had ICP filed a protest with Customs and had Customs then denied the protest, ICP never filed a

22. See, e.g., *Int’l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (quoting *Norscal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992)); *Mukand Int’l Ltd. v. United States*, 452 F. Supp. 2d 1329, 1331 (Ct. Int’l Trade 2006); *Mittal Can. Inc. v. United States*, 414 F. Supp. 2d 1347, 1351 (Ct. Int’l Trade 2006).

23. See, e.g., *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1275-76 (Fed. Cir. 2006); *Morris Costumes, Inc. v. United States*, 465 F. Supp. 2d 1345, 1348 (Ct. Int’l Trade 2006); *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 464 F. Supp. 2d 1350, 1353-54 (Ct. Int’l Trade 2006); *Abitibi-Consol. Inc. v. United States*, 437 F. Supp. 2d 1352, 1356 (Ct. Int’l Trade 2006).

24. *Int’l Custom Prods.*, 467 F.3d at 1327.

25. *Int’l Custom Prods.*, 467 F.3d at 1326.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

protest. But ICP argued—and the CIT agreed—that ICP could nonetheless bring a claim under the CIT’s § 1581(i) jurisdiction. The court concluded that jurisdiction pursuant to § 1581(a) would have been “manifestly inadequate” because the delays and costs inherent in the protest procedure required by § 1581(a) might force ICP out of business; § 1581(a) offers no prospective relief so ICP might have to bring an action a number of times, and a protest would be futile.³⁰

The Federal Circuit reversed, holding that the remedy available pursuant to § 1581(a) would not be manifestly inadequate.³¹ The appellate court reaffirmed its past holdings noting that its “cases made clear that ‘mere allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate.’”³² Furthermore, the appellate court also held that “delays inherent in the statutory process do not render it manifestly inadequate.”³³ Both of these holdings reflect the more general principle that courts presume that the review procedures stipulated by Congress are adequate, and that costs and delays that typically attend those procedures cannot provide a reason to bypass them.³⁴ As to the claim that the lack of prospective relief would lead to repeat litigation, the court noted that such a contention presumed that Customs would disregard a court ruling in its future decision making. The court “decline[d] to indulge such an assumption.”³⁵ Finally, although a remedy can be manifestly inadequate if it would be “futile” to pursue it, the court held that such was not the case for ICP. The court explained that ICP could not and should not presume that the

30. *Id.* at 1326-27; *Int’l Custom Prods., Inc. v. United States*, 374 F. Supp. 2d 1311, 1322 (Ct. Int’l Trade 2005). Last year’s article concerning § 1581(i) discussed the CIT’s now-reversed holding. See Richard O. Cunningham & Susan R. Gihring, Practitioner Commentary, *Cases Under 28 U.S.C. § 1581(i)*, 38 GEO. J. INT’L L. 137, 139-40 (2006).

31. *Int’l Custom Prods.*, 467 F.3d at 1327.

32. *Id.* (quoting *Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987)).

33. *Id.* (citing *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1551 (Fed. Cir. 1983)).

34. See *Nat’l Corn Growers Ass’n v. Baker*, 840 F.2d 1547, 1557 (Fed. Cir. 1988). Similarly, in the 2006 case *Abitibi-Consolidated Inc. v. United States*, 437 F. Supp. 2d 1352, 1360-62 (Ct. Int’l Trade 2006), the CIT held that § 1581(c) was not manifestly inadequate, even though the plaintiff said it would suffer records and personnel degradation (affecting the quality of future proceedings), business uncertainty, and increased adjudication costs if it were forced to proceed with the administrative appeals required under § 1581(c). The court noted that these harms are typical for participants in those administrative proceedings and inherent in the antidumping regime and the review scheme provided by Congress, so they cannot be used to declare the remedy provided under § 1581(c) manifestly inadequate. *Id.* at 1362.

35. *Int’l Custom Prods.*, 467 F.3d at 1327.

Customs protest would be futile, even though higher-level Customs officials were involved in the reclassification.³⁶

International Custom Products exemplifies the narrowness of the “manifest inadequacy” exception to the rule against § 1581(i) jurisdiction where other jurisdictional options are available. In one case from 2006, however, the Federal Circuit did find the exception to apply. In *Gilda Industries, Inc. v. United States*, the Federal Circuit held that relief under § 1581(a) would be “manifestly inadequate” because the plaintiff was challenging action by the United States Trade Representative (“USTR”), not Customs.³⁷ Since the administrative process required under § 1581(a) (*i.e.*, a protest with Customs) could not offer any remedy for the problem (the USTR’s allegedly unlawful actions) because Customs cannot overturn the USTR’s decision, the court exercised jurisdiction under § 1581(i).³⁸ The court did not specify whether the Customs protest process was available but just “manifestly inadequate” or whether it simply is not the proper place to review a USTR decision.³⁹ Hence, the Federal Circuit’s use of the “manifest inadequacy” standard in this case does not clearly distinguish between (1) the question of whether a jurisdictional avenue under another subsection of § 1581(i) is already available for the claim; and (2) the question of whether the remedy provided by that available avenue is manifestly inadequate. Instead, it appears that the “manifestly inadequate” inquiry is being used as a sort of heuristic aid to determine whether jurisdiction over the claim is actually available under another subsection of § 1581.

This use of the “manifestly inadequate” doctrine—as a proxy for the rule against § 1581(i) jurisdiction when other review is available rather than as an exception to that rule—is also reflected in the CIT’s 2006 ruling in *Trustees in Bankruptcy of North American Rubber Thread Co. v. United States*. In pertinent part, the court attempted to determine whether an earlier “changed circumstances” review provided a forum for adequate relief for the plaintiff’s claim relating to Commerce’s

36. *Id.* at 1328.

37. *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1275-77 (Fed. Cir. 2006).

38. *Id.* at 1276-77.

39. *See Mukand Int’l Ltd. v. United States*, 452 F. Supp. 2d 1329, 1331-32 (Ct. Int’l Trade 2006) (citing *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304-05, 1309-10 (Fed. Cir. 2004)) (holding that § 1581(a) did not apply because the plaintiff challenged the liquidation instructions issued by Commerce, not the liquidation by Customs, only the latter of which would be addressed by the Customs protest procedure required under § 1581(a)); *Mittal Can. Inc. v. United States*, 414 F. Supp. 2d 1347, 1351-53 (Ct. Int’l Trade 2006) (holding that the CIT possessed § 1581(i) jurisdiction to review liquidation instructions by Commerce, since such a challenge was not among the reviewable determinations permitted under § 1581(c)).

denial of the plaintiff's request for a second "changed circumstances" review.⁴⁰ The court determined that the earlier review "was a manifestly inadequate remedial forum" because the change of circumstance pertinent to the plaintiff's claim did not occur until after the first "changed circumstances" review was completed.⁴¹ The court concluded that, "[u]nder these circumstances, another subsection of section 1581 was not, and could not have been, available."⁴² The CIT thus employed the "manifestly inadequate" test not to find an exception granting § 1581(i) jurisdiction despite the existence of otherwise available review (as the classical rule envisions), but rather to determine whether review is otherwise available at all.

III. CAUSES OF ACTION UNDER § 1581(i) AND THE ROLE OF THE ADMINISTRATIVE PROCEDURE ACT

An underexplored question in the case law, at least until recently, was what possible causes of action exist for cases falling within § 1581(i) jurisdiction. Whether a complaint states a cause of action is a distinct question from whether a court has subject matter jurisdiction to hear a given claim, and it provides a distinct basis upon which a court may dismiss an action. This is illustrated by the procedural distinction between a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and a Rule 12(b)(5) motion to dismiss for failure to state a claim on which relief can be granted.⁴³ It is also borne out by the Supreme Court, which has held that the lack of a cause of action provides Federal courts with a reason to dismiss without even considering the independent question whether subject matter jurisdiction exists.⁴⁴

Section 1581(i) was not intended by Congress to create any new

40. *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 464 F. Supp. 2d 1350, 1357-58 (Ct. Int'l Trade 2006).

41. *Id.* at 1357.

42. *Id.* at 1357-58.

43. *See U.S. Ct. INT'L TRADE R. 12(b)(1) & 12(b)(5); Volkswagen of Am., Inc. v. United States*, 475 F. Supp. 2d 1385, 1389 n.2 (Ct. Int'l Trade 2007).

44. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984); *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 456 (1974). *See also Volkswagen*, 475 F. Supp. 2d at 1389 n.2 (citing *Block*, 467 U.S. at 353 n.4 to conclude that "preclusion of judicial review . . . has the same effect as a jurisdictional rule, but is not in fact a question of jurisdiction.").

causes of action, as explained in an oft-cited⁴⁵ report by the House Committee on the Judiciary about the Customs Courts Act of 1980:

Subsection [1581] (i) is intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provisions of law.⁴⁶

The primary reason why this is an under explored question is that the vast majority of opinions issued by the CIT in cases seeking to invoke § 1581(i) jurisdiction have not explicitly identified the cause of action upon which the claim was based. A handful of § 1581(i) cases before 2004, and quite a few since then, have been explicitly brought as Administrative Procedure Act (“APA”) causes of action (5 U.S.C. §§ 701-706) or have been spontaneously interpreted as such by the court.⁴⁷ The year 2004 was significant at least in part as a result as a result of *Shinyei Corp. of America v. United States*, where the Federal Circuit held that the plaintiff had an APA cause of action, falling under the CIT’s § 1581(i) jurisdiction, to challenge Commerce liquidation instructions as inconsistent with the results of Commerce’s preceding annual review.⁴⁸ It is now well-established in the case law that the APA can provide a cause of action under § 1581(i). The only remaining question is whether there is any other source for a cause of action

45. See, e.g., *Nat’l Corn Growers Assoc. v. Baker*, 840 F.2d 1547, 1555-58 (Fed. Cir. 1988); *Rubber Thread Co.*, 464 F. Supp. 2d at 1359 n.11; *Haarman & Reimer Corp. v. United States*, 1 Ct. Int’l Trade 148, 150-51 (Ct. Int’l Trade 1981).

