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RECENT DECISIONS OF THE COURT OF INTERNATIONAL TRADE RELATING TO JURISDICTION: A PRIMER AND A CRITIQUE

DAVID M. COHEN*

The Court of International Trade (the Court) was created by the Customs Courts Act of 1980.¹ One provision of this statute that confers jurisdiction upon the new court, section 1581 of Title 28 of the United States Code (section 1581), essentially reiterates, with some slight modifications, the jurisdiction possessed by the Customs Court.² Section 1581, however, also confers on the new court jurisdiction not previously possessed by the Customs Court. These new areas of jurisdiction represent the major concern of this Article.

The Customs Courts Act became effective approximately 3 years ago. The Court's first judicial conference seems to be an appropriate time to evaluate the trends that appear to be evolving in the course of the Court's interpretation of section 1581. Accordingly, this Article will examine jurisdictional decisions of the Court and its appellate tribunal³ made during the period extending from

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³ See Federal Customs Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (to be codified in scattered sections of 28 U.S.C.). Prior to the enactment into law of the Federal Customs Improvement Act, the Court of Customs and Patent Appeals possessed exclusive jurisdiction to entertain appeals from the Customs Court, and, after the court had been superseded, from the Court of International Trade. See 1 P. FELLER, U.S. CUSTOMS AND
January 1, 1980 through December 31, 1983. Such an examination logically must begin with a survey of the structure of section 1581 and the provisions to which it relates.

I. The Structure of Section 1581

Section 1581 is divided into nine subsections, labeled (a) through (i), each of which specifically confers exclusive jurisdiction upon the Court to entertain a particular type of civil action. The procedural rules for such civil actions are contained in chapter 169 of Title 28 of the United States Code entitled “Court of International Trade Procedure.” Each of these procedural provisions is divided into subsections, each of which, as a general rule, relates to a comparable subsection of section 1581. Thus, the structure of section 1581 indicates that it consists of nine separate jurisdictional schemes. This structure requires the Court to interpret each subsection in isolation, as a distinct entity. Frequently, as will be discussed below, it requires the Court to consider interrelationships between the nine subsections as well. With this background, it is now possible to consider the various decisions rendered by the Court in this area during the past 3 years. In addition to the provisions in title 28 relating to the jurisdiction of the Court, most of


Several decisions discussed in the text were rendered prior to the commencement of this period. They are discussed in this Article because of their significance.


See 28 U.S.C. § 1581(a)-(i) (1992); id. §§ 2631, 2632, 2636, 2637, 2639. For example, § 1581(a) grants the Court of International Trade exclusive jurisdiction over actions commenced to contest the denial of a protest, id. § 1581(a), while § 2631(a) stipulates that only parties that have previously filed protests pursuant to § 514 of the Tariff Act of 1930 may bring such actions, id. § 2631(a). The other provisions of § 1581 have similarly-lettered companion requirements in chapter 169. Compare id. § 1581(a)-(i) (actions over which the court possesses jurisdiction) with id. § 2631(a)-(i) (standing requirements for § 1581 actions) and § 2636(a)-(i) (statutes of limitation for § 1581 actions). Some requirements, however, apply to all subsections of § 1581, and not just to a specific subsection. For instance, the procedural requirement that a party exhaust all administrative remedies before filing suit in the Court, is generally applicable to § 1581. See id. § 2637(d). Similarly, subdivisions (d) through (i) of § 1581 are subject to the provision that “[t]he Court of International Trade may prescribe by rule that any . . . pleading . . . mailed by registered or certified mail . . . be deemed filed as of the date of mailing,” id. § 2632(d), while actions brought under subsections (a) through (c) of § 1581 are subject to the filing requirements set forth in subsections (a) through (c) of § 2632, id. § 2632(a)-(c).
the subsections contained in section 1581 specifically refer to the Trade Act of 1974 (Trade Act)\textsuperscript{7} and the Tariff Act of 1930 (Tariff Act).\textsuperscript{8} These statutes contain various limitations on the types of actions taken by United States agencies that may be challenged by individuals who may prosecute such challenges.

