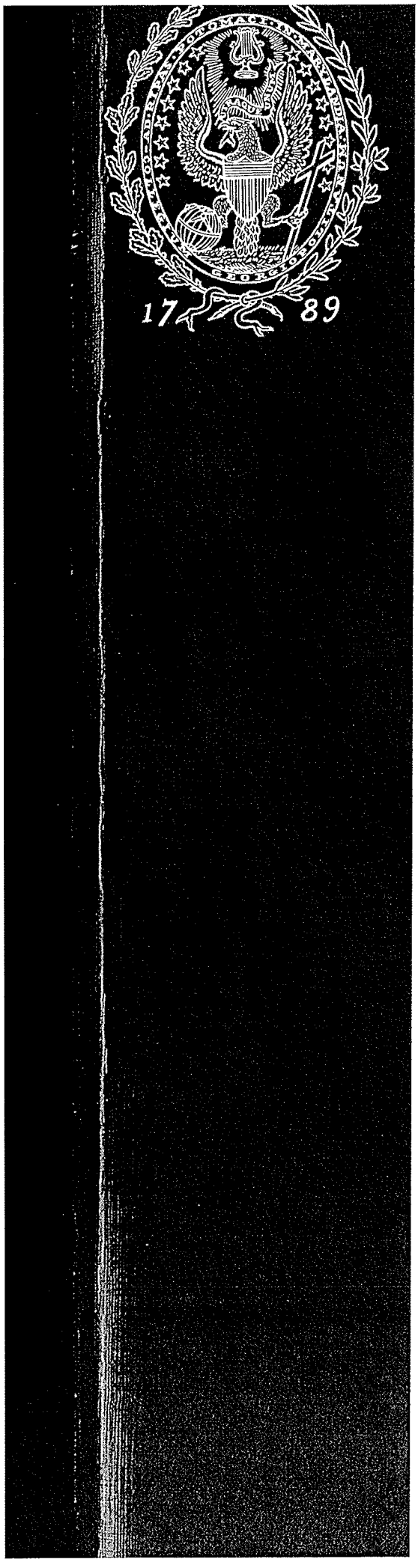

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MICHAEL J. COURSEY*

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INTRODUCTION

Thirty years ago, Congress passed the Customs Court Act of 1980 ("CCA"),[1] creating the U.S. Court of International Trade ("CIT") as the successor to the U.S. Customs Court and granting it original "residual" subject matter jurisdiction. The grant of a significant original residual jurisdiction to the CIT, codified at 28 U.S.C. § 1581(i), was a major part of Congress' effort in the CCA to endow the CIT and its judges with the same status and authority as the federal district courts and their judges, and to provide the CIT with clearly-defined original jurisdiction over appeals arising from a much broader range of customs and international trade laws than had been exercised by the Customs Court.[2] Congress intended through the CCA that all appeals arising from such laws—including those covered by the new residual jurisdiction—would be heard by CIT judges, who would have significant expertise in customs and international trade matters, and not the over-burdened federal district courts.[3]

Part I of this survey compares subsection (i) to its eight companion subsections of § 1581. Part II reviews the CIT's 2009 decisions that address the traditional jurisdictional requirements and limitations of its exercise of residual jurisdiction under subsection (i). These decisions can be described as "gatekeeper" decisions because they analyze the fundamental question of whether the CIT would have subject matter jurisdiction under § 1581(i) under a specific appeal, surviving

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1. Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified as amended at 28 U.S.C. § 251 (1996).

2. According to the CCA's legislative history, many suits involving international trade issues were then being instituted in the district courts instead of the Customs Courts "because of the limited powers of [the] Customs Court," which resulted in "inconsistent judicial decisions with litigants proceeding cautiously when choosing a forum for judicial review." *See* 126 CONG. REC. S26968, 27063 (daily ed. Sept. 24, 1980) (statement of Sen. DeConcini); *see also Customs Court Act of 1979: Hearing on S. 1654 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 96th Cong. 8 (1979) (testimony of David Cohen, Dir. of the Comm'l Litig. Branch of the Dep't of Justice) (explaining need for reform due to "jurisdictional confusion and remedial deficiencies" that led some plaintiffs to sue in district courts "because the type of relief which they could obtain in the customs court could not grant them effective redress").

3. According to the history of an earlier version of the CCA, Congress intended through this legislation "to clarify the ill-defined jurisdiction [of the Customs Court] and to require that some of the cases now instituted in the overcrowded district courts be transferred to the under-utilized Customs Court." *See* 125 Cong. Rec. S18,974-75 (daily ed. Dec. 18, 1979) (statement of Sen. DeConcini). Further, Congress intended that the legislation would "create a comprehensive system of judicial review of civil actions arising from import transactions" that would be conducted by the CIT, which "would be equipped with the same expertise and specialized skills that the U.S. Customs Court has acquired through the years." *See Id.*

what typically would be a motion by the government to dismiss the appeal under CIT Rule 12(b)(1) for lack of subject matter jurisdiction because the claims made therein: (1) do not "arise out of" any law within the general categories of laws listed in subsection (i) (*see* Part II.A, *infra*); (2) could have been made under one of the eight subsections that precede subsection (i) (*see* Part II.B.1 and 2); or (3) are not eligible for the "manifestly inadequate" exception to (2) (*see* Part II.B.3, *infra*).

Part III discusses the 2009 decisions by which the CIT continued to clarify (1) the additional jurisdictional requirements placed by the Administrative Procedures Act ("APA")[4] on all (or virtually all) appeals over which the court has residual jurisdiction under § 1581(i); and (2) the requirements and limitations of the APA's "residual" cause of action for such appeals. This discussion shows that, given the dearth of past decisions addressing the APA cause of action in § 1581(i) appeals, these decisions borrowed heavily from Supreme Court precedent applying the APA residual cause of action to challenges of the government's alleged laxity in enforcing environmental-protection, food-and-drug safety, and other laws not covered by § 1581(i).

I. A Comparison of the Nine Subsections of § 1581 that Grant the CIT Jurisdiction Over Actions Against the United States

All federal courts—including the CIT—are courts of limited jurisdiction; with rare exception, no federal court may exercise subject matter jurisdiction over a lawsuit without Congress having expressly granted it the authority to do so by statute.[5] Congress' statutory grant of original subject matter jurisdiction to the CIT for "civil actions," or appeals, that may be initiated by private parties against the United States is codified in the first nine subsections of 28 U.S.C. § 1581.[6]

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4. 5 U.S.C. §§ 701–706 (2006).

5. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986); *see* U.S. Const. art. III, § 2, cl. 1.

6. The CIT also has subject matter jurisdiction through these statutes over the specified civil actions:

> 28 U.S.C. § 1582 (2006): over civil actions commenced by the United States to recover civil penalties under certain statutes;
>
> 28 U.S.C. § 1583 (2006): over counterclaims, cross-claims and third-party actions in any civil action in the CIT involving imported merchandise that is the subject matter of such civil action; and

A. *Section 1581(a)–(h)*

The first eight subsections of § 1581, subsections (a) through (h), grant the CIT exclusive subject matter jurisdiction to hear appeals of specific types of decisions issued by four Executive Branch administrative agencies—the U.S. Department of Commerce ("Commerce"), U.S. Customs and Border Protection ("Customs"), the U.S. Department of Labor ("Labor"), and the U.S. Department of Treasury ("Treasury")—and the U.S. International Trade Commission ("ITC"), which is an independent, quasi-judicial federal agency with broad investigative responsibilities on certain trade matters.

Section 1581(a) covers any civil action commenced to contest Customs' denial of a protest of Customs' liquidation of an entry of imported merchandise under 19 U.S.C. § 1515.

Section 1581(b) covers any civil action commenced to contest certain Customs' decisions in so-called "American manufacturer challenges" brought under 19 U.S.C. § 1516, which allows domestic producers of goods to challenge certain aspects of Customs' treatment of imports against which the producers compete.

Section 1581(c) covers any civil action commenced under section 516A of the Tariff Act of 1930, as amended ("§ 1516a")[7] to contest certain determinations made by Commerce and the ITC in connection with antidumping ("AD") and countervailing duty ("CVD") proceedings.

Section 1581(d) covers any civil action commenced to review any final determination of Labor, with regard to the eligibility of workers for adjustment assistance due to competition from imports; or Commerce, with regard to the eligibility of a firm or community for such adjustment assistance, under the relevant provisions of the Trade Act of 1974.

Section 1581(e) covers any civil action commenced to review any final determination of Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.

Section 1581(f) covers any civil action involving an application for an order directing Commerce or the ITC to make available confidential information submitted during an AD or CVD proceeding.

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28 U.S.C. § 1584 (2006): over civil actions under the North American, or United States-Canada, Free Trade Agreements to enforce administrative sanctions levied for violation of a protective order or an undertaking.

7. 19 U.S.C. § 1516a (2006).

Section 1581(g) covers any civil action commenced to review certain decisions made by Customs to deny, revoke or suspend a customs broker's license, or accreditation of a private laboratory.

Section 1581(h) covers any civil action commenced prior to the importation of the goods involved to review certain rulings, or refusals to issue or change such rulings by Customs if the plaintiff would be irreparably harmed unless given an opportunity to obtain judicial review prior to the importation.

B. *Section 1581(i)*

Subsection (i) states that, in addition to the jurisdiction conferred by § 1581(a)–(h), and subject to the exception set forth in § 1581(j),[8] the CIT "shall have exclusive jurisdiction of any civil action against the United States,[9] its agencies, or its officers, that *arises out of* any law of the United States providing for" the specific matters listed in the four paragraphs of Subsection (i).[10] The text of Section 1581(i) is thus similar to the "federal question" jurisdiction of 28 U.S.C. § 1331, which grants federal district courts—not including the CIT—subject matter jurisdiction over any civil action that "arise[s] under the Constitution, laws, or treaties of the United States."[11] Accordingly, the CIT, not being a federal district court, lacks jurisdiction over any civil action that arises out of a federal law that is not within one of Subsection (i)'s four categories.

Paragraph (1) of § 1581(i) identifies the general category of federal laws providing for "revenue from imports or tonnage."[12]

Paragraph (2) identifies the general category of federal laws providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue."[13]

Paragraph (3) identifies the general category of federal laws providing for "embargoes or other quantitative restrictions on the importa-

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8. Section 1581(j) provides that the CIT shall not have jurisdiction over any civil action arising under section 305 of the Tariff Act of 1930, 19 U.S.C. § 1305, which provides a general prohibition against the importation of "immoral articles." 19 U.S.C. § 1581(j) (2006).

9. *See* Thyssenkrupp Mexinox v. United States, 616 F. Supp. 2d 1376, 1380–81 (Ct. Int'l Trade 2009) (although the CIT had jurisdiction over the plaintiff's claims against the government under Section 1581(i), that provision cannot also provide jurisdiction for the plaintiff's claims against the private, non-governmental defendant-intervenors).

10. 28 U.S.C. § 1581(i) (2006) (emphasis added).

11. 28 U.S.C. § 1331 (2006).

12. 28 U.S.C. § 1581(i) (2006).