46. H.R. REP. NO. 96-1235, at 47 (1980), reprinted in 1980 U.S.C.C.A.N. 3729, 3759.

47. Mark A. Moran & Wentong Zheng, *Claims Under the Administrative Procedure Act Before the Court of International Trade—A General Overview and Analysis of Significant Recent Jurisprudence*, 28 U. PA. J. INT’L ECON. L. 21, 26-30 (2007). See, e.g., *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004); *Consol. Fibers, Inc. v. United States*, 465 F. Supp. 2d 1338, 1342 (Ct. Int’l Trade 2006); *Tembec, Inc. v. United States (Tembec I)*, 441 F. Supp. 2d 1302, 1311 (Ct. Int’l Trade 2006); *Shandong Huarong Mach. Co. v. United States*, 435 F. Supp. 2d 1261, 1294 (Ct. Int’l Trade 2006); *Abitibi-Consol. Inc. v. United States*, 437 F. Supp. 2d 1352, 1357 (Ct. Int’l Trade 2006); *Can. Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321, 1333 (Ct. Int’l Trade 2006); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 403 F. Supp. 2d 1287, 1292, 1298 (Ct. Int’l Trade 2005) (dismissing for lack of ripeness and lack of final agency action as required for an APA cause of action); *Nakajima All Co. v. United States*, 12 Ct. Int’l Trade 189, 193 (Ct. Int’l Trade 1988); *Bonanza Trucking Corp. v. United States*, 10 Ct. Int’l Trade 314, (Ct. Int’l Trade 1986); *Sacilor, Acieries et Laminaires de Lorraine v. United States*, 3 Ct. Int’l Trade 191, 194 (Ct. Int’l Trade 1982).

48. See *Shinyei*, 355 F.3d at 1312.

under § 1581(i).⁴⁹

In 2006, the Federal Circuit provided further guidance concerning this question in *Motions Systems Corp. v. Bush*.⁵⁰ The plaintiffs' primary complaint in *Motions Systems* was that the President had not properly exercised his statutory discretion when he declined to provide import relief under § 421 of the United States-China Relations Act of 2000 (19 U.S.C. § 2451).⁵¹ The en banc majority held that there was no cause of action permitting judicial review of the President's exercise of discretion in this matter.⁵² In its analysis, the Federal Circuit stated that, because "[t]here is no explicit statutory cause of action" under § 421 granting a petitioner the right to sue the President, there are "only two potential sources for relief: (1) the Administrative Procedure Act, or (2) some form of nonstatutory review."⁵³ The court first held that the APA could not provide a cause of action against the President, because the President is not an "agency" for APA purposes.⁵⁴ Then it held that there is no nonstatutory review against the President with regard to his exercise of discretion under § 421.⁵⁵ Citing the Supreme Court in *Dalton v. Specter*, the Federal Circuit noted that there is a distinction in Supreme Court precedent between a "constitutional" challenge to Presidential action and a challenge that the President had exceeded his statutory authority.⁵⁶

A constitutional challenge would be like that in *Youngstown Sheet & Tube Co. v. Sawyer*, where the President asserted his authority to take some action by virtue of the Constitution itself.⁵⁷ But a challenge to action by the President merely under his *statutory* authority—and where the President asserts no authority by virtue of the Constitution itself—is not the same thing, and it does not necessarily receive the same treatment.⁵⁸ The Federal Circuit concluded that the plaintiffs' claim in

49. See generally *Rubber Thread*, 464 F. Supp. 2d at 1358-60 (noting that § 1581 does not create any causes of action and that the causes of action for claims falling within the CIT's jurisdiction are rather found in the statutes referenced in the other subsections of § 1581 or, in the case of subsection (i), unspecified sources such as the APA).

50. See *Motions Sys. Corp. v. Bush*, 437 F.3d 1356 (Fed. Cir. 2006) (en banc).

51. *Id.* at 1358.

52. *Id.* at 1359-62.

53. *Id.*

54. *Id.* (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992)).

55. *Id.* at 1359-62.

56. *Id.* at 1360 (citing *Dalton v. Specter*, 511 U.S. 462, 472 (1994)).

57. *Id.* (citing *Dalton*, 511 U.S. at 473); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952),

58. *Id.* at 1360 (citing *Dalton*, 511 U.S. at 474).

Motions Systems, like the claim in *Dalton*, was a statutory challenge, not a constitutional one.⁵⁹ It then held (also like *Dalton*) that even assuming that the law permits some form of review of the President’s exercise of statutory discretion, no such review exists when the discretion granted to the President is sufficiently broad.⁶⁰ It concluded that, even though § 421 limits the President’s discretion to some degree, “[t]he President must determine ‘that provision of [import] relief is not in the national economic interest of the United States or . . . that the taking of action . . . would cause serious harm to the national security of the United States’”—this is still “sufficiently discretionary to preclude judicial review.”⁶¹

Motions Systems strongly implies—and both courts and commentators have interpreted it to hold—that there are only three possible sources for a cause of action falling under the CIT’s § 1581 (i) jurisdiction: (1) a specific cause of action provided by statute, (2) an APA cause of action, or (3) some form of “nonstatutory” review.⁶² As to the first, we know of no cases decided by the CIT based upon § 1581(i) jurisdiction that were predicated upon a specific statutory cause of action. Statutes providing for judicial review of some particular matter generally have specific jurisdictional provisions associated with them, which would preclude § 1581 (i) jurisdiction. As for the scope of the third possibility—“nonstatutory” forms of review—it is still uncertain. The Supreme Court in *Dalton* and in *Franklin v. Massachusetts*, acknowledged that challenges to the President’s exercise of constitutional authority, such as that in *Youngstown Sheet & Tube*, are reviewable.⁶³ Consequently, that remains a potential cause of action, provided that § 1581 (i) permits the CIT to exercise jurisdiction over claims against the President, which is a

59. *Id.*

60. *Id.* at 1359-60 (citing *Dalton*, 511 U.S. at 474).

61. *Id.* at 1360-62 (quoting 19 U.S.C. § 2451(k)(1)(2000)).

62. *See, e.g., Volkswagen of Am., Inc. v. United States*, 475 F. Supp. 2d 1385, 1388 n.1 (Ct. Int’l Trade 2007) (noting that *Motions Systems* “suggested that a plaintiff is required to assert an APA cause of action or some form of non-statutory review in order to invoke § 1581(i) jurisdiction”); *Sakar Int’l, Inc. v. United States*, 466 F. Supp. 2d 1333, 1350 (Ct. Int’l Trade 2006) (citing *Motions Systems*, 437 F.3d at 1349, for the proposition that, without an APA cause of action or some express statutory provision for review, a plaintiff would need to have some sort of “nonstatutory” cause of action in order to obtain review under § 1581 (i) jurisdiction); Moran & Zheng, *supra* note 47, at 27-28; Stephen C. Tosini, *Foreign Sovereign Standing to Sue the United States in its own Courts Under the Administrative Procedure Act*, 28 U. PA. J. INT’L ECON. L. 91, 101-02 (2007).

63. *Dalton*, 511 U.S. at 471-76; *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

matter of some contention.⁶⁴ However, as to the challenge to the President’s exercise of statutory authority, it is still unclear whether a right of judicial review exists at all.⁶⁵ In any case, these two forms of review—of constitutional challenges and of statutory challenges—address presidential action, so they are not relevant for the vast majority of challenges to agency action that are raised before the CIT pursuant to § 1581(i). Since agency action, unlike presidential action, *may be* subject to review under the APA—on both constitutional and statutory grounds⁶⁶—the APA general cause of action to review final agency action appears to be the principal, if not the sole, basis for claims invoking § 1581(i) jurisdiction.⁶⁷

The primacy of the APA as the basis of a cause of action for claims seeking to invoke § 1581(i) jurisdiction is significant because it means that plaintiffs must not only meet the jurisdictional requirements of § 1581(i), but also must satisfy the requirements for a cause of action under the APA. Since the statutory framework underlying § 1581(i) already integrates several APA standards and requirements into that provision, the distinction between requirements for jurisdiction under § 1581(i) and the requirements for an APA cause of action will not always be important. For instance, 28 U.S.C. § 2631(i) states that a civil action under § 1581(i) jurisdiction “may be commenced in the [CIT] by any person adversely affected or aggrieved by agency action within the meaning of section 702 of [the APA].”⁶⁸ Courts have interpreted this statute to require, among other things, that a plaintiff seeking to invoke § 1581(i) jurisdiction needs to meet the additional “zone of

64. In 2003, a Federal Circuit panel held in *Corus Group PLC v. International Trade Commission*, 352 F.3d 1351, 1359 (Fed. Cir. 2003), that § 1581(i) “does not authorize proceedings directly against the President” because it, like the APA, “does not specifically include the President” in its terms. The majority opinion in *Motions Systems* did not directly address this question, even though the circuit specifically asked the parties to brief the issue of whether *Corus* should “be overruled *en banc* insofar as it holds that § 1581(i) does not authorize relief against the President.” *Motions Sys. Corp. v. Bush*, 140 Fed. Appx. 257, 258 (Fed. Cir. 2005). Since the Federal Circuit did not overturn *Corus* in *Motions Systems*, *Corus* still has precedential value, but the fact that the *en banc* majority did not apply it in this case may indicate that the court has some reservations about its holding.

65. The Supreme Court noted in *Dalton*, “We may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA. But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.” *Dalton*, 511 U.S. at 474 (internal citations omitted) (*quoted in Motions Systems*, 437 F.3d at 1360).

66. *See* Administrative Procedure Act, 5 U.S.C. § 706 (2000).

67. *See* sources cited *supra* note 47. The number of cases explicitly stating an APA cause of action is increasing, likely a recognition of this fact.

68. 28 U.S.C. § 2631(i) (2000).

interests” standing requirement of the APA.⁶⁹ Similarly, 28 U.S.C. § 2640(e) requires the CIT to review § 1581(i) cases “as provided in section 706 of title 5,” meaning the APA standard of review.⁷⁰ Because these provisions are integrated into the jurisdictional statute, they apply to all actions falling under § 1581(i), regardless of whether they assert an APA cause of action or not.