For example, section 1581(a) grants the Court jurisdiction to entertain a civil action contesting the denial of a protest of a Customs Service decision under section 515 of the Tariff Act (section 515).\textsuperscript{9} Section 515, in turn, refers to section 514 of the Tariff Act (section 514), which provides that seven specified types of Customs Service decisions "shall be final and conclusive upon all persons (including the United States) unless a protest is filed in accordance with the section, or a timely civil action contesting the denial of a protest" is instituted.\textsuperscript{10} In accordance with jurisdictional principles first developed by the Customs Court and followed by the Court of International Trade, a civil action instituted pursuant to section 1581(a) must be dismissed for lack of jurisdiction unless, in addition to fulfilling all the other jurisdictional prerequisites, the plaintiff has filed a protest to one of the seven types of Custom Service decisions specified in section 514.\textsuperscript{11}

The same principle applies to section 1581(c). This section refers to section 516A of the Tariff Act (section 516A), which subjects certain administrative decisions under the countervailing and antidumping duty statutes to judicial review.\textsuperscript{12} If a civil action instituted pursuant to section 1581(c) does not challenge one of the stipulated types of administrative decisions, the Court must find that it does not possess jurisdiction to entertain the action pursuant to section 1581(c).\textsuperscript{13}

\textsuperscript{11} See 28 U.S.C. §§ 1581(a), 2632-2647 (1982); see also United States v. Uniroyal, Inc., 687 F.2d 467, 474-75 (C.C.P.A. 1982) (no jurisdiction where appellee failed to protest denial of demand for duties or imposition of damages as required by statute); Wear Me Apparel Corp. v. United States, 511 F. Supp. 814, 818 (Ct. Int'l Trade 1981) (failure to exhaust administrative remedies by filing protest resulted in denial of jurisdiction under § 1581(a) and § 1581(i)).
\textsuperscript{13} See 28 U.S.C. § 1518(c) (1982); see, e.g., Royal Business Machs., Inc. v. United States, 699 F.2d 692, 699-99 & n.13 (C.C.P.A. 1982) (dismissal by Court of International Trade affirmed because appellant's failure to commence action within period required by 19 U.S.C. § 1516a precluded availability of jurisdiction under § 1881(c)); but cf. Sacilor,
Some of the jurisdictional questions posed by section 1581 involve the concept of sovereign immunity. The United States, of course, is not subject to suit unless it has waived its sovereign immunity, and any act purporting to waive sovereign immunity must be strictly construed.\textsuperscript{14} This principle affects the interpretation of the interrelationships among the various subsections of section 1581.

Thus, the structure of section 1581 indicates that it consists of nine separate jurisdictional schemes. This structure requires the court to interpret each subsection in isolation, as a distinct entity. Frequently, as will be discussed below, it requires the Court to consider interrelationships between the nine subsections as well. With this background, it is now possible to consider the various decisions rendered by the Court in this area during the past three years.

II. Interpretation of the Individual Subsections of Section 1581

A. Section 1581(a)

Section 1581(a) provides that the Court of International Trade shall have exclusive jurisdiction over any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act.\textsuperscript{15} This provision, which embodies nearly all of the jurisdiction previously possessed by the Customs Court, is designed to enable importers to challenge actions of the Customs Service relating to the importation of merchandise.\textsuperscript{16} A civil action may be instituted pursuant to this section either by the person who filed the protest or by a surety on the transaction that is sub-


\textsuperscript{15} 28 U.S.C. § 1581(a) (1982); see infra text accompanying note 21.

\textsuperscript{16} 28 U.S.C. § 1581(a) (1982); see supra note 3 and accompanying text. For instance, the Customs Courts Act of 1980 newly authorized the court to remand to the Customs Service a suit instituted pursuant to § 1581(a). See 28 U.S.C. § 2643(b) (1982); see also House of Adler v. United States, 2 Ct. Int'l Trade 274, 277-78 (1981) (remand intended to provide viable alternative to dismissal of claim where plaintiff was able to prove that administrative action was in error but was unable to demonstrate proper result).
ject to the protest. The protest must be filed within 90 days of liquidation of duties or other payments owed, and the civil action must be filed within 180 days after the date when notice of the denial of the protest is mailed, or within 180 days after the date that denial of the protest becomes effective by operation of law under the terms of section 515(b). All liquidated duties, charges or exactions must be paid when the action is commenced.