13. *Id.*

tion of merchandise for reasons other than the protection of public health or safety."[14]

Paragraph (4) identifies the general category of federal laws providing for "administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section."[15]

II. LIMITATIONS ON § 1581(I) JURISDICTION

While the courts routinely refer to § 1581(i) as Congress' grant to the CIT of "broad residual jurisdiction over civil actions that arise out of import transactions,"[16] they also add that this residual jurisdiction is "not absolute,"[17] and have recognized two substantial limitations on § 1581(i).[18]

A. *Section 1581(i) Jurisdiction is Strictly Limited to Appeals Arising Out of Laws Within the Four General Categories of Laws Identified Therein*

1. *K Mart Corp. v. Cartier* Set the Standard for Determining Whether a Claim is Within Section 1581(i)

First, § 1581(i) jurisdiction does not extend to all claims related to customs or international trade matters. In *K Mart Corp. v. Cartier, Inc.*,[19] which involved a statute that enabled the owner of a U.S.-registered trademark to instruct Customs to prohibit imports that bore the trademark without the owner's permission, the Supreme Court recognized that § 1581(i) jurisdiction is limited to the specific matters addressed in that subsection's four paragraphs. The issue was whether Customs' prohibition of such "unauthorized" imports at a trademark owner's request was among the "embargoes or other quantitative restrictions on the importation of merchandise" Congress had in mind in paragraph (3).[20]

The Federal Circuit had ruled that paragraph (3) "only extends to

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14. *Id.*

15. *Id.*

16. *See, e.g.*, Salmon Spawning & Recovery Alliance v. United States (*Salmon Spawning IV*), 626 F. Supp. 2d 1277, 1281–82 (Ct. Int'l Trade 2009) (citing Conoco, Inc. v. United States Foreign-Trade Zones Bd., 18 F.3d 1581, 1588 (Fed. Cir. 1994)).

17. *Salmon IV*, 626 F. Supp. 2d at 1282.

18. Jeanne E. Davidson & Zachary D. Hale, *Developments During 2006 Concerning 28 U.S.C. § 1581(i)*, 39 GEO. J. INT'L L. 127, 128–29, 131–32 (2007).

19. *See* 485 U.S. 176 (1988).

20. *Id.* at 179, 182–83.

quotas and embargoes arising out of trade policy, the sort of measures that have traditionally limited the importation of shoes, textiles, automobiles, and the like,"[21] and that the import prohibitions authorized by the statute under review did not arise out of the Government's trade policy. In rejecting this reasoning, The Supreme Court observed that "trade policy is not the sole, nor perhaps even the primary, purpose served by embargoes," and that "the Government typically imposes embargoes" for many reasons unrelated to trade policy, such as "to protect public health . . . , safety . . . morality . . . further interests relating to foreign affairs . . . law enforcement . . . or ecology . . . ."[22] The Court noted that had Congress intended in paragraph (3) to limit "embargoes" to those that are grounded in "trade policy"; it would have been unnecessary for it to specifically exclude embargoes that are for "the protection of the public health or safety."[23] Instead, Congress intended "embargo" as used in paragraph (3) to have the "ordinary" meaning of that term, "a *governmentally imposed* quantitative restriction—of zero—on the importation of merchandise."[24] The Court ruled that the statute at issue did not contemplate such an embargo because it did not authorize "a governmental restriction on the quantity of a particular product that will enter," but instead "merely provide[d] a mechanism by which a *private party* might . . . enlist the Government's aid in restricting the quantity of imports in order to enforce a *private right.*"[25]

The Court rejected the notion that Congress had intended through § 1581 to grant the CIT jurisdiction over all customs and international trade matters. The Court observed that, in enacting that provision,

> Congress intended, first and foremost, to remedy the confusion over the division of jurisdiction between the Customs Court (now the Court of International Trade) and the district courts, and to "ensure . . . uniformity in the judicial decisionmaking process." But Congress did not commit to the Court of International Trade's exclusive jurisdiction every suit against the Government challenging customs-related laws and regulations.[26]

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21. *Id.* at 183 (citations omitted).
22. *Id.* at 184.
23. *Id.*
24. *Id.* at 184–85 (emphasis added).
25. *Id.* at 185 (emphasis added).
26. *Id.* at 188 (citing H.R. REP. No. 96-1235, at 47 (1980)).

The Court noted that Congress' intent to provide the CIT with the limited jurisdiction indicated by the detailed terms of § 1581—including subsection (i)—was evidenced by Congress' rejection of at least two prior and shorter versions of § 1581 which would have given that court exclusive jurisdiction over all civil actions against the Government "'directly affecting imports,'" or which arose from several specified trade statutes.[27] The Court noted:

> In rejecting bills that would have implemented such a categorical approach, Congress opted for a scheme that achieved the desired goals of uniformity and clarity by delineating precisely the particular customs-related matters over which the [CIT] would have exclusive jurisdiction.[28]

2. The CIT Ruled in 2009 that Several Trade-Related Lawsuits Were Outside the Scope of § 1581(i)

i. *Salmon Spawning & Recovery Alliance v. United States*

In 2009, the CIT dismissed at least three trade-related cases it viewed as asserting claims outside its residual jurisdiction under § 1581(i). In *Salmon Spawning & Recovery Alliance v. United States* ("*Salmon Spawning IV*"),[29] the CIT addressed a lawsuit filed four years earlier involving the Endangered Species Act's ("ESA") ban on the importation of certain salmon and steelhead trout ("ESA-listed salmon") that were included on the ESA's list of threatened and endangered species. The complaint was originally filed with the federal district court for the Western District of Washington by certain non-profit organizations dedicated to the protection of wild fish, and named Customs, the U.S. Fish and Wildlife Service ("FWS"), and the National Marine Fisheries Service ("NMFS") as defendants. The complaint alleged that Customs and FWS were legally charged with preventing, but in fact had failed to prevent, the continued importation into the United States of ESA-listed salmon that had been caught in Canadian waters by Canadian commercial and recreational fishermen, in violation of the ESA's section 9 ban on such imports.[30] The complaint also alleged that Customs and FWS

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27. *Id.* (citation omitted).

28. *Id.*

29. *Salmon Spawning IV*, 626 F. Supp. 2d 1277 (Ct. Int'l Trade 2009).

30. Salmon Spawning & Recovery Alliance v. Spero (*Salmon Spawning I*), 29 I.T.R.D. 1471, 1472 (W.D. Wash. May 3, 2006).

had failed to consult with NMFS as required by the ESA's section 7 to determine whether the agencies' failure to enforce the section 9 ban of ESA-listed salmon imports jeopardized such fish.[31]

In *Salmon Spawning I*, the district court tentatively concluded, but did not rule, that the CIT had exclusive jurisdiction over the section 9 claim under § 1581(i)(3), and transferred the complaint to that court so that it could itself "determine the question of its own jurisdiction."[32] In *Salmon Spawning II*,[33] the CIT determined that no federal court had subject matter jurisdiction over either of the complaint's claim, and thus initially avoided having to decide whether it had exclusive jurisdiction over the complaint under § 1581(i)(3). The CIT ruled that it did not have jurisdiction over the section 9 claim, because each agency's alleged failure to enforce the section 9 import ban on the listed fish involved its decision on whether to exercise its enforcement powers, which is solely within the agency's absolute discretion, and thus is expressly excluded from the type of final agency action federal courts are authorized to review under section 701(a)(2) of the APA.[34] The CIT also ruled that the section 7 consultations sought by the plaintiffs were required only in response to affirmative agency action that threatened or endangered the listed fish, and that Customs' failure to enforce the section 9 import ban did not constitute affirmative action, and thus could not require the section 7 consultations sought by the plaintiffs.[35] The court accordingly determined that section 7 "cannot provide the remedy that plaintiffs seek,"[36] which meant that the section 7 Claim was not "redressable," and thus "fails to meet the 'case' or 'controversy' requirement of Article III and so is dismissed for lack of subject matter jurisdiction, based on the plaintiff's lack of standing for the section 7 claim."[37]

In *Salmon Spawning III*, the Federal Circuit upheld the CIT's dismissal of the section 9 claim on APA grounds, and noted that the CIT had the discretion to consider whether the section 9 claim failed to allege the type of agency action required by the APA before consider-

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31. *Id.*

32. *Id.* at 1475–77.

33. Salmon Spawning & Recovery Alliance v. Basham (*Salmon Spawning II*), 477 F. Supp. 2d 1301 (Ct. Int'l Trade 2007).

34. *Id.* at 1308 (*citing, e.g.*, Heckler v. Chaney, 470 U.S. 821, 830–31 (1985)). *See* discussion *infra* Part III.C.2.

35. *Id.* at 1309–10.

36. *Id.* at 1310.

37. *Id.*

ing its jurisdiction under § 1581(i)(3) and (4) because "both questions go to the court's jurisdiction."[38] However, the Federal Circuit ruled that the CIT had erred in dismissing the section 7 claim, because the court had failed to "focus on whether a favorable decision would likely provide plaintiffs' redress," but instead had "mistakenly reasoned" that the plaintiffs could not achieve "a favorable result" under its section 7 claim, which "is not an issue of standing but rather a question on the merits."[39] The court ruled that "the plaintiffs have sufficiently alleged the elements of standing to preclude dismissing" the section 7 claim "for lack of standing based on the pleadings,"[40] and directed the CIT on remand to determine whether it had exclusive jurisdiction over the section 7 claim under § 1581(i)(3) and/or (4). The Federal Circuit noted this question "is one of first impression" for the CIT, "and it raises difficult, novel issues concerning the scope of the [CIT's] jurisdiction."[41]

In *Salmon Spawning IV*, the CIT ruled that it did not have jurisdiction over the section 7 claim under § 1581(i)(3) because nothing in section 7 resembled the type of import restraints Congress intended § 1581(i)(3) to cover, under the Supreme Court's definition of that term in *K Mart*.[42] The Court further ruled that it did not have jurisdiction under § 1581(i)(4), which "applies where the law pursuant to which a claim is brought involves the administration and enforcement of, among other determinations, an embargo or other quantitative restriction," for two reasons.[43] First, the court stated that section 7 "does not explicitly state, or otherwise imply, that the purpose of the provision is to administer or enforce an embargo," and a federal agency "cannot be said to be engaging in the administration or enforcement of an embargo . . . when it authors an opinion on listed species and their habitats to fulfill its consultation obligations under the ESA."[44] Second, the court stated that where a law fails to trigger the CIT's jurisdiction because it is not the type of embargo covered by § 1581(i)(3), "no jurisdiction remains for the Court under § 1581(i)(4)."[45] However, the

38. Salmon Spawning & Recovery Alliance v. Customs *(Salmon Spawning III)*, 550 F.3d 1121, 1129–30 n.4 (Fed. Cir. 2008).

39. *Id.* at 1131 (citing Litecubes, LLC v. N. Light Prods., 523 F.3d 1353, 1360 (Fed. Cir. 2008)).

40. *Id.*

41. *Id.* at 1134.

42. *Salmon Spawning IV*, 626 F. Supp. 2d 1277, 1282–83 (Ct. Int'l Trade 2009) (citing K Mart Corp. v. Cartier, 485 U.S. 176, 185–89 (1988)).

43. *Id.* at 1283.

44. *Id.*

45. *Id.* at 1283–84 (citation omitted).