But, to the extent that a requirement for a cause of action under the APA is not already integrated into § 1581(i), and where the jurisprudence of § 1581(i) is less restrictive in some respect than the APA, the requirements for an APA cause of action will matter. One example of this is the APA’s final agency action requirement. In *Sakar International v. United States*, plaintiff Sakar challenged a fine that Customs assessed as a result of Customs’s determination that Sakar’s imports were counterfeit.⁷¹ To be precise, Sakar challenged not the original fine assessment but the *mitigated* fine assessment that Sakar had subsequently obtained from Customs.⁷² Sakar alleged that the assessment of the fine was contrary to law in a number of respects, including that Customs did not properly calculate the suggested retail price, incorrectly determined that Sakar’s use of a Microsoft symbol was a violation of trademark, and was just generally incorrect in its determinations because of a flawed methodology.⁷³ The CIT allowed jurisdiction under § 1581(i)(4) as it relates to § 1581(i)(3), but dismissed the case for failure to state a claim for which relief could be granted.⁷⁴ Invoking the *Motions Systems* cause of action analysis outlined above, the court held that (1) there is no specific cause of action in the statute (19 U.S.C. § 1526(f)) to review the assessment of these fines, (2) there is no APA cause of action, and (3) there is no nonstatutory form of review

69. *See, e.g.*, *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1279-80 (Fed. Cir. 2006); *Can. Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321, 1352-53 (Ct. Int’l Trade 2006). The “zone of interests” test is commonly articulated as “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Gilda*, 446 F.3d at 1279-80 (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

70. 28 U.S.C. § 2640(e) (2000). *See, e.g.*, *Mittal Can., Inc. v. United States*, 461 F. Supp. 2d 1325, 1328 (Ct. Int’l Trade 2006); *SKF USA Inc. v. U.S. Customs & Border Protection*, 451 F. Supp. 2d 1355, 1356 (Ct. Int’l Trade 2006).

71. *Sakar Int’l, Inc. v. United States*, 466 F. Supp. 2d 1333, 1335 (Ct. Int’l Trade 2006). *Sakar Int’l* is currently on appeal with the Federal Circuit, as mentioned in Part I *supra*.

72. *Sakar Int’l*, 466 F. Supp. 2d at 1336.

73. *Id.* at 1336-37.

74. *Id.* at 1341, 1350.

available in this instance.⁷⁵

The APA holding merits emphasis: because the assessment of the fine had not yet been consummated in a collection action, there had been no “final agency action” as required by APA § 704.⁷⁶ Quoting *Bennett v. Spear*, the CIT noted that, “[t]o be reviewable under the APA, the agency action being challenged must be ‘final’ such that it ‘must mark the consummation of the agency’s decision making process’ and, in addition, ‘must be one by which the rights or obligations have been determined, or from which legal consequences will flow.’”⁷⁷ The court reasoned that the mitigated assessment decision by itself—lacking a collection action in a district court—was not a consummation of Customs’s decision making process, as Customs still had to decide whether to collect, nor was it any longer an action with legal consequences because the mitigated fine decision being challenged had expired when Sakar failed to pay the mitigated fine by the effective date of the mitigation decision.⁷⁸

Relatedly, in *Abitibi-Consolidated Inc. v. United States*, the CIT cited lack of ripeness as an alternative basis for its dismissal of the plaintiffs’ APA cause of action.⁷⁹ The plaintiffs challenged Commerce’s procedure for selecting its review sample for an annual administrative review of the antidumping duty order covering Canadian softwood lumber imports.⁸⁰ The plaintiffs also challenged Commerce’s denial to include plaintiffs’ voluntarily submitted information as part of the sample.⁸¹ Primarily, the CIT held that jurisdiction would be available under § 1581(c) once the annual review was concluded, and that waiting for the final results of the annual review would not be “manifestly inadequate.”⁸² But as an alternative basis for dismissal, the CIT cited APA § 704, noting that the APA permits review only of final agency action⁸³ and that “[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the

75. *Id.* at 1348-50.

76. Administrative Procedure Act, 5 U.S.C. § 704 (2000).

77. *Sakar Int’l*, 466 F. Supp. 2d at 1347-48 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

78. *Id.* at 1348-50.

79. *Abitibi-Consol. Inc. v. United States*, 437 F. Supp. 2d 1352, 1357-62 (Ct Int’l Trade 2006).

80. *Id.* at 1355.

81. *Id.*

82. *Id.* at 1360-62.

83. Or for “agency action made reviewable by statute,” Administrative Procedure Act, 5 U.S.C. § 704, which is not relevant here.

final agency action.”⁸⁴ The court reasoned that this raised issues with regard to the ripeness of the plaintiffs’ claims, and it concluded that, because the review was still in progress and because the court didn’t have enough information at this stage, the plaintiffs’ claims lacked ripeness.⁸⁵ Both *Abitibi* and *Sakar* express the basic principle that, even if the requirements for § 1581(i) jurisdiction are satisfied, the APA requirement of final agency action creates an additional hurdle that plaintiffs need to clear before they can state a valid claim.

But APA § 704 is not the only provision that provides constraints not already incorporated into the jurisdictional requirements of § 1581(i). Section 701(a) bars an APA cause of action where “(1) statutes preclude judicial review” or where “(2) agency action is committed to agency discretion by law.”⁸⁶ Two APA cause of action cases from 2006 apply § 701, one addressing each exception.

In *Trustees in Bankruptcy of North American Rubber Thread Co. v. United States*, the plaintiffs—a domestic producer and a foreign importer—sought judicial review of Commerce’s decision to deny their request for a “changed circumstances” review.⁸⁷ The Government filed a motion to dismiss for lack of subject matter jurisdiction.⁸⁸ It noted that the CIT previously possessed jurisdiction under § 1581(c) to review Commerce denials of such requests, since the right of such review came from § 516A of the Tariff Act of 1930.⁸⁹ The Government claimed that Congress subsequently removed that provision from § 516A, thus precluding CIT jurisdiction over the question.⁹⁰ The CIT disagreed with this characterization of Congress’s action. It noted that § 1581 is a jurisdictional provision whereas the other statutes referred to in § 1581, such as § 516A of the Tariff Act of 1930, provide the cause of action.⁹¹ The CIT reasoned that the congressional action here did not restrict *jurisdiction*, it only restricted the *cause of action*.⁹² Thus, the court applied the normal analysis for § 1581(i) jurisdiction, holding that such

84. *Abitibi-Consol.*, 437 F. Supp. 2d at 1357 (quoting 5 U.S.C. § 704).

85. *Id.* at 1357-62.

86. Administrative Procedure Act, 5 U.S.C. § 701(a)(1)-(2) (2000).

87. *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 464 F. Supp. 2d 1350, 1351-53 (Ct. Int’l Trade 2006). This decision was issued following a motion to dismiss, and the case has not yet reached final judgment.

88. *Id.* at 1353.

89. *Id.* at 1355. Section 1581(c) provides CIT exclusive jurisdiction over civil actions “commenced under section 516A of the Tariff Act of 1930.” 28 U.S.C. § 1581(c) (2000).

90. *Rubber Thread*, 464 F. Supp. 2d at 1355, 1358-59.

91. *Id.* at 1358-59.

92. *Id.*

jurisdiction was available because no other form of review under other subsections of § 1581 is or had been available to provide relief for the domestic industry's change of heart.⁹³

The CIT then addressed the question of whether a cause of action existed for the plaintiffs' claim. The CIT noted that, although there was no longer a cause of action under § 516A, it was possible that there could be a cause of action under the APA.⁹⁴ But since § 701(a) of the APA denies the existence of an APA cause of action where Congress has precluded judicial review by statute, the question became whether Congress had done so.⁹⁵ The CIT examined the legislative history of the bill that removed the § 516A right of review and concluded that Congress did so because it was concerned that interlocutory appeals were slowing the administrative process.⁹⁶ However, the CIT noted that, in rare cases, a denial of a request for a "changed circumstances" review could in fact be a final agency action (and therefore not interlocutory).⁹⁷ For instance, in the present case, there would have been no further Commerce reviews (annual reviews or otherwise) because the duty order had been revoked, and there was no longer an affected domestic industry to support the imposition of duties.⁹⁸ Consequently, Commerce's denial of the plaintiff's request for a change of circumstances review would likely have been the end of the road.⁹⁹ Since an APA cause of action falling under the court's § 1581(i) jurisdiction only would apply to these rare, non-interlocutory situations (because the availability of any further Commerce review would make CIT review possible under § 516A and therefore make jurisdiction available under § 1581(c), precluding § 1581(i) jurisdiction), the CIT concluded that the legislative history does not show that Congress intended to restrict an *APA cause of action* regarding a denial of a request for a "changed circumstances" review.¹⁰⁰ The CIT therefore held that a cause of action existed and denied the Government's motion to dismiss.¹⁰¹

93. *Id.* at 1355-59. Presumably it did so under a law providing for "tariffs, duties, fees, or other taxes" or under a law providing for the "administration and enforcement" of the matters referred to in § 1581(c). *See* 28 U.S.C. § 1581(c), (i)(2), (i)(4), (2000).

94. *Rubber Thread*, 464 F. Supp. 2d at 1359.

95. *Id.* at 1359-60.

96. *Id.* at 1362-63.

97. *Id.* at 1363.

98. *Id.* at 1352, 1363.

99. *Id.* at 1363.

100. *Id.* at 1356, 1363-64.

101. *Id.* at 1364.