1. Types of Decisions That May Be The Subject of a Protest

Since denial of a protest is a prerequisite to the institution of a suit, the legitimacy of the protest must be known before the existence of jurisdiction can be ascertained. The seven types of Customs Service decisions that may properly serve as the subject of the protest include:

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of [title 19, United States Code];
(5) the liquidation or reliquidation of an entry, or any modification thereof;
(6) the refusal to pay a claim for drawback; and
(7) the refusal to reliquidate an entry under section 1520(c) of [title 19, United States Code].

An importer may challenge a Customs Service decision falling into one of these seven categories, as well as the “legality of all orders or findings” that entered into the decision.

Several recent decisions have considered the question of whether a particular Customs Service decision comes within one of

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20 Id. § 2637(a). The plaintiff, if successful, receives a refund of the duties, charges, or exactions with interest. Id. § 2644. A surety’s obligation to pay liquidated duties is limited to the sum of any bond related to each entry that formed the subject of the denied protest. Id. § 2637(a).
22 Id.
these seven types. In *Alberta Gas Chemicals, Inc. v. Blumenthal* (*Alberta Gas I*), the plaintiff, an importer of Canadian methanol, filed a protest against a decision of the Secretary of the Treasury to commence an antidumping investigation involving Canadian methanol. The plaintiff alleged that its protest challenged an “order or finding [that entered] into a decision to impose a charge or exaction,” a type of decision specified in section 514(a)(3) of the Tariff Act. The court rejected the plaintiff’s challenge on the ground that the decision was not subject to protest. In the court’s view, the terms “charge” and “exaction,” as employed in section 514(a)(3), were not intended to embrace an interlocutory determination to initiate an antidumping investigation. These terms were held to apply only to “actual assessments of specific sums of money (other than ordinary customs duties),” and no such sum had been assessed in this case.

In *Carlingswitch, Inc. v. United States*, (*Carlingswitch I*), the plaintiff voluntarily tendered a certain sum to the Customs Service in connection with a civil penalty investigation prior to the issuance of a penalty notice. Though no civil penalty was ever assessed, the Customs Service rejected the plaintiff’s demand for return of the money. The plaintiff subsequently filed a protest challenging the refusal and instituted suit in the Customs Court when the protest was denied, claiming that the Customs Service’s refusal to refund the money constituted an “exaction.”

The court rejected this contention, relying in part upon the decision in *Alberta Gas I*. According to the court, the term “exaction” implied some form of coercion upon the part of the Customs Service. In this case the plaintiff had made the payment voluntarily, and thus the payment did not constitute an “exaction” within the meaning of section 514(a)(3).

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24 Id. at 1246.
25 Id. at 1249.
26 Id. at 1249-50.
29 500 F. Supp. at 226.
30 Id. at 227.
31 Id. at 226-27. The Court of Customs and Patent Appeals affirmed on the ground, among others, that a refusal to refund money is not a “charge” or “exaction” within the meaning of § 514(a)(3) of the Tariff Act. See Carlingswitch, Inc. v. United States, 651 F.2d 768, 773 (C.C.P.A. 1981).
A similar result was reached on similar facts in *ITT Semiconductors v. United States.*\(^{32}\) In that case, the Customs Service issued a notice of penalty to the plaintiff. After negotiations between the parties, the Customs Service reduced the amount demanded and notified the plaintiff that unless it remitted the sums now claimed, including an amount representing duties the Service alleged should have been paid on the entries at issue, the matter would be referred to the Department of Justice for the possible commencement of a civil penalty action.\(^{33}\) The plaintiff paid the sums demanded and filed a protest relating only to the part of the payment representing the claim for duties, on the grounds that such demand represented a retroactive assessment of duties in violation of section 514. On denial of the protest, the plaintiff filed a timely civil action in the Court of International Trade.\(^{34}\)