CIT noted that it might have had jurisdiction over the section 7 claim under § 1581(i)(4) had the section 9 claim survived, for the Supreme Court in *K Mart* identified embargoes to protect endangered species as being among those covered by § 1581(i)(3).[46] Nevertheless, the court ruled that it did not have jurisdiction over the section 7 claim and transferred the case back to the district court from which it had been transferred three years earlier.[47]

ii. *Funai Electric Co. v. United States*

In *Funai Electric Co. v. United States*,[48] the CIT ruled that it did not have jurisdiction under § 1581(i) over a lawsuit challenging Customs' alleged unilateral modification of an ITC order that instructed Customs to exclude certain imports of digital televisions and related products the ITC had determined during an investigation under section 337 of the Tariff Act of 1930 ("section 337") were infringing a U.S. patent. That lawsuit was filed by the holder of the U.S. patent—which also had filed the section 337 complaint—after certain importer-respondents from the investigation obtained a ruling from Customs to the effect certain "work around" products—foreign-produced digital televisions and related products the importers claimed had been redesigned to avoid infringing the relevant patent, and which the ITC had determined infringed the patent—were not covered by the ITC's exclusion order. In its complaint, the plaintiff alleged that Customs' ruling had thwarted the relief against infringement intended by the ITC's exclusion order, and asked the CIT to declare Customs' ruling null and void, and to provide affirmative relief consistent with that declaration.[49]

The CIT reluctantly ruled that it did not have subject matter jurisdiction over the lawsuit under any subsection of § 1581. The court

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46. *Id.* at 1284 n.7 (citations omitted). The CIT also identified two cases in which the U.S. Court of Appeals for the Ninth Circuit had ruled that the ESA bans on the importation of certain fish and crustacean products to protect endangered species were embargoes covered by § 1581(i)(3). *See id.* at 1283 (citations omitted).

47. *Id.* at 1285. After the lawsuit was transferred back to the district court in which it was filed, that court dismissed the remaining section 7 claim on the ground that Customs' and the FWS's alleged failure to enforce the section 9 ban on imports of the listed salmon did not constitute the type of affirmative, ongoing agency action required by section 7 to trigger the requirement for agency consultations under that provision. Salmon Spawning & Recovery Alliance v. Ahern, No. CO5-1878Z, 2010 WL 890047 (W.D. Wash. Mar. 9, 2010).

48. Funai Elec. Co. v. United States, 645 F. Supp. 2d 1351 (Ct. Int'l Trade 2009).

49. *Id.* at 1354–56.

identified substantial precedent that demonstrated that the plaintiff's claim did not meet the specific limitations of § 1581(h), the only subsection that arguably applied.[50] As for subsection (i), the court noted that the complaint did not involve a law that provided for "revenue from imports or tonnage" or for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue"; nor did the complaint involve a law related to "embargoes or other quantitative restrictions" as defined in *K Mart Corp.*[51] Finally, the court stated that paragraph (4) of § 1581(i) did not apply because that provision "conjoins" the first three paragraphs of that subsection with subsection (h), "each of which is not apposite in this matter."[52] The court recognized that while its ruling left the plaintiff with no avenue for challenging Customs' ruling at the CIT,[53] it stated that the "'restrictive statutory scheme of § 1581(a)–(h) and its relationship to § 1581(i) should be re-examined', but that process remains the province of higher authority."[54]

iii. *Almond Bros. Lumber v. United States*

Almond Bros. Lumber Co. v. United States[55] involved a challenge to the Softwood Lumber Agreement ("SLA") that was reached in 2006 between the United States and Canada to settle their longstanding dispute regarding the alleged dumping of unfairly subsidized Canadian softwood lumber products into the United States. The plaintiffs were U.S. producers of softwood lumber that were not members of the Coalition for Fair Lumber Imports ("Coalition"), whose members also

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50. *Id.* at 1357 (citations omitted). Section 1581(h) grants the CIT jurisdiction over appeals of certain rulings by Customs, or Customs' refusals to issue or change such rulings, with regard to goods prior to their importation. 19 U.S.C. § 1581(h) (2006). The case precedent cited in *Funai Electric Co.* established that any such appeal may be brought only by the prospective importer of such goods. *See, e.g.*, Am. Frozen Food Inst., Inc. v United States, 855 F. Supp. 388, 392 (Ct. Int'l Trade 1994), *cited in Funai Electric Co.*, 645 F. Supp. 2d at 1357.

51. *Funai Electric Co.*, 645 F. Supp. 2d 1351.

52. *Id.* at 1356–57.

53. While it is uncertain whether the plaintiff subsequently could have pursued its claim against Customs before a federal court other than the CIT, it appears that its claim was mooted by *Vizio, Inc. v. International Trade Commission*, in which the Federal Circuit reversed the ITC's determination that the work-around products infringed the relevant patent, which had been the basis for plaintiff's claim against Customs. 605 F.3d 1330, 1343–44 (Fed. Cir. 2010),

54. *Funai Electric*, 645 F. Supp. 2d at 1357 (quoting Conoco Inc. v. U.S. Foreign-Trade Zones Bd., 790 F. Supp. 279, 282 (1992)).

55. 31 I.T.R.D. 1493 (Ct. Int'l Trade 2009).

were domestic softwood lumber producers, and had been the sole domestic producers that requested and participated in the U.S. trade investigations of softwood lumber imports from Canada that resulted in the issuance of final AD and CVD orders on those imports. At the time of the settlement, Customs had collected $5 billion in estimated AD and CVD duties under the two orders.[56] While the SLA provided for the distribution of the collected duties to the softwood lumber producers in both countries, the U.S. recipients identified in the agreement were limited to the Coalition members, and did not include non-Coalition domestic producers like the plaintiffs. The plaintiffs claimed that the United States Trade Representative ("USTR"), in negotiating the SLA on behalf of the United States, had acted unlawfully under the authority provided by section 301 of the Trade Act of 1974 ("section 301") by limiting the domestic recipients of the U.S. share of the collected duties to the Coalition members.[57]

The plaintiffs claimed that the CIT had jurisdiction over their complaint under paragraphs (2) and (4) of § 1581(i), because section 301 authorizes the USTR to enter into agreements that provide for compensatory trade benefits, and such benefits included, according to the plaintiffs, the collected estimated AD and CVD duties that were made subject to the softwood lumber agreement. The plaintiffs claimed that this triggered paragraph (2) of § 1581(i) ("duties . . . on the importation of merchandise other than for the raising of revenue"), and which in turn triggered paragraph (4).[58] The court noted that even assuming this to be true, section 301 would support jurisdiction under section 1581(i)(2) and (4) only if the USTR's authority for entering into the SLA was actually based on section 301. Noting that the plaintiffs failed to provide evidence that established this fact, the court ruled that the plaintiffs had failed to meet their burden to demonstrate the court's jurisdiction and dismissed the complaint.[59]

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56. *Id.* at 1497 n.14.

57. 19 U.S.C. § 2411(c)(1)(D).

58. *Almond Bros. Lumber Co.*, 31 I.T.R.D. at 1498.

59. *Id.* at 1500. The CIT also noted that the public record indicated that the USTR did not rely on section 301 as authorizing her negotiation of the SLA, because that record included nothing that indicated that the USTR had conducted the investigation, and had issued the determination based on the results of an investigation, that are required before the USTR is authorized to take action under section 301. *Id.* at 1499.

B. *Section 1581(i) Jurisdiction Generally Is Not Available if Jurisdiction Was or Is Available Under Another Subsection of § 1581*

1. The Courts Have Followed Congressional Intent to Deny Jurisdiction Under § 1581(i) if Jurisdiction Was or Is Available Under § 1581(a)–(h)

That jurisdiction has been granted to the CIT under § 1581(i) "[i]n addition to the jurisdiction conferred . . . by subsections (a)–(h)"[60] of § 1581 suggests that § 1581(i) may provide a separate basis for the CIT's jurisdiction over matters already covered by subsections (a) through (h). However, shortly after § 1581 was enacted, the Federal Circuit ruled that a litigant generally cannot obtain jurisdiction under § 1581(i) for any claim for which jurisdiction is, or could have been, provided under Subsections (a) through (h), unless the relief provided by the other provision would have been "manifestly inadequate."[61] This general limitation, which the courts have frequently confirmed,[62] prevents a litigant from avoiding the need to exhaust its administrative remedies before an agency under another subsection of § 1581 before it can appeal the agency's decision to the CIT, and reflects congressional intent expressed in the legislative history of § 1581 not to make jurisdiction available under § 1581(i) to litigants that had failed to meet the procedural requirements for securing jurisdiction under subsections (a) through (h).[63]

This limitation was invoked by the CIT in 2009 in *Hartford Fire Insurance Co. v. United States* ("*Hartford III*"),[64] which involved an attempt by a surety to avoid having to perform under eight single-entry customs bonds it had issued on behalf of an importer, and in favor of Customs, against the importer's potential failure to pay the AD duties that Customs ultimately assessed upon liquidation of the entries secured by the bonds.[65] When the

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60. 28 U.S.C. § 1581(i) (2006).

61. Am. Air Parcel Forwarding Co. v. United States, 718 F.2d 1546, 1549 (Fed. Cir. 1983).

62. *See, e.g.*, Int'l Custom Prods. v. Unied States, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (citing Norcal/Crosetti Foods, Inc. v. United States, 963 F.2d 356, 358 (Fed. Cir. 1992) both citing *Am. Air Parcel Forwarding Co.*, 718 F.2d at 1549).

63. *See Int'l Customs Prods.*, 467 F.3d at 1327; *Norcal/Crosetti Foods Inc.*, 963 F.2d at 359.

64. *See* Hartford Fire Ins. Co. v. United States (*Hartford III*), 679 F. Supp. 2d 1362 (Ct. Int'l Trade 2009).

65. *Id.* at 1364–65. *Hartford III* was preceded by Hartford Fire Ins. Co. v. United States, 507 F. Supp. 2d 1331, 1333, 1335–35 (Ct. Int'l Trade 2007) (*Hartford I*), *aff'd*, 544 F.3d 1289 (Fed. Cir. 2008) (*Hartford II*), in which the CIT rejected the same surety's attempt to block through a § 1581(i) lawsuit Customs' performance demands for other of the surety's customs bonds that secured the payment of assessed AD duties, which demands the surety had failed to timely protest.

importer failed to pay those AD duties, Customs made a formal demand on the surety for its performance under the bonds; this demand triggered the surety's ability to file a formal protest against the demand within 90 days of its issuance, which the surety failed to do.[66]

The surety later filed suit against Customs at the CIT under § 1581(i), asserting through four causes of action that it was relieved from having to perform under the bonds as a result of Customs' failure to notify the surety prior to the running of the 90-day protest period that the agency was investigating the importer for potential customs fraud related to other entries it had made that were also subject to the AD order.[67] The court noted that the "true nature" of the surety's lawsuit "is that it is a challenge to" Customs' demand that the surety perform under the bonds, a legitimate charge against the surety that became final as to all parties—including the surety—when it failed to file a timely protest of that charge.[68] The court ruled that because the surety could have challenged Customs' denial of the surety's protest of Customs' demand under the bonds in an appeal to the CIT under § 1581(a), the surety's failure to file that protest precluded it from asserting essentially the same challenge in its later appeal under § 1581(i).[69] The surety had claimed that it could not have filed a timely protest of Customs' demand because the surety learned of Customs' investigation of the importer after the period for protesting Customs' demand had expired. In response, the court noted that the record showed that the surety actually learned from a third-party of Customs' investigation of the importer prior to the date of Customs' first demand for performance under the bonds, which meant that the surety reasonably should have known about its alleged defense against Customs' bond demand well before the 90-day period for protesting that demand expired.[70]

2. In 2009 the CIT Reaffirmed that Section 1581(i) Jurisdiction is Unavailable for Claims that Could Be Asserted as a Defense to a Government Claim Under 19 U.S.C. § 1592

In *Kahrs International, Inc. v. United States,*[71] the CIT reaffirmed that the general rule—that § 1581(i) jurisdiction is not available for a claim

66. *Hartford III,* 679 F. Supp. 2d at 1364–65.
67. *Id.* at 1365.
68. *Id.* at 1366.
69. *Id.* at 1366–68.
70. *Id.* at 1364–66.
71. 645 F. Supp. 2d 1251 (Ct. Int'l Trade 2009).

that can be or could have been brought under another subsection of § 1581—also includes 19 U.S.C. § 1582, which provides the CIT with "exclusive jurisdiction over any civil action . . . which is commenced by the United States . . . to recover a civil penalty" under several statutes, including 19 U.S.C. § 1592.[72] Section 1592 authorizes Customs to impose penalties upon any person who enters merchandise into the United States "by fraud, gross negligence or negligence . . . ."[73]

Kahrs involved an importer's appeal under 19 U.S.C. § 1581(a) of Customs' denial of its protests of the agency's liquidation of several entries of engineered wood flooring, specifically with regard to Customs' determination that the importer had calculated the estimated duty deposits for these entries under an incorrect classification number under the Harmonized Tariff Schedule of the United States ("HTSUS"), which had a much lower duty rate than the proper classification. The importer also asked the CIT to declare that the importer had used "reasonable care" in claiming the lower-rate classification upon entry, and asserted that the CIT had jurisdiction over this claim under § 1581(i).[74] After noting that the importer had conceded that the CIT did not have jurisdiction over its reasonable-care claim under § 1581(a), which was the only subsection of § 1581(a)–(h) that might apply,[75] the CIT ruled that its exercise of § 1581(i) jurisdiction over this claim would be improper, and dismissed that claim.