In *Consolidated Fibers Inc. v. United States*, the plaintiffs (importers of polyester staple fibers from Korea and Taiwan) sought judicial review of the ITC's denial of the plaintiffs' request for reconsideration of the ITC's original injury determination.¹⁰² The plaintiffs alleged that they had new evidence that the domestic industry had conspired to fix prices and allocate customers during the original investigation, compromising the integrity of that investigation.¹⁰³ Rejecting the ITC's motion to dismiss for lack of subject matter jurisdiction, the CIT held that it possessed jurisdiction pursuant to § 1581(i) to hear the claim, which it interpreted to be an APA cause of action.¹⁰⁴ In the course of its analysis, the CIT stated that jurisdiction is only available over APA claims if the exceptions of APA § 701(a) do not apply, including the provision that excludes review when an action is "committed to agency discretion by law."¹⁰⁵ It noted that the general rule for denials of requests for agency reconsideration is that they are "committed to agency discretion and not subject to judicial review *unless* the request is based on 'new evidence or changed circumstances,' in which case the court evaluates" the refusal according to the APA § 706 arbitrary, capricious, or abuse of discretion standard.¹⁰⁶ The CIT concluded that, because the plaintiffs alleged the existence of new evidence, the CIT could exercise jurisdiction over the plaintiffs' APA claim.¹⁰⁷

Beyond these standard APA issues, the CIT in 2006 raised an important question about the limits of the general APA cause of action—that is, whether *foreign sovereigns* may assert it. In *Tembec, Inc. v. United States (Tembec I)*, the CIT, sitting as a rare three-judge panel, determined that the Canadian Government and the governments of

102. *Consol. Fibers, Inc. v. United States*, 465 F. Supp. 2d 1338, 1339 (Ct. Int'l Trade 2006).

103. *Id.*

104. *Id.* at 1342. The court noted that no other subsection of § 1581 provided review for an ITC denial of a request for reconsideration, so review could be available. *Id.* at 1341-42. As to its status as an APA claim, the court construed it as such from the parties' characterization, but the plaintiff had not explicitly stated that it was asserting an APA cause of action. *Id.* at 1342.

105. *Id.* at 1342. In *National Fisheries Institute, Inc. v. U.S. Bureau of Customs and Border Protection*, 465 F. Supp. 2d 1300, 1321-22 (Ct. Int'l Trade 2006), ruling upon a motion for preliminary injunction, the CIT applied APA § 701 as well, but the opinion does not cite the APA as the basis for the plaintiff's cause of action. Given the foregoing analysis, it is fairly safe to assume that the APA provided the underlying cause of action. The court applied § 701 in response to the government's claim that the statute at issue commits the action to agency discretion, therefore precluding review under the § 706 "arbitrary and capricious" or "abuse of discretion" standard. *Id.* The *National Fisheries* case was still being litigated when this article was submitted for publication.

106. *Consol. Fibers*, 465 F. Supp. 2d at 1343 (quoting *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278-79 (1987)).

107. *Id.* at 1344.

some of its provinces could assert an APA cause of action challenging the USTR's authority under 19 U.S.C. § 3538(a)(6) to order the implementation of a new affirmative injury determination that the ITC pronounced in order to make its determination compatible with an adverse World Trade Organization ("WTO") ruling on an earlier determination.¹⁰⁸ Section 702 states that a "*person* suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."¹⁰⁹ The APA defines "person" to include "an individual, partnership, corporation, association, or public or private organization other than an agency."¹¹⁰ Given this ambiguity, standard principles of sovereign immunity and the longstanding custom that foreign sovereigns resolve their differences through traditional diplomacy or international dispute resolution, rather than in each other's domestic courts, would seem to dictate that the court resolve the ambiguity against providing foreign sovereigns with a cause of action under the APA. A great number of governmental actions are reviewable under § 702, and it is implausible that Congress would have granted foreign sovereigns the unprecedented license to interfere with the sovereign powers of the United States without even discussing this dramatic departure from traditional state-to-state dispute resolution.

The court in *Tembec I* cited two cases where courts have held foreign governments to be "persons" as defined in APA § 551,¹¹¹ but neither of these cases addresses reliance upon § 702 to state a cause of action, which uniquely raises the troublesome questions of sovereign immu-

108. *Tembec, Inc. v. United States (Tembec I)*, 441 F. Supp. 2d 1302, 1321-25 (Ct. Int'l Trade 2006). Section 129 of the Uruguay Round Agreements Act, 19 U.S.C. § 3538 (2006), provides the USTR with mechanisms to respond to adverse WTO panel decisions regarding ITC injury determinations, Commerce duty orders, and the like. It includes the ability to ask the ITC (under § 129(a)(1)) or Commerce, under § 129(b)(1) to decide whether anything can be done compatible with U.S. law to make the subject determination consistent with the WTO panel decision. *Id.* § 3538(a)(1), (b)(2). If so, the USTR may ask the ITC (under § 129(a)(4)) or Commerce (under § 129(b)(2)) to issue a determination to that effect. *Id.* § 3538(a)(4), (b)(2).

The substantive question in the case was whether the USTR possesses authority under § 129(a) to order anything other than partial or total revocation of an existing duty order (as expressly permitted in § 129(a)(6)) in response to the ITC's § 129(a)(4) determination. *Tembec I*, 441 F. Supp. 2d at 1331. The court ultimately held that the USTR does not have any additional authority, i.e., it cannot order the implementation of an *affirmative* injury determination. *Id.* at 1343.

109. Administrative Procedure Act, 5 U.S.C. § 702 (2000) (emphasis added).

110. *Id.* § 551(2).

111. *Tembec I*, 441 F. Supp. 2d at 1322 (citing *Stone v. EXIM Bank of U.S.*, 552 F.2d 132, 136 (5th Cir. 1977); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 776 (D.D.C. 1974)).

nity and interference by a foreign sovereign. Both address the question of the meaning of “persons” as used in separate provisions of the Freedom of Information Act. One case concerns whether a foreign government agency is a person falling under the Act’s disclosure exemption for “trade secrets and commercial or financial information obtained from a *person* and privileged or confidential.”¹¹² Another case concerns whether a foreign sovereign is a “person” under the Act’s requirement that agencies, upon receiving a proper request, “shall make the [requested] records promptly available to any *person*.”¹¹³ Although the Court of Appeals for the District of Columbia Circuit cited these two cases approvingly in the context of discussing the meaning of “person” in § 702, it did so only to the extent that it was considering whether a state (i.e., a state of the United States) could be a “person” for the purposes of § 702.¹¹⁴ None of these contexts raise the salient issue present in the *Tembec* scenario: whether a foreign sovereign may challenge actions of United States agencies in its domestic courts.

Judgment in this case, entered by the court in *Tembec II*, was later vacated in *Tembec III*.¹¹⁵ Consequently, the *Tembec I* decision has no judgment associated with it and is therefore not appealable for lack of an order or judgment as required by Rule 4(a) of the Federal Rules of Appellate Procedure and for lack of “final decision” within the meaning of 28 U.S.C. § 1295(a)(5).¹¹⁶ This issue was, however, raised in the appeal to the Federal Circuit in *Canadian Lumber Trade Alliance v. United States*.¹¹⁷ The Canadian Government is cross-appealing the CIT’s holding that the Canadian Government did not have standing because it had obtained a remedy from the WTO proceeding and therefore no longer had actual harm.¹¹⁸ In its appellate brief, the United States urges affirmance upon the alternative ground that foreign sovereigns

112. See *Stone*, 552 F.2d at 135-137 (citing 5 U.S.C. § 552(b)(4) (2000)) (emphasis added).

113. See *Neal-Cooper Grain*, 385 F. Supp. at 776 (citing 5 U.S.C. § 552(a)(3)(A) (2000)) (emphasis added).

114. See *Md. Dep’t of Human Res. v. Dep’t of Health & Human Servs.*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985).

115. See *Tembec, Inc. v. United States (Tembec III)*, 475 F. Supp. 2d 1393, 1402-03 (Ct. Int’l Trade 2007); *Tembec, Inc. v. United States (Tembec II)*, 461 F. Supp. 2d 1355, 1367 (Ct. Int’l Trade 2006).

116. Fed. R. App. P. 4(a); 28 U.S.C. § 1295(a)(5) (2006).

117. *Can. Lumber Trade Alliance v. United States (Can. Lumber I)*, 425 F. Supp. 2d 1321 (Ct. Int’l Trade 2006). This case is discussed in Part IV.B *infra*.

118. *Can. Lumber I*, 425 F. Supp. 2d at 1349-52.

lack a cause of action under the APA.¹¹⁹

No doubt there are further ways in which an APA cause of action places restrictions beyond those already built into § 1581(i). Since the law regarding APA causes of action under § 1581(i) has only been developing since *Shinyei* in 2004, the implications of this clarification have yet to be fully developed. The Federal Circuit's holding in *Motions Systems* serves to emphasize that the question of the source of the cause of action is important for claims falling within § 1581(i) jurisdiction, and given the predominance of the APA as the basis for those causes of action, we can expect further litigation over the ramifications of APA review in the future.

IV. CASES CONCERNING THE CONTINUED DUMPING & SUBSIDIES OFFSET ACT

Congress enacted the CDSOA, also known as the “Byrd Amendment,” in late 2000 as a rider to an agricultural spending bill.¹²⁰ The CDSOA instructs Customs to distribute the antidumping and countervailing duties that it assesses to “affected domestic producers.”¹²¹ Customs may provide such disbursements for “qualifying expenditures,” which include equipment, manufacturing facilities, research and development, training, and health care benefits.¹²² Importantly, the CDSOA defines “affected domestic producers” to include only those producers who were “petitioner[s] or interested part[ies] in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered.”¹²³ The effect of this provision is to prevent domestic producers who had opposed such a petition from receiving distributions under CDSOA.

The CDSOA was repealed on February 8, 2006.¹²⁴ Nevertheless, duties upon entries of goods made and filed before October 1, 2007 still will be distributed.¹²⁵ Furthermore, given the nature of administrative process, the CDSOA likely will continue to foster litigation for a few

119. Combined Response and Reply Brief of Defendant-Appellant at 18-25, *Can. Lumber Trade Alliance v. United States*, Nos. 2006-1662, -1625, -1626, -1627, -1636, -1648 (Fed. Cir. June 26, 2007).

120. Continued Dumping & Subsidy Offset Act (“CDSOA”) of 2000, Pub. L. No. 106-387, 114 Stat. 1549, 1549A-72 (2000) (codified as amended at 19 U.S.C. § 1675c (2000)) (repealed 2006).

121. CDSOA, 19 U.S.C. § 1675c(a) (2000) (repealed 2006).

122. *Id.* § 1675c(b)(4).

123. *Id.* § 1675c(b)(1)(A).

124. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154 (2006).