The court observed that the importer was attempting through this claim to "blunt[]" any future action Customs might bring against it under 19 U.S.C. § 1592 to impose penalties on the importer for having posted a deficient amount of estimated duties on the entries, due to its use of the incorrect, lower-rate rate HTWUS classification.[76] The court noted, however, that it would have jurisdiction under 28 U.S.C. § 1582 over any such action, and that while that statute allows for jurisdiction only over penalty-related lawsuits initiated by the United States, § 1582 "'provide[s] a complete judicial remedy for those who believe that Customs has wrongfully assessed a penalty'" against them, because § 1592(e) "'allows a party to obtain *de novo* review of a government claim from the Court of International Trade before paying any pen-

72. 19 U.S.C. § 1582 (2006).

73. 19 U.S.C. § 1592(a)(1) (2006).

74. *Kahrs*, 645 F. Supp. 2d. at 1262.

75. *Id.*

76. *Id.* at 1263.

alty.'"[77] Thus, the importer in *Kahrs*, according to the court, would be allowed to assert its reasonable-care claim as a defense against any future action brought against it by the government under 19 U.S.C. § 1592, over which the court would have jurisdiction under 28 U.S.C. § 1582; and this made it inappropriate for the court to exercise § 1581(i) jurisdiction over the importer's reasonable-care claim before Customs initiated an action against the importer under § 1592.[78]

In so ruling, the CIT adopted the reasoning of its 1997 decision, *Tikal Distributing Corp. v. United States*, in which the court denied § 1581(i) jurisdiction over an importer's claim that Customs had wrongfully withheld money the importer had paid as part of its voluntary disclosure of underpayment of duties owed on certain of its entries.[79] Customs subsequently initiated an investigation of these entries under § 1592, but had not yet filed a penalty proceeding at the CIT under § 1582 at the time the importer filed its lawsuit asserting that it in fact had not underpaid duties on the relevant entries, and that Customs' retention of the importer's subsequent over-payment of duties was unlawful.[80] The CIT noted in *Tikal* that while § 1582 gave the court jurisdiction over matters arising out of § 1592, that jurisdiction was limited to actions initiated by Customs to recover penalties under § 1592. The court nevertheless ruled that § 1581(i) jurisdiction was not available because the *de novo* review requirement of § 1592(e) "provide[s] a complete judicial remedy for those who believe that Customs has wrongfully assessed a penalty."[81] The CIT did not recognize in *Tikal* that in the absence of jurisdiction for its claim under § 1581(i), the importer would have no judicial review of Customs' alleged unlawful retention of the importer's voluntary disclosure payment unless Customs decided to initiate § 1592 action at the CIT under § 1582.

Thus, in both *Kahrs* and *Tikal*, the CIT treated the importer's ability to assert essentially the same claim against Customs for which it was then seeking jurisdiction under § 1581(i) as the equivalent to the importer being able to assert its claim in a future action under one of the first eight subjections of § 1581. However, the court in neither case considered that the importer would have its claim heard only if Customs decided to prosecute a § 1592 penalty claim under § 1582. It

77. *Id.* at 1264 (quoting Tikal Dist. Corp. v. United States, 970 F.Supp. 1056, 1061 (Ct. Int'l Trade 1997)).

78. *Id.*

79. *Tikal*, 970 F.Supp. at 1057–58.

80. *Id.*

81. *Id.* at 1061.

thus appears that the rule conditioning § 1581(i) jurisdiction on claimant not having another avenue for the CIT's jurisdiction is applied more restrictively with regard to the court's alternative jurisdiction under § 1582 than under subsections (a) through (h) of § 1581 itself.

3. While Section 1581(i) Jurisdiction is Available if the Relief Provided by Another Subsection of § 1581 is "Manifestly Inadequate," that Exception is Rarely Recognized by the CIT

The CIT and the Federal Circuit have fashioned a rarely-granted exception to the general rule barring § 1581(i) jurisdiction in cases where jurisdiction is or was available under one of the other subsections of § 1581, for circumstances where the relief provided by the other subsection is or would have been "manifestly inadequate" to the plaintiff that is seeking jurisdiction under § 1581(i). In 2009, the CIT issued three decisions which declined to recognize this exception for claims asserted under § 1581(i) which the court determined could be, or could have been, brought under another of § 1581's subsections.

i. *Sahaviriya Steel Industries v. United States*

The first decision, *Sahaviriya Steel Industries Public Co. v. United States*,[82] involved a "changed circumstances" administrative review ("CCAR")[83] Commerce had initiated to investigate whether an exporter Commerce had previously excluded from an AD order, based on the exporter's having not dumped over a three-year period, should be reinstated under that order, based on the exporter's alleged resumed dumping. Shortly after Commerce initiated that review, the exporter petitioned the CIT to enjoin the agency from proceeding, claiming § 1581(i) gave the court jurisdiction over the exporter's lawsuit.[84]

The exporter acknowledged that if it participated in the CCAR and Commerce ultimately reinstated the exporter under the order in the agency's final results of the review, the exporter would have a right to appeal under § 1516a, and the CIT would have exclusive jurisdiction over that appeal under § 1581(c).[85] The exporter nevertheless argued that its ability to eventually appeal Commerce's adverse final results of the CCAR was manifestly inadequate. The exporter claimed that Com-

82. 601 F. Supp. 2d 1355 (Ct. Int'l Trade 2009).

83. CCARs are authorized by section 751(b)(1)(A) of the Tariff Act of 1930, 19 U.S.C. § 1675(b)(1)(A) (2006).

84. *Sahaviriya Steel*, 601 F. Supp. 2d at 1361.

85. *Id.* at 1365–67; *see also* 19 U.S.C. § 1516a(a)(2)(A)(i).

merce's conduct of a CCAR to determine whether to reinstate an exporter under an AD order from which it had previously been excluded was an *ultra vires* act,[86] because the agency's regulation under which Commerce was conducting the CCAR[87] was not authorized by the two provisions of the AD statute[88] which the regulation purportedly implemented.[89] The exporter further claimed that the relief that would be available to it under § 1581(c) would be manifestly inadequate because the relief it was seeking under § 1581(i)—not having to participate in the CCAR—would be unavailable if exporter were required to wait to appeal Commerce's reinstatement of the exporter under the order until the end of the CCAR.[90]

In rejecting this argument, the court stated that "given the clear Congressional preference" in § 1581(i)'s legislative history for appellate review under § 1581(c) of certain AD/CVD proceedings—including CCARs—"the Court must be careful not to interfere in [such] ongoing proceedings absent a clear indication of the inadequacy of a section 1581(c) review."[91] After noting that the exporter had cited five CIT decisions in support of its claim that the court would have jurisdiction over the exporter's appeal under § 1581(i) if Commerce's conduct of the CCAR was indeed an *ultra vires* act, the CIT ruled that the agency's action was not, in fact, *ultra vires.*[92]

The court first observed that an *ultra vires* act "is one performed without any authority to act,"[93] and that "[t]he scope of an agency's authority turns on whether the agency was empowered to engage in the challenged course of conduct in the first place."[94] The court noted that neither of the statutory provisions at issue—those authorizing Commerce to conduct CCARs, and to partially revoke AD/CVD orders as to

86. *Id.* at 1361–62.

87. *See* 19 C.F.R. § 351.222 (2009).

88. *See* 19 U.S.C. § 1675(b) (2010) (providing circumstances warranting changed circumstances administrative reviews); 19 U.S.C. § 1675(d) (2010) (stating basis for revocation of AD/CVD orders).

89. *Sahaviriya Steel,* 601 F. Supp. 2d at 1361, 1366.

90. *Id.*

91. *Id.* at 1365 (citing Hysla, S.A. de C.V. v. United States, 960 F. Supp. 320, 325 (Ct. Int'l Trade 1997)). The CIT noted that the exporter's *ultra vires* claim, in addition to being a basis for the exporter's assertion of jurisdiction under § 1581(i), was also the basis for the exporter's main substantive claim in the appeal, which meant that the court had to "review at least in part this substantive question" in order to "adequately consider the jurisdictional issue." *Id.* at 1366.

92. *Id.* at 1361–62 (citations omitted).

93. *Id.* at 1366 (citations omitted).

94. *Id.*

individual exporters—specifically authorized Commerce to reinstate an exporter under an order from which the exporter had previously been excluded.[95] The court stated, however, that Congress had entrusted Commerce as the agency charged with administering the AD law to "address statutory ambiguities" through rulemaking, and found that Commerce's adoption of its current regulation, which "describes in detail the procedures to be followed and the conditions imposed on a producer seeking to avail itself of partial revocation," is a "proper exercise" of Commerce's "explicit authority to resolve the ambiguity left by Congress in the relevant sections of the antidumping statute."[96] The court concluded that even if Commerce had made a mistake of law in exercising its lawful authority to promulgate a regulation to "fill such gap" created by the AD statute, that would not amount to an *ultra vires* act on Commerce's part, and thus could not support the exporter's claim that its future remedy of appealing a final decision against it in the CCAR under § 1581(c) was "manifestly inadequate."[97]

ii. Decisions Involving Appeals of Commerce's Section 123 and 129 Determinations Related to "Zeroing"

The other two CIT decisions in 2009 that addressed the "manifestly inadequate" exception of Section 1581(i)—*United States Steel Co. v. United States* ("*U.S. Steel*")[98] and *Acciaierie Valbruna S.p.A. v. United States* ("*Valbruna*")[99]—involved challenges to Commerce's efforts (1) to generally modify its methodology for calculating dumping margins in original AD investigations by replacing therein the procedure referred to as "zeroing" with the procedure referred to as "offsetting"[100]; and (2) to reconsider, by applying this modification, several of its final AD determinations that had resulted in the issuance of AD orders.

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95. *Id.*

96. *Id.* at 1367 (citations omitted).

97. *Id.* The exporter also argued that its ability to appeal any decision against in the CCAR under § 1581(c) would be manifestly inadequate because it would force it to fully participate in that review, which "would essentially require the same level of data collection as" a regular, annual administrative review. *Id.* at 1368. The court rejected this claim, noting that "the great weight of authority holds 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." *Id.* at 1368–69 (citations omitted).

98. 627 F. Supp. 2d (Ct. Int'l Trade 2009).

99. No. 08-00381, 2009 WL 2190188 (Ct. Int'l Trade July 23, 2009).

100. For an explanation of the concepts of "zeroing" and "offsetting" in the context of Commerce's AD margin calculations, *see U.S. Steel*, 627 F. Supp. 2d at 1376 n.1.

Commerce's efforts were in response to the results of several appeals brought before the World Trade Organization ("WTO") by the European Communities ("EC") against Commerce's use of zeroing in several AD investigations of European steel imports into the United States, which the EC claimed was unlawful under the WTO Antidumping Agreement ("AD Agreement"), one of the agreements approved by the United States in joining the WTO. Each WTO Dispute Settlement Panel that presided over these appeals ruled that Commerce's use of zeroing was inconsistent with the United States' obligations under the AD Agreement, and that the United States was required to bring its practice into conformance with that agreement. Each Panel ruling was upheld by the WTO's Appellate Body.

U.S. Steel and *Valbruna* involved challenges to Commerce's efforts to implement the WTO rulings on zeroing. U.S. law provides that any Commerce regulation or practice that is found to be inconsistent with the AD Agreement may be amended, rescinded or modified to bring it into conformance with that agreement through the conduct and issuance of a determination under section 123 of the Uruguay Round Agreements Act of 1994 ("URAA") ("section 123 Determination").[101] No provision of U.S. law expressly grants the CIT jurisdiction over challenges to section 123 Determinations.[102] U.S. law further provides that Commerce may apply any such amended, rescinded or modified regulation or practice in a specific AD proceeding through the conduct and issuance of a determination under section 129 of the URAA ("section 129 Determination").[103] In contrast with section 123 Determinations, appeals of section 129 Determinations are authorized by § 1516a,[104] which gives the CIT exclusive jurisdiction over such appeals under section 1581(c).[105]

a. *U.S. Steel v. United States*

In *U.S. Steel,* Commerce had issued a section 123 Determination in which it modified its AD margin calculation methodology by replacing zeroing with offsetting, and had applied that modification in a section 129 Determination in which the agency reconsidered the final determination that resulted in the issuance of an AD order on hot-rolled

101. 19 U.S.C. § 3533(g)(1) (2006).
102. *U.S. Steel,* 627 F. Supp. 2d at 1378.
103. 19 U.S.C. § 3538(a)(1) (2006).
104. 19 U.S.C. § 1516a(a)(2)(B)(vii), and 28 U.S.C. § 1581(c) (2006).
105. *U.S. Steel,* 627 F. Supp. 2d at 1378.

carbon flat products from the Netherlands. In that section 129 Determination, Commerce determined that under its modified AD margin calculation methodology that the subject merchandise had not been dumped, and accordingly revoked the AD order.[106] The plaintiffs—domestic producers that had been protected by the revoked AD order—had argued during the proceeding leading to the section 129 Determination that Commerce's replacement of zeroing with offsetting in the agency's related section 123 Determination was contrary to law. However, Commerce refused to consider this argument, on the ground that its change in methodology could not be challenged outside the context of the section 123 Determination itself.

The plaintiffs initially appealed Commerce's section 129 Determination under § 1581(c), and claimed there that Commerce's elimination of zeroing from its AD dumping methodology through its section 123 Determination was contrary to law both "as such" (i.e., as applied to any AD investigation), and "as applied" through its section 129 Determination specifically to the AD determination on hot-rolled carbon flat products from the Netherlands.[107] However, Commerce indicated that it would contest the court's ability to hear the plaintiffs' challenge of the section 123 Determination under § 1581(c), on the ground that Congress had not expressly provided the CIT with jurisdiction through statute over appeals of section 123 Determinations. This caused the plaintiffs to file a second complaint that directly challenged Commerce's section 123 Determination, and asserted that the CIT had residual jurisdiction over that appeal under § 1581(i).

The court granted Commerce's motion to dismiss the second complaint. The court noted that notwithstanding the second complaint's focus on the section 123 Determination, its "true nature" was as a challenge to the section 129 Determination, which could be brought under § 1581(c), and which had already been brought by the plaintiffs through its first complaint.[108] By rejecting Commerce's claim that the change in dumping methodology embodied in the section 123 Determination could not be challenged by plaintiffs in their initial appeal of the related section 129 Determination,[109] the court made clear that plaintiffs' appeal under § 1581(c) could potentially provide them with a fully adequate remedy. The Court noted that plaintiffs had challenged below during the section 129 Determination the change in methodol-

106. *Id.* at 1379.
107. *Id.* at 1377 n.4.
108. *Id.* at 1381.
109. *Id.* at 1382.

ogy adopted by Commerce in the section 123 Determination, and had again challenged the section 123 Determination in its first complaint under § 1581(c), both on an "as such" basis, and as applied in the final results of the section 129 Determination to the dumping calculations in the investigation of hot-rolled carbon flat products from the Netherlands.[110] The court observed that, as it had done in other appeals under § 1581(c), the court "may address a facial challenge to the general agency practice employed by Commerce, as well as to the final results of an agency proceeding that is subject to judicial review under" § 1516a.[111] The court accordingly ruled that because the plaintiffs had a fully adequate remedy available through their appeal initiated by their first complaint under § 1581(c), the court was required to dismiss the plaintiffs' second complaint filed under § 1581(i).[112]

b. *Acciaierie Valbruna S.P.A. v. United States*

Valbruna involved the same section 123 Determination that was at issue in *U.S. Steel*, and a separate section 129 Determination through which the section 123 Determination was applied to the AD order on stainless steel bar imports from Italy ("Italy Steel Order").[113] Valbruna—the plaintiff in the case—was the sole Italian producer and U.S. importer of the subject merchandise. The order was issued in early 2002, and required that Valbruna post an estimated AD duty cash deposit on each entry subject to the order equal to 2.50% *ad valorem* of such entry's customs value.

The section 123 Determination was issued on December 27, 2006, and the final results of the section 129 Determination, which applied the section 123 Determination to the Italy Steel Order, was issued on May 4, 2007. Valbruna had participated in the preliminary results of the section 129 Determination, and had argued that if, as it turned out, the dumping margin for the Italy Steel Order fell to zero percent under Commerce's modified AD margin calculation methodology, Commerce should revoke the order for all unliquidated entries subject to it.[114] However, Valbruna did not participate in that proceeding's final determination.[115] Commerce rejected Valbruna's argument in both

110. *Id.*
111. *Id.*
112. *Id.* at 1382–83.
113. *Valbruna*, No. 08-00381, 2009 WL 2190188, at *1–2 (Ct. Int'l Trade July 23, 2009).
114. *Id.* at 2–3.
115. *Id.* at 3–4.

the preliminary and final results of the section 129 Determination, and instead determined to only prospectively revoke the AD order for entries made on or after April 23, 2007, (*i.e.* shortly before the issuance of the final results for the section 129 determination).

On April 2, 2007, the importer asked Commerce to conduct an annual administrative review of all of the entries it made under the order for the order's sixth period of review, which covered the one-year period from March 2006 through February 2007.[116] However, the importer shortly thereafter withdrew that request, and Commerce ultimately rescinded the administrative review, and instructed Customs to liquidate all of the relevant entries at the AD deposit rate in effect at the time of entry.[117] When Customs assessed significant AD duties in liquidating the entries, the importer filed protests of the liquidations, claiming Customs lacked the authority to assess the duties, because Commerce had determined in the section 129 proceeding "that no dumping occurred" during the period covered by the original investigation, "and, thus, there was no valid antidumping order in place at the time of liquidation."[118] Customs denied the protests, asserting that a challenge to the calculation of AD duties was not a protestable decision and that Customs had correctly liquidated the entries pursuant to Commerce's instructions.[119]

On appeal, the court promptly dismissed the importer's claim under § 1581(a) against Customs' denial of its protests, on the ground that the claim "is in essence tantamount to a challenge to an antidumping decision," which Customs has no authority to make, and which are exclusively made by Commerce.[120] The court also rejected Valbruna's claim that Commerce had exceeded its authority when it instructed Customs to assess duties on the relevant entries, given that agency's revocation of the order in connection with the section 129 proceeding.[121] The court noted that it would have subject matter jurisdiction over this claim under § 1581(i) only if such jurisdiction was not available to the importer under any other provision of § 1581, or the relief provided by any such provision would have been "manifestly inadequate." The court observed that the "core" of Valbruna's claim against Commerce was its "decision" in the section 129 Determination "not to make the

116. *Id.* at 4.
117. *Id.*
118. *Id.* at 5.
119. *Id.*
120. *Id.* at 6.
121. *Id.* at 7.

revocation of the antidumping duty order apply retroactively to all then unliquidated entries of stainless steel bar from Italy."[122] The court pointed out that Valbruna could have meaningfully appealed Commerce's decision not to retroactively apply the revocation of the order under § 1581(c) by continuing to participate in either (1) the section 129 proceeding, whose final determination would have been appealable under § 1581(c) (through § 1516a(a)(2)(B)(vii));[123] or (2) the sixth administrative review, whose final results also would have been appealable under Section 1581(c) (through § 1516a(a)(2)(B)(iii)).[124]

While the court was correct with regard to the first point, it seems unlikely that the CIT ultimately would have upheld Valbruna's right to challenge during the order's sixth administrative review of Commerce's decision in the section 129 Determination not to retroactively revoke the AD order, because there is no basis by which Valbruna could have lawfully raised this claim during the review. Of course, Valbruna could have avoided the assessment of AD duties against its entries subject to the sixth administrative review by demonstrating during that review that those entries were not dumped. However, that is not the equivalent of Valbruna being able to claim in that review that, regardless of the extent to which the entries may have been dumped, Commerce was foreclosed from instructing Customs to assess AD duties on the entries because Commerce had erred in not revoking the AD order in the section 129 Determination retroactively as well as prospectively.

III. CASES CLARIFYING THE ROLE OF THE APA IN ESTABLISHING CAUSES OF ACTION AND THE CIT'S SUBJECT MATTER JURISDICTION UNDER SEC. 1581(I)

A. *To Date, All Appeals Subject to the CIT's "Residual" Jurisdiction under § 1581(i) Have Asserted the APA's "Residual" Cause of Action*

As has been noted, § 1581 grants the CIT exclusive subject matter jurisdiction over specific civil actions against the United States that arise out of the specific laws listed in subsections (a) through (h), and the general categories of law listed in subsection (i). However, none of these subsections itself grants any cause of action over which the CIT would have subject matter jurisdiction. This is confirmed by § 1581's legislative history, which states that Congress, in enacting § 1581, "intended only to confer subject matter jurisdiction on the court, and

122. *Id.*
123. *Id.* at 7–8.
124. *Id.*

not to create any new causes of action not founded on other provisions of law."[125]

Indeed, the causes of action over which the CIT would have jurisdiction under the first eight subsections of § 1581—i.e., not including subsection (i)—are expressly provided for in the specific law or laws identified in each subsection. Each such law identifies, either internally or by reference from one or more other laws, the specific limitations Congress has placed on the prosecution of the identified causes of actions against the United States. Such limitations include (but are not limited to): the specific U.S. agency and agency officials and employees, against which suit may be brought; the parties that may file such suits; the specific agency actions (or inactions) that may be the subject to such suits; the time by which such suits must be filed; and the standard of review to be applied by the CIT.