125. *Id.* § 7601(b).

more years. Given this continued relevance, we note several decisions issued during 2006 that are of great significance to the CDSOA and the CIT's jurisdiction pursuant to § 1581(i).

A. *Constitutionality of the CDSOA*

Two cases in 2006 assessed the constitutionality of the CDSOA's provision permitting distributions only to those domestic producers who supported the petition in accordance with which an antidumping or countervailing duty order was entered.¹²⁶ In both of these cases, the plaintiff was a domestic company that had responded to questionnaires issued by the ITC during the course of antidumping investigations.¹²⁷ In their responses, the plaintiff companies indicated that they did *not* support the domestic industry's petition for an antidumping investigation. Later on, after ITC issued an affirmative material injury finding and Commerce issued duty orders, the ITC did not include plaintiffs on the list of "affected domestic producers" designated to receive CDSOA distributions of collected duties.¹²⁸ Both plaintiffs petitioned the ITC to be included on this list and submitted a certification to Customs to request CDSOA disbursements. The ITC denied their requests, citing the plaintiffs' lack of support for the respective petitions, and Customs subsequently denied certification because plaintiffs were not on the ITC distribution lists. Subsequently, the plaintiffs brought suit in the CIT invoking its § 1581(i) jurisdiction.¹²⁹

In *PS Chez Sidney, LLC v. United States*, the CIT declared the petition support requirement to be unconstitutional under the First Amendment.¹³⁰ The court noted that not only does a domestic producer have to express support for the petition to get a CDSOA disbursement, but producers are also required by law to do so honestly.¹³¹ The court reasoned that, because CDSOA payments reward "a particular view on

126. *See* *SKF USA Inc. v. United States*, 451 F. Supp. 2d 1355, 1356 (Ct. Int'l Trade 2006); *PS Chez Sidney, LLC v. U.S. Int'l Trade Comm'n*, 442 F. Supp. 2d 1329, 1330-31 (Ct. Int'l Trade 2006).

127. *SKF USA*, 451 F. Supp. 2d at 1356; *PS Chez Sidney*, 442 F. Supp. 2d at 1330-31.

128. *SKF USA*, 451 F. Supp. 2d at 1357; *PS Chez Sidney*, 442 F. Supp. 2d at 1334.

129. *SKF USA*, 451 F. Supp. 2d at 1356-58; *PS Chez Sidney*, 442 F. Supp. 2d at 1333. Neither case provides any analysis as to why the plaintiffs' claims fall within the CIT's § 1581(i) jurisdiction or what their causes of action might be. Presumably, jurisdiction is based upon § 1581(i)(4) as it relates to § 1581(i)(1), and the cause of action is provided by APA § 702, which allows for review of the constitutionality of agency action.

130. *PS Chez Sidney*, 442 F. Supp. 2d at 1359.

131. *Id.* at 1353-54, 1356-57.

a controversial issue of public policy,” and deny payment to those who do not express that particular view, the regulation infringes upon the constitutionally protected interest in freedom of speech.¹³² As a result, the court concluded that the regulation is subject to strict scrutiny.¹³³ The strict scrutiny test requires the Government to show two things: (1) “that the burden it imposes is ‘necessary to serve a compelling state interest,’” and (2) “that it is ‘narrowly drawn to achieve that end.’”¹³⁴ The court held that strict scrutiny cannot possibly be met because the support requirement fails the “narrowly drawn” prong of the test.¹³⁵ The interest at stake in the CDSOA is to provide assistance to domestic producers who are harmed by foreign dumping and subsidies. In the court’s view, however, “[t]here is no necessary connection between support for a petition and harm to a domestic producer,” and this makes the support requirement “simultaneously over and underinclusive.”¹³⁶ A producer could be harmed but not support the petition, and

132. *Id.* at 1355-56.

133. *Id.* The CIT held that the exceptions to this rule, as provided in *United States v. American Library Ass’n*, 539 U.S. 194 (2003), and related cases, do not apply here. *Id.* at 1352-56.

In *American Library*, the Supreme Court held that Congress did not infringe First Amendment rights by conditioning its funding of public libraries on the installation of Internet filters by those libraries. *American Library*, 539 U.S. at 214. The Court distinguished its earlier case of *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), which deemed unconstitutional a public university’s policy granting funding to all sorts of student publications but not those based on religion, by arguing that public libraries do not “acquire Internet terminals in order to create a public forum for Web publishers.” *Id.* at 206. Rather, libraries provide the Internet “for the same reasons it offers other library resources: to facilitate research, learning and recreational pursuits by furnishing materials of requisite and appropriate quality.” *Id.* The CIT utilized this analysis to argue that the CDSOA is much more like the policy in *Rosenberger* because here the Government does provide a forum (i.e., the domestic producer questionnaires) for producers to express their support of a petition and requires participants to be honest in doing so. *PS Chez Sidney*, 442 F. Supp. 2d at 1353.

The CIT also distinguished the recent Supreme Court decision in *Rumsfeld v. Forum for Academic & Institutional Rights*, 126 S. Ct. 1297 (2006), where the Court held that Congress could deny federal funding under the Solomon Amendment to universities if their associated law schools refused military recruiters access to law school students for recruiting purposes. The CIT noted that central to the Court’s decision was that the Solomon Amendment did not require law schools to say anything or limit what they could say, but merely provided a requirement on behavior. *PS Chez Sidney*, 442 F. Supp. 2d at 1354 (citing *Rumsfeld*, 126 S. Ct. at 1297, 1307). The CDSOA, however, requires a producer not just to *do* something if it is to receive funding, but also that it *say something*—namely, that it supports the petition. *Id.* at 1354.

134. *PS Chez Sidney*, 442 F. Supp. 2d at 1356 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 403 (1992)).

135. *Id.* at 1356-59.

136. *Id.* at 1358-59. The CIT admitted that there could well be a high degree of correlation between support for the petition and harm experienced by the producer. It notes that this could

similarly a producer could support the petition but not be harmed. Given that the survey could (for instance) just as easily ask directly whether a producer is being harmed, and the CDSOA could make funds conditional upon a positive response to *that* question, the support requirement is not narrowly tailored enough to serve the compelling state interest behind the CDSOA.¹³⁷

In *SKF USA Inc. v. United States*, the CIT declared the petition support requirement to be unconstitutional under Equal Protection doctrine.¹³⁸ The CDSOA support requirement draws a distinction between those domestic producers that support a petition and those that do not, and it treats producers differently based on that distinction.¹³⁹ Since the CDSOA falls in the domain of social and economic policy, this distinction and differential treatment can satisfy Equal Protection so long as “there is any reasonably conceivable state of facts that could provide a rational basis for this classification.”¹⁴⁰ Even given this deferential standard, the court held that there is no rational or conceivable basis for this classification given that the purpose of the antidumping statute and the CDSOA is to remedy the injurious effects of dumping and subsidization to the “*industry as a whole*” rather than individual companies.¹⁴¹ The court also held that, even if Congress passed the CDSOA to help producers that had suffered more injury than others, the support requirement would still be arbitrary.¹⁴² The court asserted that there is no “reasonable correlation” between support of a petition by a producer and the gravity of injury to that producer, because many things could influence the decision to support or not.¹⁴³ Having held that the support requirement unconstitutional

be enough to satisfy a “rational basis” standard but since a higher standard applies under First Amendment strict scrutiny analysis, such a correlation is insufficient. *Id.* at 1357.

137. *Id.* at 1357 n.58, 1358-59.

138. *SKF USA Inc. v. United States*, 451 F. Supp. 2d 1355, 1360 (Ct. Int’l Trade 2006).

139. *Id.*

140. *Id.* (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)).

141. *Id.* at 1361-62.

142. *Id.* at 1362.

143. *Id.* It is not at all clear what the court meant by “reasonable correlation.” The court could not have meant that there is no empirical correlation because it cites no study to that effect. Perhaps the court meant that whatever correlation there is needs to be comprehensible as a matter of human motivation. But it is not clear that this should be the right standard to apply for “rational basis” analysis, and even if it is, it is perfectly comprehensible that the greater the harm to one’s business of foreign dumping and subsidies, the more likely a domestic producer is to support a petition for duties and the less likely the producer will be led by other factors to decline support. The court basically says as much in dicta in the *PS Chez Sidney* opinion. *PS Chez Sidney*,

as applied, the court also ruled that the support requirement was severable from the rest of the statute, such that participation as an interested party in the survey process would be adequate to be an “affected domestic producer.”¹⁴⁴ The court then remanded back to the agencies to review their decisions to deny CDSOA disbursements to SKF.¹⁴⁵

In *SKF USA*, after affirming the remand decisions issued by the ITC and Customs, which determined that SKF would, if the court’s decision became final, be entitled to receive CDSOA disbursements, the CIT entered final judgment in that case.¹⁴⁶ The period within which the judgment could be appealed had not yet expired at the time this article was submitted for publication.¹⁴⁷ Judgment is not yet final in *PS Chez Sidney*.¹⁴⁸

B. NAFTA Countries & the CDSOA

In *Canadian Lumber Trade Alliance v. United States* (“*Canadian Lumber F*”),¹⁴⁹ a number of Canadian exporters and Canadian industry associations, along with the Canadian Government and the Governments of some of its provinces, filed suit in the CIT alleging an APA § 702 cause of action under the CIT’s § 1581(i) jurisdiction.¹⁵⁰ The plaintiffs argued that Customs’s application of the CDSOA to duties assessed upon the plaintiffs’ respective goods was unlawful because it violated § 408 of the North American Free Trade Agreement Implementation Act, adopted by Congress in 1993.¹⁵¹

As a preliminary matter, the CIT held that the exporters and industry associations had Article III standing while the Canadian governments

LLC v. U.S. Int’l Trade Comm’n, 442 F. Supp. 2d 1329, 1357 (Ct. Int’l Trade 2006). See discussion *supra* notes 130-133 and accompanying text.

144. *SKF USA*, 451 F. Supp. 2d at 1364-66.

145. *Id.* at 1366-67.

146. *SKF USA, Inc. v. United States*, No. 05-00542, 2007 WL 2142291 (Ct. Int’l Trade Jul. 26, 2007).