For example, § 1581(c) grants the CIT exclusive jurisdiction over any civil action commenced under § 1516a,[126] which expressly grants to certain identified parties that have participated in one of the specified proceedings conducted by Commerce or the ITC under the AD/CVD law the right to appeal certain aspects of such agency's final determination or results in that proceeding.[127] Section 1516a also dictates other aspects of these appeals, such as the time within which such an appeal must be brought[128] and the standard of review the CIT is to apply in adjudicating the appeal.[129]

However, the laws listed in the first eight subsections of section 1581—including the listing of § 1516a in § 1581(c)—do not provide a cause of action against (i.e., a right to appeal) every harmful action the relevant agencies could take (or fail to take) under those laws. A good example is presented by Commerce's issuance of so-called "liquidation" instructions, which in recent years has been the subject of significant litigation under § 1581(i)—a trend that continued into 2009.[130] Once Commerce completes an annual administrative review of an AD order, it issues instructions to Customs as to the exporter-

125. H.R. Rep. No. 96-1235, at 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759.

126. 19 U.S.C. § 1516a (2006).

127. 19 U.S.C. §§ 1516a(a)(1), 1516a(a)(2)(A), 1516a(a)(3) (2006).

128. 19 U.S.C. § 1516a(a)(5) (2006).

129. 19 U.S.C. § 1516a(b)(1).

130. In 2009, the CIT issued two decisions affirming its jurisdiction under Section 1581(i) over appeals challenging Commerce's issuance of liquidation instructions. *See* SKF USA Inc. v. United States, 675 F. Supp. 2d 1264, 1269 (Ct. Int'l Trade 2009); SKF USA Inc. v. United States, 659 F. Supp. 2d 1338, 1342–43 (Ct. Int'l Trade 2009).

specific assessment rates (which typically are expressed as a percentage) Customs must use in assessing final AD duties on the imports that were entered during the one-year period covered by the review. If such instructions erroneously included an assessment rate for an exporter that was higher than the rate determined by Commerce in the review's final results, and Customs assessed final AD duties at the erroneous rate, Customs would bill that exporter's U.S. importer for a higher amount of final AD duties than had Customs applied the correct rate, which would impose an economic injury on that importer.

Section 1516a provides a cause of action for appeals alleging error by Commerce in determining an assessment rate issued in the final results of an administrative review;[131] as a result, the CIT has jurisdiction over such appeals under § 1581(c). However, the Federal Circuit observed several years ago in *Consolidated Bearings Co. v. United States ("Consol. Bearings")*[132] that the CIT does not have jurisdiction under § 1581(c) over an appeal alleging that Commerce's liquidation instructions include an assessment rate that differs from the one issued in the final results, because such an action "is not a challenge to the final results."[133] The court nevertheless recognized that such a claim is "a challenge to the 'administration and enforcement' of those final results," and that the CIT has jurisdiction over such claims under § 1581(i)(4). The court added that because "liquidation instructions direct Customs to impose antidumping duties to protect domestic markets . . . an action against those instructions also arises as a challenge to 'tariffs, duties, fees or other taxes on the importation of merchandise for reasons other than the raising of revenue,'—i.e., § 1581(i)(2).[134] The Federal Circuit thus ruled that the CIT has jurisdiction over challenges to Commerce's liquidation instructions under Paragraph (2) as well as Paragraph (4) of § 1581(i).[135]

Decisions such as *Consol. Bearings* established that the CIT would have jurisdiction under § 1581(i) for at least some claims arising from the laws identified in subsections (a) through (h), but for which

131. 19 U.S.C. § 1516a(a)(2)(A)(i)(I).

132. Consol. Bearing Co. v. United States, 348 F.3d 997 (Fed. Cir. 2003).

133. *Id.* at 1002.

134. *Id.*

135. This was confirmed in *Shinyei Corp. of America v. United States*, another appeal alleging error in Commerce's liquidation instructions. 355 F.3d 1297, 1304–05 (Fed. Cir. 2004). There, the Federal Circuit indicated that the CIT's jurisdiction over such actions arises under both Paragraphs (2) and (4) of § 1581(i) by highlighting only the text of those two paragraphs in its recitation of all of subsection (i). *Id.*

jurisdiction was not available under those subsections. However, the source of the cause (or causes) of action for such claims under § 1581(i) remained unclear until recently. Unlike the first eight subsections of § 1581, subsection (i) does not specify any law that provides a specific cause of action over which the CIT would have jurisdiction under subsection (i). Instead, § 1581(i) refers, as mentioned above in Part I, to four general categories of laws.[136] While the language of these four paragraphs suggests that the range of laws from which appeals subject to the CIT's jurisdiction under § 1581(i) may arise is quite wide, to date no law within the general categories of law covered by subsection (i) has been found that provides a specific a cause of action over which the CIT would have jurisdiction under that subsection. Indeed, the CIT through 2004 generally did not specifically identify the statutory source of the causes of action over which it presided under Section 1581(i).[137] For example, while the Federal Circuit held in *Consolidated Bearings* that the CIT had jurisdiction over challenges to Commerce's liquidation instructions under paragraphs (2) and (4) of § 1581(i), the court did not identify the statute that provided the plaintiff's cause of action in that case.[138]

That changed in 2004, after the Federal Circuit ruled in *Shinyei Corp.* that the cause of action for an importer's appeal of Commerce's erroneous liquidation instructions arises under the APA.[139] Since then, the CIT and the Federal Circuit have identified the APA as the sole source of the cause of action for all or virtually all of the § 1581(i) appeals they have considered.

The APA cause of action constitutes Congress' general waiver of the Executive Branch's sovereign immunity from being sued by any "per-

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136. *See supra* n.12–15 & accompanying text.

137. Davidson, *supra* n.18, at 136.

138. The only reference to the APA in *Consol. Bearings* was the court's recognition that the CIT was required by statute to review all Section 1581(i) cases under the relatively deferential APA standard of review provided in 5 U.S.C. § 706. *Consolidated Bearings*, 348 F.3d at 1004.

139. *Shinyei Corp.*, 355 F.3d at 1304. While Congress did not expressly state that the APA would provide *a* (let alone *the*) cause of action for Section 1581(i) cases, Congress clearly intended that the APA would play a significant role in the CIT's adjudication of lawsuits over which it had jurisdiction under Section 1581(i) jurisdiction. For example, a statutory provision that identifies certain standing requirements for Section 1581(i) appeals states that such appeals "may be commenced in the [CIT] by any person adversely affected or aggrieved by agency action with the meaning of section 702 of [the APA]." 28 U.S.C. § 2631(i) (2006). Also, the CIT is required by statute (28 U.S.C. § 2640(e) (2010)) to review all Section 1581(i) cases under the relatively deferential APA standard of review provided in 5 U.S.C. § 706. *See, e.g.*, Gilda Indus. v. United States, 625 F. Supp. 2d 1377, 1381 (Ct. Int'l Trade 2009), *aff'd*, 2010 U.S. App. LEXIS 21074 (Fed. Cir. 2010).

son suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[140] The APA thus provides, with some broad exceptions, what is, in effect, a "residual" cause of action against any injurious agency action or inaction "within the meaning of" any law that does not itself specifically provide a cause of action against such action or inaction. When such a law fits within one of the categories listed in the four paragraphs of § 1581(i), the CIT will have "residual" jurisdiction over any appeal brought under the APA "residual" cause of action.

B. *The Extent to Which Some Restrictions on, and Requirements for, an APA Cause of Action are Jurisdictional Remains Uncertain*

In the several years since the Federal Circuit identified the crucial role played by the APA in appeals under § 1581(i), the CIT's examination of claims asserted under that subsection has focused on the whether such claims satisfy the requirements for asserting an APA cause of action that are in addition to the basic requirements for establishing subject matter jurisdiction under Section 1581(i), which are discussed above in Part II. This trend was continued in 2009.

For example, the APA residual cause of action applies only to an "agency" action[141] that is "final".[142] Thus, the cause of action is not available where the challenged government action was not performed by an "agency," or where the challenged agency action is not "final," as each term is defined under the APA. Both of these issues were examined in *Michael Simon Design, Inc. v. United States* ("*Michael Simon*"),[143] in which importers challenged modifications made to the HTSUS, which stripped certain HTSUS classifications of interest to them of their previous duty-free status.[144] As provided by the applicable statute, the modifications were initially recommended by the ITC, and were ultimately given legal effect by to the President of the United States.[145] The importers claimed that the ITC's recommendation to the

140. 5 U.S.C. § 702 (2006) ("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.").

141. *Id.*

142. 5 U.S.C. § 704 (2006) ("[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review."); *see also* Norton v. So. Utah Wilderness Alliance, 542 U.S. 55, 61–62 (2004) (quoting 5 U.S.C. § 704 (2006)).

143. 637 F. Supp. 2d 1218 (Ct. Int'l Trade 2009), *aff'd*, 609 F.3d 1335 (Fed. Cir. 2010).

144. *Id.* at 1222.

145. *Id.* at 1220–23.

President violated the relevant statute's requirement that any recommended HTSUS modifications "maintain 'substantial rate neutrality,'" or, as the court interpreted this language, "not significantly alter the applicable duty rate" of the existing classifications.[146] They further claimed that the President abused his discretion under the relevant statute by accepting the ITC's unlawful recommendation.[147]

The CIT observed that the importers' claims were made "under the general-review provisions of the APA," because the statute under which both the ITC and the President acted, and which thus gave rise to the claims, did not provide the importers with a private right of action against the government.[148] The court dismissed the complaint for want of the court's subject matter jurisdiction over either the President—because Supreme Court precedent established that the President is not covered by the term "agency" as it is used in the APA[149]—or the ITC—because that agency's recommendation to the President was not a "final" agency action required by the APA.[150]

This ruling raises the question of whether it was properly based on the absence of the court's jurisdiction over the asserted APA cause of action (the existence of which can be challenged by either a motion to dismiss under USCIT Rule 12(b)(1), or by the court itself without such a motion[151]), or defects in the asserted cause of action (which typically must be raised in a defendant's answer to the complaint, and then in a motion to dismiss under USCIT Rule 12(b)(5), and which typically are waived if not asserted in a defendant's answer).[152] For example, the CIT treated the absence of "final" agency action as a defect in the

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146. *Id.* at 1221 n.5.

147. *Id.* at 1224.

148. *Id.*

149. *Id.* at 1225 (citing Dalton v. Specter, 511 U.S. 462, 470 (1994) and Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992)).

150. *Id.* at 1225–26.

151. If the defects were, in fact, jurisdictional, and had the government failed to challenge them in a Rule 12(b)(1) motion, the CIT itself would have been required to raise the issue even if the government failed to do so (as appears to have been the case in *Michael Simon*); if the defects pertained solely to the asserted APA cause of action, the government would have waived any objection to them if it failed to raise the objection in its answer. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) ("[S]ubject-matter jurisdiction, because it involves the court's power to hear a case, can never be forfeited or waived. Moreover, courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.") (citations and internal quotation marks omitted).

152. The government also claimed in its Rule 12(b)(5) motion that the importers lacked any non-statutory—i.e., Constitutional—right to challenge the President's actions in this case. *Michael Simon*, 637 F. Supp. 2d at 1223–24.

asserted APA cause of action in at least one pre-2009 case, in contrast to treating it as a jurisdictional issue in *Michael Simon.*[153] Further, the Second Circuit has observed that there is a split of authority among the federal Courts of Appeal as to whether the requirements that the agency action challenged under the APA cause of action be "final" action, and not be committed to agency discretion under 5 U.S.C. § 701(a)(2) (*see* discussion *infra* at Part III.C.2), are jurisdictional, or "threshold," requirements, because of their relative significance over the more minor requirements of the APA cause of action.[154] In another 2009 decision, the CIT cited that Second Circuit case in reporting a similar split in the circuits as to whether APA-based claims that fail to challenge "discrete" or "required" agency action (*see* discussion *infra* at Part III.C.1) must be dismissed for lack of jurisdiction, or for failure to state a claim for which relief may be granted.[155] Thus, the degree to which the elements of the APA residual cause of action are jurisdictional has not been fully resolved, and likely will be contested in future CIT decisions.