147. On the same day that final judgment was entered in *SKF USA*, in *PS Chez Sidney*, the CIT adopted the court’s conclusion, in *SKF USA*, that the unconstitutional support requirement of the CDSOA was severable from the rest of the statute. *PS Chez Sidney v. U.S. Intern. Trade Com’n*, No. 02-00635, 2007 WL 2128305 (Ct. Int’l Trade Jul. 26, 2007).

148. The court remanded the matter to the agencies to determine *PS Chez Sidney*’s eligibility to receive CDSOA distributions. *Id.* at *5.

149. *Can. Lumber Trade Alliance v. United States (Can. Lumber I)*, 425 F. Supp. 2d 1321, 1330-33 (Ct. Int’l Trade 2006).

150. *Id.* at 1330-33.

151. *Id.* at 1333.

did not.¹⁵² The central question for each was whether the plaintiffs met the injury-in-fact test.¹⁵³ The court reasoned that the Canadian producers were likely to face some competitive injury from distribution of the duties to their U.S. competitors and that, even if the degree of that injury was uncertain, a trifling degree of competitive injury is sufficient to establish injury-in-fact.¹⁵⁴ The Canadian governments, on the other hand, had already pursued relief in the WTO and had received a favorable judgment.¹⁵⁵ Even if they otherwise would have established injury-in-fact (the governments asserted that their injury was that of breach of contract, i.e. NAFTA), their remedy in the WTO is presumed adequate since a party cannot pursue duplicative or inconsistent remedies for the same harm.¹⁵⁶ The Canadian government therefore lacked standing because it could not establish injury-in-fact.¹⁵⁷

As to the merits, the CIT held that the application of CDSOA to duties assessed upon Canadian imports was indeed unlawful.¹⁵⁸ Specifically, section 408 of the NAFTA Implementation Act provides that “[a]ny amendment enacted after the Agreement enters into force with respect to the United States that is made to . . . title VII of the Tariff Act of 1930 [19 U.S.C. §§ 1671 *et seq.*], or any successor statute, . . . shall apply to goods from a NAFTA country only to the extent specified in the amendment.”¹⁵⁹ The court reasoned that, because (1) the CDSOA amended title VII of the Tariff Act of 1930, (2) Congress enacted the CDSOA after NAFTA entered into force, and (3) the CDSOA is silent as to whether it applies to goods from Canada and Mexico, then any attempt by Customs to apply it to such goods is unlawful.¹⁶⁰

In a separate opinion concerning remedies, the CIT granted declaratory and injunctive relief to the plaintiff producers, but refused to require disgorgement of CDSOA distributions from domestic recipients.¹⁶¹ The court granted a permanent injunction to prevent Customs from making any further distributions of duties collected on the plaintiffs’ goods, noting that there would be irreparable harm without

152. *Id.* at 1349, 1352.

153. *Id.* at 1335-36, 1347.

154. *Id.*

155. *Id.* at 1350.

156. *Id.* at 1350-51.

157. *Id.* at 1351-52.

158. *Id.* at 1373.

159. NAFTA Implementation Act, 19 U.S.C. § 3438 (2000).

160. *Can. Lumber I*, 425 F. Supp. at 1366-67.

161. *Can. Lumber Trade Alliance v. United States (Can. Lumber II)*, 441 F. Supp. 2d 1259, 1263, 1268-89 (Ct. Int’l Trade 2006).

an injunction because sovereign immunity would prevent plaintiffs from seeking later monetary relief for competitive harm.¹⁶² However, the court denied the plaintiff's request for disgorgement upon a number of grounds. First, whenever the government distributes money, the recipients have some right to rely upon that payment.¹⁶³ Second, the plaintiffs did not bring their action immediately upon distribution, and under such circumstances "public policy ordinarily requires that recipients should be allowed to expend such money without fear that it will later be recollected [, at least] until the distribution of the money is called into question."¹⁶⁴ Third, the administrative costs of disgorgement are incredibly high. Given the permanent injunction, and the fact that only a fraction of the duties have been distributed at this point, the benefit of disgorgement would not outweigh these administrative costs.¹⁶⁵

The CIT's decision in *Canadian Lumber I* is currently on appeal. The United States challenges the CIT's holding that the plaintiff exporters and industry associations had Article III standing and prudential standing to sue.¹⁶⁶ The Canadian Government is also cross-appealing the CIT's holding that it did not have standing due to lack of injury-in-fact.¹⁶⁷ In response, the United States urges the Federal Circuit to affirm the CIT's holding that the Canadian Government lacks injury-in-fact and also contends that Canada (like any other foreign sovereign) has no cause of action under the APA.¹⁶⁸

C. Customs Deadlines

The CDSOA requires Customs to make its distribution of the duties collected during a given fiscal year no later than 60 days after the end of that fiscal year.¹⁶⁹ It also requires Customs to publish a notice of

162. *Id.* at 1265-66.

163. *Id.* at 1268 (citing *Parsons v. United States*, 670 F.2d 164, 166 (Ct. Cl. 1982)).

164. *Id.* (citing *Laskowski v. Spellings*, 443 F.3d 930, 936 (7th Cir. 2006)).

165. *Id.*

166. *See* Brief of Defendant-Appellant at 22-49, *Can. Lumber Trade Alliance v. United States*, Consol. Nos. 2006-1622, -1625, -1627, -1636, -1648 (Fed. Cir. Feb. 21, 2007).

167. Combined Opposition Brief for Plaintiff-Appellees and Opening Brief for Plaintiff-Cross Appellant at 60-88, *Can. Lumber Trade Alliance v. United States*, Consol. Nos. 2006-1622, -1625, -1626, -1627, -1636, -1648 (Fed. Cir. May 14, 2007).

168. Combined Response and Reply Brief of Defendant-Appellant at 18-25, *Can. Lumber Trade Alliance v. United States*, Consol. Nos. 2006-1622, -1625, -1626, -1627, -1636, -1648 (Fed. Cir. June 26, 2007).

169. 19 U.S.C. § 1675c(c) (2000), *repealed by* Act of Feb. 8, 2006, Pub.L. 109-171, § 7601(a), 120 Stat. 154.

intention to distribute in the Federal Register at least thirty days before distribution.¹⁷⁰ But by regulation, Customs is required to file this notice at least *ninety* days before the end of the fiscal year.¹⁷¹ Producers who wish to be included on the distribution list must send in certifications within sixty days following publication of that notice.¹⁷² In 2005, the CIT heard a case in which Customs filed its notice seventy-eight days before the end of the fiscal year.¹⁷³ The plaintiff in that case then filed its certification 102 days after the publication of the notice, at which point Customs denied the certification because it had been filed outside of the sixty day limit.¹⁷⁴ The issue before the court was whether Customs's lateness excused the plaintiff's late filing of its certification. The CIT decided that the regulation regarding filing of the notice was merely a procedural aid, so the fact that Customs violated the regulation did not make it lose its authority to administer the CDSOA.¹⁷⁵ Consequently, the plaintiff would have to show that it was prejudiced by Customs's action in order to obtain relief.¹⁷⁶ The CIT determined that it was indeed prejudiced, citing the fact that Congress aimed to protect domestic producers through the CDSOA and asserting that the plaintiff was "clearly injured by Customs 'failure to give timely notice of its intent to distribute—the only notice that Customs's' regulations direct domestic producers to expect."¹⁷⁷

In 2006, the Federal Circuit reversed this decision on appeal.¹⁷⁸ Although it agreed with the CIT's holding that Customs's violation of the procedural regulation did not invalidate subsequent agency action in enforcing the CDSOA and its regulations, and it agreed that the plaintiff would need to show prejudice to obtain relief, it sharply criticized the CIT's finding of prejudice.¹⁷⁹ The panel noted that the plaintiff had provided no evidence that Customs's late publication of its

170. *Id.* § 1675c(d)(2), *repealed by* Act of Feb. 8, 2006, Pub.L. 109-171, § 7601(a), 120 Stat. 154.

171. 19 C.F.R. § 159.62(a) (2003).

172. *Id.* § 159.63(a).

173. *Dixon Ticonderoga Co. v. U.S. Customs & Border Prot. (Dixon Ticonderoga I)*, 366 F. Supp. 2d 1352 (Ct. Int'l Trade 2005). Last year's version of this article discussed this case. *See* Cunningham & Gihring, *supra* note 30, at 149-50.

174. *Dixon Ticonderoga I*, 366 F. Supp. 2d at 1353-54.

175. *See id.* at 1355-56.

176. *Id.* at 1356-57.

177. *Id.* at 1357-58.

178. *Dixon Ticonderoga Co. v. United States (Dixon Ticonderoga II)*, 468 F.3d 1353, 1357 (2006).

179. *Id.* at 1355-57.

notice is what caused the plaintiff to file its own certification so late.¹⁸⁰ It determined that the purpose of the notice regulation, unlike the CDSOA itself, is simply to provide notice to domestic producers of upcoming distributions, and there was no evidence that this purpose was undermined by Customs's lateness.¹⁸¹ Furthermore, the fact that the regulation had been violated cannot be sufficient to establish prejudice, as the CIT appeared to imply, because that would eviscerate the prejudice requirement.¹⁸² Given the absence of evidence of actual prejudice on the record, the panel reversed.¹⁸³

V. RETALIATION LISTS UNDER THE TRADE ACT OF 1974

In *Gilda Industries, Inc. v. United States*, the Federal Circuit interpreted, as a matter of first-impression, several features of the statutory provisions authorizing the USTR to take retaliatory measures in response to violations of U.S. trade rights by other countries.¹⁸⁴

The dispute in *Gilda Industries* stemmed from the USTR's implementation of retaliatory measures against the European Community ("EC") in 1999.¹⁸⁵ The EC had failed to implement a WTO panel decision that the EC's ban on imports of meat from hormone-treated animals was contrary to the EC's WTO obligations.¹⁸⁶ A WTO arbitrator subsequently determined that the United States was impaired by the EC's ban, permitting the United States to increase duties on imports from the EC.¹⁸⁷ The USTR adopted a retaliation list of goods to which an *ad valorem* duty of one-hundred percent would apply.¹⁸⁸ Among these goods were those of the plaintiff, Gilda Industries, Inc., an importer of toasted bread from Spain.¹⁸⁹

On appeal from the CIT's dismissal for failure to state a claim, Gilda alleged that the USTR ignored various procedures and other requirements set forth in 19 U.S.C. §§ 2416-2417.¹⁹⁰ Only a few are worth mentioning. First, Gilda argued that only reciprocal goods could be

180. *Id.* at 1355-56.

181. *Id.* at 1356-57.

182. *Id.* at 1357.

183. *Id.*

184. *Gilda Indus., Inc. v. United States*, 446 F.3d 1271 (Fed. Cir. 2006).

185. *Id.* at 1274.

186. *Id.* at 1274.

187. *Id.*

188. *Id.* at 1275.

189. *Id.*

190. *Id.* at 1277

included on the retaliation list, so its bread product was inappropriately included. The Federal Circuit disagreed, holding that although § 2416(b)(2)(F) requires the USTR to include reciprocal goods on the list, it did not preclude the USTR from also including nonreciprocal goods.¹⁹¹ The court cited legislative history indicating that Congress wished retaliation lists to be periodically altered so as to prevent foreign governments from subsidizing the target industries to compensate.¹⁹² Without the ability to include nonreciprocal goods on the retaliation list, this feature of the retaliation scheme could not be realized.

Second, Gilda argued that the USTR violated § 2417(c)(3), which requires the USTR to conduct a review of the effectiveness of the retaliation list after receiving a request for continuation of that list.¹⁹³ Gilda noted that the USTR did not hold a hearing and that the review had not yet been completed.¹⁹⁴ The Federal Circuit responded that the statute “does not specify a particular method or timeline for completing the review.”¹⁹⁵ Given that neither the record nor the plaintiff’s arguments suggest that the USTR had “unreasonably delayed the review,” the court concluded that Gilda had no claim stemming from § 2417(c)(3).¹⁹⁶

Finally, Gilda alleged that the USTR failed to comply with the “carousel provision” contained in § 2416(b)(2)(C)¹⁹⁷:

The Trade Representative shall, 120 days after the date the retaliation list or other section 2411(a) action is first taken, and every 180 days thereafter, review the list or action taken and revise, in whole or in part, the list or action to affect other goods of the subject country or countries.¹⁹⁸

Both parties agreed that the USTR had not revised the retaliation list since its implementation in 1999, but the Government explained that one of the statutory exceptions to this carousel provision was applicable.¹⁹⁹ Section 2416(b)(2)(B)(ii)(I) provides the USTR need not

191. *Id.*

192. *Id.*

193. *Id.* at 1278; 19 U.S.C. § 2417(c)(3) (2000).

194. *Gilda Indus.*, 446 F.3d at 1278.

195. *Id.*

196. *Id.*

197. *Id.*

198. 19 U.S.C. § 2416(b)(2)(C) (2000).

199. *Gilda Indus.*, 446 F.3d at 1280.

revise the retaliation list if the USTR “determines that implementation of a recommendation made pursuant to a dispute settlement proceeding . . . by the country is imminent.”²⁰⁰

Although the CIT accepted this argument and dismissed Gilda’s claim, the Federal Circuit vacated this part of the CIT’s holding because the record did not supply sufficient facts to determine that the exception applied as a matter of law.²⁰¹ The court reasoned that, for the exception to apply, the USTR must have made an actual *determination*, and that there was no indication that the USTR ever made such a determination.²⁰² The court therefore remanded to the CIT for further proceedings.²⁰³ The court did note, however, that even if Gilda were ultimately successful in its claim, it would not be able to obtain the full remedies it seeks. Because it was far from certain that Gilda’s products would have been or will be removed from the list upon carousel review by the USTR, the court stated that it would have no grounds upon which to order reliquidation or removal of Gilda’s products from the list.²⁰⁴ All the court would be able to do is to compel the USTR to undertake the required review and revision process.²⁰⁵

On remand, the CIT concluded that the *second* exception to the carousel provision—not emphasized in its earlier opinion and not examined on appeal—applied to the USTR’s action.²⁰⁶ Section 2416(b)(2)(B)(ii)(II) provides that the USTR need not revise the retaliation list if the USTR “together with the petitioner involved in the initial investigation . . . (or if no petition was filed, the affected United States industry) agree that it is unnecessary to revise the retaliation list.”²⁰⁷ The Government provided the CIT with documentation on

200. 19 U.S.C. § 2416(b)(2)(B)(ii)(I) (2000).

201. *Gilda Indus.*, 446 F.3d at 1279-82.

202. *Id.* at 1281-82.

203. *Id.* at 1279.

204. *Id.* at 1282-83.

205. *Id.* at 1283. Gilda alleged that it was entitled to notice and the opportunity to comment upon the retaliation list every 180 days under the carousel provision. *Id.* The Federal Circuit disagreed, noting that the statute only requires notice and a comment period for the implementation of the retaliation list in the first place. *Id.* If the USTR finds that revision is necessary, the statute only requires the USTR to consult with the petitioner that prompted the initial investigation, not all interested parties. *Id.*; see 19 U.S.C. § 2416(b)(2)(C)-(D) (2000). There is no consultation requirement at all if the USTR finds revision to be unnecessary. See *Gilda Indus.*, 446 F.3d at 1283-84.

206. See *Gilda Indus., Inc. v. United States*, No. 03-00203, slip op. 2006-149 (Ct. Int’l Trade Oct. 10, 2006).

207. *Id.* (citing 19 U.S.C. § 2416(b)(2)(B)(ii) (2000)) (alteration in original).

remand that the USTR and the domestic industry currently agreed that revision of the retaliation list was unnecessary.²⁰⁸ The CIT accepted this as sufficient to meet the requirements of the exception.²⁰⁹

VI. CUSTOMS LIQUIDATIONS AND COMMERCE INSTRUCTIONS

Over the course of 2006, the CIT and the Federal Circuit decided a number of issues regarding the laws governing Customs liquidations and Commerce liquidation instructions, as well as the relation of both of these matters to Commerce change of circumstances reviews and annual reviews.

A. Automatic Liquidation and “Changed Circumstance” Reviews

In *Mittal Canada, Inc. v. United States*, the plaintiff was an importer that changed its company name from Ipsat Sidbec Inc. to Mittal Canada Inc.²¹⁰ As a result of the name change, Mittal no longer received the special deposit rate applied to its entries previously, but instead received the higher generic deposit rate established for the relevant class of imports.²¹¹ Mittal requested a “changed circumstances” review from Commerce to establish that Mittal was in fact the successor-in-interest to Ipsat, so that Mittal could obtain the favorable deposit rate once again.²¹² In its Final Results, Commerce agreed to reinstate the previous deposit rate, but it noted that this change would apply only to liquidations of goods entered on or after the date when the notice of Final Results was published.²¹³ Subsequent to this, Customs liquidated some of Mittal’s previous entries at the higher default rate, in accordance with its automatic liquidation regulation that requires unliquidated entries to be liquidated unless certain forms of

208. *Id.* at 2.

209. *Id.* Gilda filed an appeal of this judgment with the Federal Circuit, but its notice of appeal was filed outside of the 60-day deadline set by Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure. *Gilda Indus., Inc. v. United States*, 216 Fed. Appx. 973, 973-74 (Fed. Cir. 2007). Accordingly, the Federal Circuit dismissed Gilda’s appeal. *Id.* at 974. Gilda had previously requested an extension of time from the CIT to file its notice of appeal, but the CIT denied this request. *Id.* at 973. Gilda then appealed that decision by the CIT. *See* Brief of Appellant and Joint Appendix at 5, *Gilda Indus., Inc. v. United States*, No. 03-00203 (Ct. Int’l Trade Apr. 13, 2007). However, the Federal Circuit rejected the appeal.

210. *Mittal Can. Inc. v. United States (Mittal Can. I)*, 414 F. Supp. 2d 1347, 1349 (Ct. Int’l Trade 2006).

211. *Id.*

212. *Id.*

213. *Id.* at 1349-50.

review have been requested within the timeframe required by law.²¹⁴

Mittal initially filed suit asking for a temporary restraining order and a preliminary injunction against liquidation of its entries at the higher rate.²¹⁵ The CIT granted a temporary restraining order as a precaution but later denied a preliminary injunction because the court thought that Mittal's arguments at that time had little likelihood of success.²¹⁶ By the time of summary judgment, Mittal had "refined" its argument to the following: (1) Commerce regulation 19 C.F.R. § 351.212 is arbitrary and capricious because it does not exempt entries from automatic liquidation in the presence of a change of circumstances review, even though it does do so for new shipper reviews and expedited antidumping reviews; and (2) the regulation does not require automatic liquidation to be applied at the deposit rate, as Commerce argues.²¹⁷

The CIT rejected both claims, sustaining the Commerce regulation and Commerce's interpretation of it. With respect to the first claim, the court noted that there is a difference between changed circumstances reviews on the one hand, and new shipper reviews and expedited antidumping reviews on the other.²¹⁸ That is, a changed circumstances review can cover a variety of topics and they don't necessarily compute dumping margins or lead to new deposit rates.²¹⁹ Commerce asserted that the purpose behind its regulation is to suspend automatic liquidation only when a review of the assessment rate is ongoing.²²⁰ Because changed circumstances reviews do not always lead to a modification of that rate, the CIT reasoned that there was a rational basis for Commerce to grant suspension for new shipper reviews and expedited antidumping reviews but not for change of circumstances reviews.²²¹ Therefore, the agency regulation is not arbitrary or capricious.²²² With respect to the second claim, the CIT held that Commerce's interpretation of § 351.212 to require automatic liquidation at the cash deposit rate at the time of entry passes the *Seminole Rock* "plainly erroneous" test

214. *Mittal Can. Inc. v. United States (Mittal Can. II)*, 461 F. Supp. 2d 1325, 1326-27 (Ct. Int'l Trade 2006); *see* 19 C.F.R. § 351.212 (2006).

215. *Mittal Can. I*, 414 F. Supp. 2d at 1350.

216. *See id.* at 1350, 1353.