C. *Limitations on the APA Cause of Action Under § 1581(i) Have Been Adopted from APA Decisions Involving Environmental-Protection and Food-and-Drug Safety Statutes*

The scope and complexity of appeals brought under § 1581(i)—and the CIT's decisions in such appeals—has increased in the several years since the primacy of the APA cause of action in such appeals became evident. Given the relative dearth of federal court decisions analyzing the APA cause of action in the § 1581(i) context prior to 2004, the CIT has applied several major Supreme Court decisions that clarified the requirements of the APA cause of action in the context of claims asserted against the federal agencies charged with administering environmental-protection and food-and-drug safety statutes in its § 1581 (i) decisions.[156] The CIT continued this trend in 2009 through two significant

153. *See, e.g.*, Sakar Int'l, Inc. v. United States, 466 F. Supp. 2d 1333, 1341, 1350 (Ct. Int'l Trade 2006) (dismissing plaintiff's complaint under CIT Rule 12(b)(5) because the alleged injurious agency action was not a "final" agency action.), *vacated and remanded on other grounds*, 516 F.3d 1340, 1346–48 (Fed. Cir. 2008).

154. Sharkey v. Quarantillo, 541 F.3d 75, 87–88 (2d Cir. 2008) (*Sharkey*).

155. S. Shrimp Alliance v. United States, 617 F. Supp. 2d 1334, 1361 n.5 (Ct. Int'l Trade 2009) (citing *Sharkey*, 541 F.3d at 87–88).

156. *See, e.g.*, Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot., 465 F. Supp. 2d 1300, 1322–24 (2006) [hereinafter *Nat'l Fisheries I*].

decisions, *Southern Shrimp Alliance v. United States* ("*SSA*")[157] and *National Fisheries Institute, Inc. v. United States Bureau of Customs & Border Protection* ("*Nat'l Fisheries II*").[158]

1. The APA Cause of Action Can Reach an Agency's Failure to Act if the Withheld Action is "Discrete" and "Required"

SSA involved a broad-based challenge to Customs' allegedly improper administration of the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA")[159]—also known as the "Byrd Amendment"—under which Customs is required to distribute, after the end of each of the government's fiscal years, all duties the agency collected during that year under each AD and CVD order to the "affected domestic producers" ("ADPs") under each order on a *pro rata* basis, based on each producer's relative claimed costs for producing goods that compete with the imports subject to that order ("qualifying expenditures"), as evidenced by annual "certifications" submitted by such ADPs. The plaintiffs, principally domestic harvesters of raw shrimp, claimed that Customs had mismanaged the CDSOA distribution of duties collected under the AD orders on frozen shrimp imports from six countries, which had caused them to receive lower distributions—and certain non-plaintiff domestic shrimp processors to receive higher distributions—than would have occurred in the absence of Customs' mismanagement.

One of the complaint's 11 counts alleged that although the CDSOA required Customs to promulgate regulations specifying the agency's procedures for distributing collected AD and CVD duties, Customs had "failed to prescribe procedures *sufficient and necessary* to ensure that CDSOA distributions were made to applicants for qualifying expenditures."[160] Plaintiffs claimed that Customs' failure amounted to the agency's "failure to act"—which is included in the APA's definition of "agency action"[161]—and asked the CIT to compel Customs to issue effective regulations under 5 U.S.C. § 706(1), which instructs a reviewing court to, among other things, "compel agency action unlawfully withheld or unreasonably delayed."[162]

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157. 617 F. Supp. 2d 1334 (Ct. Int'l Trade 2009).

158. 637 F. Supp. 2d 1270 (Ct. Int'l Trade 2009).

159. Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c (2000), *repealed by* Pub. L. No. 109-171, § 7601(a), 120 Stat. 154 (Feb. 8, 2006).

160. *SSA*, 617 F. Supp. 2d at 1361 (referring to 19 U.S.C. § 1675c(c) (repealed)).

161. 5 U.S.C. § 551(13) (2006).

162. *SSA*, 617 F. Supp. 2d at 1359–60.

In dismissing this count, the CIT relied heavily on two decisions, *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*")[163] and *Lujan v. National Wildlife Federation* ("*Lujan*"),[164] in which the Supreme Court analyzed the APA cause of action in lawsuits challenging alleged federal agency laxity in enforcing certain environmental statutes. The CIT observed that the Supreme Court had confirmed in *SUWA* that 5 U.S.C. § 706(1) "permits litigants to challenge an agency's inaction . . . 'only where a plaintiff asserts that an agency failed to take a *discrete* action that it is *required to take*'," and that "a 'failure to act' is properly understood to be limited . . . to a *discrete* action."[165] The court further noted that the limitation of a court's authority under 5 U.S.C. § 706(1) to remedy "discrete" agency inaction precludes the kind of "'broad programmatic attack' that was rejected" by the Supreme Court in *Lujan*.[166] The CIT found that in the case before it, the plaintiffs were not challenging a discrete agency action, but instead were challenging an alleged "'[g]eneral deficienc[y] in [Customs'] compliance'" with the CDSOA's instruction to promulgate implementing regulations.[167] The court accordingly dismissed the count because the challenged agency inaction "'lack[s] the specificity required for agency action.'"[168]

The CIT further cited *SUWA* for the proposition that the APA only authorizes a court to compel an agency to "'perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* it shall act.'"[169] The court added that, as explained in *SUWA*, this limitation "was carried forward from the use of writs of mandamus under 28 U.S.C. § 1361, prior to the passage of the APA," and that "the mandamus remedy was normally limited to enforcement of a specific unequivocal command, the ordering of a precise, definite act . . . about which [an official] had no discretion whatever."[170] The CIT accordingly also based its dismissal of this count on the ground that the

163. 542 U.S. 55 (2004).

164. 497 U.S. 871 (1990).

165. *SSA*, 617 F. Supp. 2d at 1360 (citing *SUWA*, 542 U.S. at 61).

166. *Id.* (citing *Lujan*, 497 U.S. at 891).

167. *Id.* (citing *SUWA*, 542 U.S. at 66). Citing to two federal court of appeals decisions in environmental cases, the CIT noted that the plaintiffs "are not really challenging agency inaction at all," because Customs had, in fact, promulgated regulations as required by the CDSOA, and that the plaintiffs "simply object to the efficacy of the process Customs has adopted." 617 F. Supp. 2d at 1361 (citing Sierra Club v. Peterson, 228 F.3d 559, 568 (5th Cir. 2000) (en banc); and Pub. Citizen v. Nuclear Regulatory Comm'n, 845 F.2d 1105, 1108 (D.C. Cir. 1988)).

168. *SSA*, 617 F. Supp. 2d at 1360.

169. *Id.* at 1361 (citing *SUWA*, 542 U.S. at 64).

170. *Id.* (citing *SUWA*, 542 U.S. at 63) (quotations omitted).

requested relief went well beyond the court's authority under the APA to instruct Customs to perform a ministerial or non-discretionary action.[171]

2. An Agency's Decision Not to Institute Enforcement Proceedings is Presumptively Unreviewable Under the APA as an Action "Committed to Agency Discretion By Law"

The CIT in *SSA* construed another of the complaint's counts to allege that "Customs should have done more to identify and reject suspicious certifications submitted for shrimp-based CDSOA distributions" by non-plaintiff ADPs that obviously contained excessive qualifying expenditure claims, and that Customs' failure to do so resulted in the plaintiffs receiving smaller distributions.[172] As relief, the plaintiffs asked the CIT to direct Customs "to develop standards and procedures for 'systematically verifying CDSOA certifications.'"[173]

The CIT observed that Customs' alleged failure to audit such certifications amounted to the agency's decision not to institute enforcement proceedings, an action the Supreme Court held in *Heckler v. Chaney* ("*Heckler*")[174] is "presumptively unreviewable under the APA."[175] *Heckler* involved a challenge to the Food and Drug Administration's refusal to conduct enforcement proceedings to stop the use of certain drugs as lethal injection in state death penalty proceedings, a use the FDA had not approved.[176] The Supreme Court viewed the FDA's decision not conduct enforcement proceedings as being an "agency action [that] is committed to agency discretion by law"[177]—which is expressly excluded from the APA's residual waiver of sovereign immunity.[178] The Court observed in *Heckler* that an agency's decision not to undertake an enforcement proceeding that is not specifically required by statute "'involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise,'" all of which are related to selecting from all possible enforcement proceedings those that best suit the agency's institutional goals and limited resources.[179] Noting

171. *Id.*
172. *SSA*, 617 F. Supp. 2d at 1362.
173. *Id.* at 1363 (quoting Complaint).
174. Heckler v. Chaney, 470 U.S. 821 (1985).
175. *SSA*, 617 F. Supp. 2d at 1362 (citing *Heckler*, 470 U.S. at 831–32).
176. *Heckler*, 470 U.S. at 823–24.
177. 5 U.S.C. § 701(a)(2) (2006).
178. *Heckler*, 470 U.S. at 831.
179. *SSA*, 617 F. Supp. 2d at 1362–63 (citing *Heckler*, 470 U.S. at 831–32).

that the CDSOA does not expressly require Customs to conduct the type and level of certification verifications requested by the plaintiffs, and that the agency annually receives over 9,000 CDSOA certifications under just the six frozen shrimp AD orders, the CIT ruled that Customs' decisions not to conduct specific certification verifications had been committed to the agency's discretion by law, and dismissed the count for lack of subject matter jurisdiction over it.[180]

3. The APA Exception for Action "Committed to Agency Discretion by Law" is Narrow, and is Less Likely to Include Agency Decisions to Act, as Opposed to Decisions to Not Act

In contrast to *SSA*, the CIT determined that Customs' action at issue in *Nat'l Fisheries II* was not "committed to agency discretion by law," and thus could be challenged in a lawsuit under Section 1581(i) through the APA residual cause of action. In that appeal,[181] Customs had required the plaintiffs—27 U.S. importers of frozen shrimp imports from six countries subject to newly issued AD orders—to maintain in Customs' favor continuous-entry bonds that were both 100 percent higher than the cash deposits for estimated AD duties required by Commerce, and substantially higher than had been required before the orders were issued.[182] Customs had required the higher-value bonds to cover what Customs viewed as the enhanced risk that the importers would fail to pay the final AD duties the agency ultimately

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180. *Id.* at 1363.