217. *Mittal Can. II*, 461 F. Supp. 2d at 1327. Mittal also argued that the regulation was internally inconsistent, but since the alleged internal inconsistency didn't affect Mittal given the facts of its case, the CIT held that Mittal lacked standing to raise that claim. *Id.* at 1330-31.

218. *Id.* at 1331-32.

219. *Id.*

220. *Id.* at 1332.

221. *Id.*

222. *See id.*

for agency interpretations of its own regulations.²²³

B. *The Procedural Consequences of Liquidation*

An important question for the CIT over the years has been whether, and to what extent, liquidation by Customs renders moot an action challenging that liquidation. In *Zenith Radio Corp. v. United States*,²²⁴ and cases following it, the Federal Circuit and CIT have held that liquidation deprives the CIT of jurisdiction over causes of action under § 516A of the Tariff Act of 1930.²²⁵ But in *Shinyei Corp. of America v. United States*, the Federal Circuit demonstrated that this does not necessarily apply to all causes of action.²²⁶ The *Shinyei* court held that the CIT still had jurisdiction to hear an APA cause of action challenging the validity of Commerce’s liquidation instructions in relation to Commerce’s underlying review results, even though Customs had already liquidated the subject entries.²²⁷ It also rejected the idea that reliquidation is only permitted under the protest provisions provided by § 1514(a) of the Tariff Act, holding that the CIT is permitted to order reliquidation under its “broad remedial powers” if it finds such relief to be necessary.²²⁸

But in 2006, the Federal Circuit in *Ugine & ALZ Belgium v. United States* expressed reservations about the generality of its *Shinyei* holding.²²⁹ The subject of appeal was the CIT’s denial of the plaintiffs’ motion for a preliminary injunction to prevent liquidation of the plaintiffs’ unliquidated entries.²³⁰ The plaintiffs had mistakenly declared the country-of-origin for their imports, a mistake which resulted in high duties rather than none.²³¹ Once they noticed this mistake, they requested Commerce to correct the problem, which Commerce did during a periodic review.²³² However, Commerce declined to apply

223. *See id.* at 1332, 1339 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

224. *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983).

225. *See e.g. Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1306-08 (Fed. Cir. 2004); Trade Act of 1930, 19 U.S.C. § 1516a (2006).

226. *See Shinyei Corp.*, 355 F.3d at 1309 (noting that the holding in *Zenith* is “limited to section 516A actions”).

227. *Id.* at 1309-10.

228. *Id.* at 1311-12 (discussing 19 U.S.C. § 1514(a)).

229. *Ugine & ALZ Belg. v. United States*, 452 F.3d 1289, 1296-97 (Fed. Cir. 2006).

230. *Id.* at 1290.

231. *Id.* at 1290-91.

232. *Id.* at 1291.

this change to unliquidated entries that were not directly subjects of the annual administrative review, and it issued liquidation instructions accordingly.²³³ The plaintiffs brought suit in the CIT to challenge these instructions and to obtain a preliminary injunction preventing liquidation.²³⁴ The CIT denied the preliminary injunction on the grounds that (1) the plaintiffs were unlikely to succeed in their claim that the classification correction should apply retroactively to all unliquidated entries, and (2) an injunction was unnecessary because liquidation would not lead to irreparable harm, as plaintiffs could still obtain relief in court.²³⁵ However, the Federal Circuit disagreed with both of these contentions, reasoning that the state of the law on both issues was too uncertain to deny a preliminary injunction on those bases.²³⁶

With regard to the question of irreparable harm, the panel noted that *Shinyei* permitted the CIT to order reliquidation in the context of entries liquidated according to Commerce liquidation instructions inconsistent with a prior annual administrative review.²³⁷ *Ugine & ALZ Belgium*, however, concerned the liquidation of entries according to liquidation instructions issued *before* the annual review providing the change of classification.²³⁸ Because of that difference, the panel noted that it was uncertain whether the action would be mooted by liquidation or not, but it declined to decide the issue definitively at the preliminary injunction stage.²³⁹

Somewhat tangentially, another case from 2006 addressed the question of the availability of reliquidation, but in a different respect. In *Nippon Steel Corp. v. United States*, the plaintiff had originally challenged Commerce's margin calculations that would be used in assessing duties on the plaintiff's imports.²⁴⁰ The CIT had granted a preliminary injunction to prevent liquidation during litigation, and it ultimately found for the plaintiff.²⁴¹ However, Commerce accidentally issued liquidation instructions and Customs liquidated the entries despite the injunction.²⁴² This error turned out to be in the plaintiff's favor

233. *Id.*

234. *Id.*

235. *Id.* at 1291-92.

236. *See id.* at 1293-97.

237. *Id.* at 1296.

238. *Id.*

239. *Id.* at 1296-97.

240. *Nippon Steel Corp. v. United States (Nippon I)*, 25 Ct. Int'l Trade 1192, 1192-93 (2001).

241. *See Nippon Steel Corp. v. United States (Nippon II)*, No. 99-08-00466, 2006 WL 1755067, at *1 (Ct. Int'l Trade June 27, 2006).

242. *Id.*

because the new margin calculations that Commerce computed on remand were less favorable to the plaintiff than the calculations it had originally appealed.²⁴³ Commerce subsequently submitted a motion to reliquidate given the new calculations, and the plaintiff challenged this motion on the grounds that the Government “should not benefit from its own wrongdoing.”²⁴⁴ The CIT granted the Government’s motion, holding that since liquidation in violation of an injunction is void, reliquidation is warranted regardless of who benefits from it.²⁴⁵

C. *Timing of Liquidation Instructions*

In *Mukand International Ltd. v. United States*, the CIT touched on the issue of whether, following the issuance of the final results of an annual administrative review by Commerce, Commerce has an obligation to delay issuing liquidation instructions so as to give affected importers time to file an action challenging those results and to obtain a temporary or preliminary injunction to prevent liquidation.²⁴⁶ The plaintiff in *Mukand* timely sought review of the final results regarding an AD order covering its imports—delivering summons 30 days after the final results were published and a complaint within 30 days after that, as required by 19 U.S.C. § 1516a.²⁴⁷ In the meantime, Commerce issued liquidation instructions to Customs on day 35, and Customs liquidated Mukand’s entries on day 75.²⁴⁸ On day 97, unaware of the liquidation, Mukand and the Government filed a consent motion for preliminary injunction to prevent liquidation, and the injunction became effective on day 116.²⁴⁹ Upon discovering the liquidation, Mukand then filed an action under § 1581(i)(4) challenging Commerce’s administration and enforcement of the underlying law providing for tariffs and duties.²⁵⁰

243. *See id.*

244. *Id.*

245. *Id.* at *1-2.

246. *Mukand Int’l Ltd. v. United States*, 452 F. Supp. 2d 1329 (Ct. Int’l Trade 2006). The CIT would have jurisdiction to review the results of such an administrative appeal under § 1581(c) because it depends on the cause of action provided by 516A of the Tariff Act. *See* 28 U.S.C. § 1581(c) (2000). In this context, even under the *Shinyei* holding, a Customs liquidation *does* render an action moot and deprive the CIT of jurisdiction. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1308 (Fed. Cir. 2004). This is why the question of how quickly Commerce can issue liquidation instructions matters here.

247. *Mukand Int’l*, 452 F. Supp. 2d at 1330.

248. *Id.* at 1330-31.

249. *Id.*

250. *Id.* at 1330-31.

The CIT ruled that Commerce’s instructions and the resulting liquidation were lawful, and Mukand had no claim upon which relief could be granted.²⁵¹ Importantly, the CIT distinguished its earlier holding in *Tianjin Machinery Import & Export Corp. v. United States* that Commerce’s policy of issuing liquidation instructions within fifteen days of publishing the final results of an administrative review in the Federal Register was not in accordance with law because 19 U.S.C. § 1516a allows plaintiffs to wait up to 60 days before filing a complaint.²⁵² The *Mukand* court noted that (1) Commerce did not follow that policy here, instead issuing instructions 35 days after publication of the final report, with liquidation taking place 75 days after publication; (2) even if Commerce had waited until day 60 to issue liquidation instructions, liquidation would have still happened (keeping Customs’s response time constant) on day 105, before the injunction was in place.²⁵³

This is a rather significant limitation on the scope of the *Tianjin* holding, since even though Commerce issued its liquidation instructions on day 35, it was quite possible that Customs could have liquidated before the 60-day window for filing a complaint had passed.²⁵⁴ It was only *ex post* that the court could say that this did not pose a problem, given how long Customs actually took to liquidate the entries. Furthermore, the court’s statement that the *Tianjin* holding does not benefit the plaintiff because Commerce did not specifically follow the fifteen day policy held unlawful in *Tianjin* raises the question of whether the court intended here to limit that holding to instances where Commerce issues liquidation instructions on day 15 or earlier. Resultantly, it is unclear from the opinion whether the court would have decided for the plaintiff if Customs had liquidated on day 55, for instance, rather than on day 75.

VII. CONCLUSION

Since the enactment of the Customs Court Act of 1980, § 1581(i) has provided a fertile ground for plaintiffs seeking to obtain judicial review in circumstances that do not fall neatly within any of the other

251. *Id.* at 1333-35.

252. *Id.* at 1333.

253. *Id.*

254. Under 19 U.S.C. § 1675(a)(3)(B) (2000), Customs must—after Commerce issues its liquidation instructions—liquidate the subject entries “promptly and, to the greatest extent practicable, within 90 days . . .”.

subsections of § 1581. The courts have endeavored to establish standards that give meaning to Congress's intent in enacting § 1581(i), without eroding the express requirements for jurisdiction in particular types of cases, and without endangering the jurisdictional boundaries between the CIT and the district courts. Decisions during 2006 concerning § 1581(i) have helped to clarify the requirements for establishing jurisdiction under that section, including the separate requirement that a plaintiff must state a valid cause of action for which relief may be granted. In most, if not all, future cases, that cause of action will be based upon the APA. Notwithstanding the need to satisfy the requirements of the APA, litigants continued to raise important substantive issues within the court's § 1581(i) jurisdiction during 2006, and no doubt will continue to do so in the future.