181. The CIT asserted jurisdiction in *Nat'l Fisheries II* under Section 1581(i) without specifying which of subsection (i)'s four paragraphs applied. *See* 637 F. Supp. 2d 1270, 1281 (Ct. Int'l Trade 2009). However, in an earlier decision in that appeal granting a preliminary injunction against Customs' imposition of the enhanced bonding requirements on several of the plaintiffs, the CIT ruled that it had jurisdiction over the importers' claims under Paragraphs (1), (2) and (4) of Section 1851(i). *Nat'l Fisheries I*, 465 F. Supp. 2d 1300, 1309 (Ct. Int'l Trade 2006). This signaled the court's view that the AD law, which was one of the principal laws out of which the plaintiffs' claims arose, is at least covered by Paragraph (2), because it was the only law at issue that "provid[es] for . . . duties . . . on the importation of merchandise for reasons other than the raising of revenue." *Id.*

182. *Nat'l Fisheries II*, 637 F. Supp. 2d at 1274–75, 1294. The value of an importer's continuous bond is typically set by a formula in Customs' 1991 *Monetary Guidelines for Setting Bond Amounts*, Directive 99-3510-004 (July 23, 1991) ("Bond Directive"), and typically is the higher of $50,000 or 10 percent of the duties taxes and fees the importer paid during preceding year. *See id.* at 1274. Customs imposed significantly higher continuous bond requirements on the plaintiff importers in *Nat'l Fisheries II* through an amendment to its Bond Directive posted on the agency's website. *Id.* at 1274–75.

assessed on their imports subject to the new shrimp AD orders.[183] Customs' decision was based on its ongoing experience involving the substantial non-payment of duties that had been assessed under several existing AD orders on agricultural and aquacultural imports, such as garlic and crawfish tail meat, from China.[184]

The CIT rejected Customs' claim that under *Heckler*, the agency's imposition of the enhanced bonding requirements was within the APA exception for agency action that is committed to the agency's discretion by law. The CIT noted that *Heckler* involved the FDA's refusal to take action by conducting the requested enforcement proceedings, and that the Supreme Court had recognized in that case the "'general unsuitability for judicial review of agency decisions to refuse enforcement.'"[185] The CIT repeated the Court's observation in *Heckler* that, in refusing to act, an agency "'generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.'"[186] The CIT stated that, in contrast to *Heckler*, the case before it "arose from actions Customs took as an exercise of its authority over importers," and adopted the *Heckler* court's observation that "'when an agency *does* act to enforce, that action itself provides a focus for judicial review,'" and "'at least can be reviewed to determine whether the agency exceeded its statutory powers.'"[187]

The CIT also repeated the Supreme Court's observation in *Citizens to Preserve Overton Park, Inc. v. Volpe*[188] that the APA's agency-discretion exception "'is a *very* narrow exception,'" and is only "'applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."'"[189] The CIT ruled that "there is law for a court to apply in this case"[190] in the form of 19 U.S.C. § 1623, which authorizes Customs to require the posting of various types of customs bonds, and to set the requirements for such bonds, that the agency "may deem necessary" (1) for the protection of the revenue, or (2) to ensure compliance with any of the many laws that

183. *Id.* at 1274–75, 1294.

184. *Id.* at 1276, 1295–98.

185. *Id.* at 1283 (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).

186. *Id.* (quoting *Heckler*, 470 U.S. at 832).

187. *Id.*

188. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) [hereinafter *Overton Park*].

189. *Nat'l Fisheries II*, 637 F. Supp. 2d at 1283, 1284–85 (quoting *Overton Park*, 401 U.S. at 410).

190. *Id.* at 1284.

impose limitations on imports.[191] Conceding that Section 1623 does grant Customs a certain amount of discretion in administering it, the court nevertheless observed that this discretion "is not boundless," and does not include the discretion to impose "[o]verly burdensome bond requirements" that "are not 'necessary' to the fulfillment of either of those two statutory purposes" (i.e., securing compliance with the law, or securing collection of the revenue).[192] Finally, the CIT ruled that the discretion granted Customs by Section 1623 was much narrower than that granted by the statute that authorized the Director of the Central Intelligence Agency to, "in his discretion," terminate the employment of any Agency officer or employee whenever he deemed such termination "necessary or advisable in the interests of the United States," which terminations the Supreme Court recognized in *Webster v. Doe*[193] are exempt from APA review.[194] The CIT accordingly ruled that the plaintiff importers could use the APA cause of action to challenge Customs' imposition of its enhanced bonding requirements on them.

D. *Under the APA's Standard of Review, the Challenged Agency Must Have Considered the Relevant Facts, and Have Stated a Rational Connection Between those Facts and Its Decision*

Having ruled that Customs' imposition of the enhanced bonding requirements on the plaintiff shrimp importers was not exempt from judicial review, the CIT reached the merits of the plaintiffs' APA cause of action, and thereby demonstrated how the CIT analyzes a fairly complex APA cause of action under its Section 1581(i) jurisdiction. As noted, the APA authorizes a court to "hold unlawful and set aside" only agency action that is (1) arbitrary; (2) capricious; (3) an abuse of discretion; or (4) otherwise not in accordance with law.[195] As the CIT noted in *Nat'l Fisheries II*, this standard of review "is a narrow one under which the court is not empowered to substitute its judgment for that of the agency."[196] The CIT's summary of Supreme Court precedent examining the APA cause of action in connection with environmental-

191. *Id.* (quoting 19 U.S.C. § 1623(a) (2006)).

192. *Id.* The court also noted that an earlier CIT decision had suggested that Customs' abuse of its authority to set bond requirements would be subject to judicial review. *Id.* (citing Hera Shipping, Inc. v. Carnes, 640 F. Supp. 266, 269 (Ct. Int'l Trade 1986)).

193. 486 U.S. 592 (1988).

194. *Nat'l Fisheries II*, 637 F. Supp. 2d at 1285.

195. 5 U.S.C. § 706(2)(A) (2006).

196. 637 F. Supp. 2d at 1285 (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285–86 (1974)) [hereinafter *Bowman*].

protection and food-and-drug safety laws suggests four factors a court should consider in determining whether the challenged agency action is "arbitrary and capricious":

- Did the agency consider all of the relevant facts before taking the challenged action,[197] or did it, for example, "'entirely fail[] to consider an important aspect of the [relevant] problem'"?[198]
- Does the agency's decision constitute a "clear error of judgment,"[199] for example, by being "'so implausible that it could not be ascribed to a [reasonable] difference in view or the product of agency expertise'"?[200]
- Does the agency's explanation provide a rational connection between the relevant facts and the agency's chosen action,[201] or does it, for example, "'run[] counter to the evidence before the agency'"?[202]
- Is the agency's explanation clear enough to allow the reviewing court to "reasonably . . . discern the agency's path"[203] without the court having to provide its own explanation?[204]

In *Nat'l Fisheries II*, the CIT held that Customs failed to provide a rational basis for its decision under § 1623 to require all importers subject to the six frozen shrimp AD orders to post bonds with substantially higher values than were required before the orders were issued. The court first noted that while § 1623 may authorize Customs in some cases to obtain security on imports subject to an AD order beyond the cash deposit amounts set by Commerce,[205] any such authority was limited, because the AD law authorizes Commerce to make all substantive decisions under the AD law—including the amount of cash deposits of estimated AD duties required for imports subject to AD orders—and assigns Customs the ministerial role of implementing Commerce's decisions.[206] Noting that Customs as a result "does not possess the general authority, or the necessary expertise, to make substantive determinations under" the AD law, the CIT concluded "that Customs acts unlawfully when its decisions under 19 U.S.C. § 1623 encroach on

197. *Id.* (citing *Overton Park*, 401 U.S. 402, 416 (1971)).

198. *Id.* at 1286 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co. (*MVMA*), 463 U.S. 29, 43 (1983).

199. *Nat'l Fisheries II*, 637 F. Supp. 2d 1285 (citing *Overton Park*, 401 U.S. at 416).

200. *Id.* at 1286 (quoting *MVMA*, 463 U.S. at 43).

201. *Id.* at 1285–86 (citing *Bowman*, 419 U.S. at 285).

202. *Id.* at 1286 (quoting *MVMA*, 463 U.S. at 43).

203. *Id.* (citing *Bowman*, 419 U.S. at 285–86).

204. *Id.*

205. *Id.* at 1286–91, 1294.

206. *Id.* at 1292–93.

the substantive responsibility of Commerce" to determine the appropriate amount of estimated AD duties.[207]

The CIT observed that Customs had based its decision to impose enhanced bonding requirements on all importers subject to the six frozen shrimp AD orders on the agency's recent unfortunate experience under AD orders on agricultural/aquacultural imports from China other than the orders on frozen shrimp imports. Under the non-shrimp orders, certain importers had failed to pay tens of millions of dollars in assessed duties that were many times greater than the relatively small cash deposits of estimated AD duties the importers had posted upon entry, which left Customs with no security against the importers' failure to pay the difference.[208] Customs had determined that the defaulting importers were significantly under-capitalized, which allowed them to avoid Customs' payment efforts by declaring bankruptcy or simply shuttering operations and disappearing, and rendered the importers judgment proof against any collections lawsuits Customs might bring against them.[209] Customs also had determined that these importers typically had been in business for less than five years at the time they defaulted, which Customs apparently interpreted as a sign of their unreliability.[210]

The CIT ruled that the record Customs considered "provides no rational basis on which the agency could have concluded" that its experience under the AD orders on non-shrimp imports from China would be repeated under the six AD orders on frozen shrimp imports, or that the domestic shrimp importers "are particularly susceptible to bankruptcy, are likely to go out of business, or are operating as 'sham' or 'successor companies.'"[211] The court recognized that the risk to the federal revenue posed by the future non-payment of duties under the frozen shrimp AD orders "stood as an important factor for Customs to consider," because "it related to the scope of, and the justification for, the entire action."[212] Customs nevertheless admitted, according to the court, that it "'never made a determination that shrimp imports posed more or less of a risk to the revenue than other agricultural/aquacultural products.'"[213] The CIT observed that this admission "highlights the arbitrariness of . . . [Customs'] decision to single out the U.S.

207. *Id.* at 1293–94.
208. *Id.* at 1295, 1298.
209. *Id.* at 1296.
210. *Id.* at 1297.
211. *Id.* at 1296–97.
212. *Id.* at 1299.
213. *Id.* at 1298.

shrimp importing industry as the target for greatly expanded bonding requirements,"[214] and demonstrated that Customs "failed to address what was, in the words of *Bowman* and *Overton Park*, one of the 'relevant factors'" it was required to consider to pass muster under the APA standard of review.[215]

The CIT further ruled that there was no rational basis for Customs to determine that there was a high risk that the domestic importers of frozen shrimp from the five countries other than China that were subject to an AD order would default on paying duties assessed under those orders, because Customs' recent experience with substantial non-payment of assessed AD duties arose exclusively under AD orders on imports from China, and Customs had failed to separately consider the risk that the importers of frozen shrimp from the five countries other than China would fail to pay any duties that might be assessed under those orders.[216] Finally, the CIT noted that the absence of a rational basis for Customs' decision was underscored by the agency's application of the enhanced bonding requirements only to importers subject to the six frozen shrimp AD orders, and not to importers subject to the very AD orders on non-shrimp imports from China, whose massive duty-payment defaults was the sole basis for Customs' to develop and impose its enhanced bonding requirements.[217]

The CIT concluded that Customs' decision "was motivated entirely by considerations *other than* any unique risk to the revenue" posed by the shrimp importers, including the agency's inappropriate sensitivity to pressure from domestic shrimp producers and their Congressional representatives that Customs prevent the massive non-collection of duties under the relevant AD orders on non-shrimp imports from China from occurring under the six AD orders on frozen shrimp imports.[218] The CIT accordingly ruled that Customs' enhanced bonding requirement, and each bond sufficiency determination made for the plaintiffs thereunder, were arbitrary, capricious and not otherwise in accordance with law, and remanded the matter to Customs with instructions that the agency make new bond sufficiency determinations under its pre-existing procedures.[219]

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214. *Id.*

215. *Id.* at 1299 (quoting *Bowman*, 419 U.S. 281, 285 (1974), and *Overton Park*, 401 U.S. 402, 416 (1971)).

216. *Id.* at 1297.

217. *Id.* at 1297–99.

218. *Id.* at 1299–1300.

219. *Id.* at 1304–06.