The United States moved to dismiss the suit, relying upon the decision in *Carlingswitch I.*\(^{35}\) The plaintiff alleged that this decision was distinguishable, since, unlike the *Carlingswitch I* plaintiff, it had been "forced" to make the payment or face an action for the imposition of a civil penalty. The Court rejected this attempted distinction on the ground that the plaintiff had remitted the funds voluntarily as a part of a decision by the Customs Service to mitigate the government's total claim against the plaintiff.\(^{36}\)

The terms "charges" and "exactions" were also interpreted in *St. Paul Fire and Marine Insurance Co. v. United States.*\(^{37}\) The plaintiff in that case was the surety for two importers who failed to file a protest even though duties in excess of the estimated duties that had been paid upon entry were assessed against their merchandise upon liquidation. When the importers failed to pay the additional duties, payment was demanded from the plaintiff. The plaintiff failed to respond, and the Customs Service set off the amounts due against amounts it owed the plaintiff. The plaintiff then protested the setoff and, upon denial of its protest, filed suit in the Court of International Trade.\(^{38}\)

The Court rejected the plaintiff's contention that the "set-off"

\(^{33}\) Id. at 642-43.
\(^{34}\) Id. at 643.
\(^{35}\) See id. at 644-45.
\(^{36}\) Id. at 645.
\(^{38}\) Id. at 283-84.
constituted an “exaction” within the meaning of section 514(a)(3) and dismissed the action for lack of jurisdiction. The Court reasoned that section 514(a)(2) authorized the filing of a protest concerning the amount of “duties chargeable,” while section 514(a)(3) authorized the filing of a protest against a “charge” or “exaction.” In the Court’s view, these provisions were separate and distinct. The plaintiff initially had attempted to challenge the amount of the duties assessed, but since that possibility had been foreclosed due to the importers’ failure to file a protest, the plaintiff was now attempting to circumvent the section 514(a)(2) requirement by framing its challenge in terms of a protest to a “charge” or “exaction” under section 514(a)(3). The Court refused to permit such circumvention of the statutory standard.

Less judicial solicitude for congressional intent has been shown in cases in which the importer’s protest was based on exclusion of merchandise from entry. In Alberta Gas Chemicals, Inc. v. United States (Alberta Gas II), the entry papers of a plaintiff who was attempting to import methanol from Canada were rejected by the Customs Service on the grounds that the merchandise was subject to a dumping finding and the plaintiff had failed to file a bond for antidumping duties that might be assessed as a result of the findings. The plaintiff protested the action taken by the Customs Service and, upon denial of the protest, instituted suit in the Customs Court.

The United States conceded that the Customs Court possessed jurisdiction to consider the validity of the bond requirement, but argued that the plaintiff actually sought to contest the validity of the underlying dumping as an order or finding “entering

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59 Id. at 285.
60 Id. at 284-85 & n.2.
61 Id. at 284-85. The Court maintained that plaintiff, in effect, was claiming that it had been denied a property right without due process. Id. If this argument were valid, the Court reasoned, the case was in the wrong forum since the proper court before which to bring its protest on this issue would be the district court or the Court of Claims. Id. The problem presented in St. Paul Fire & Marine may have been obviated by a recent amendment to § 514 which now permits a surety to file a protest within 90 days of the mailing of a notice of demand for payment against its bond. See 19 U.S.C. § 1514(c)(2) (1982).
63 Id. at 305. The Customs Service apparently also refused to permit the plaintiff to take delivery of the merchandise due to its failure to provide a bond, although this is not entirely clear from the opinion. Id. at 305-06; see 19 U.S.C. § 1673 (1982) (duty imposed where strong potential exists for substantial injury or actual material injury to an industry).
64 483 F. Supp. at 305.
into” the decision to require a bond, a claim that the court lacked jurisdiction to entertain. According to the United States, if the importer wished to challenge the underlying dumping finding, it first had to import the merchandise, pay the duties assessed, file a protest challenging the amount of duties paid, and await denial in order to be able to file suit in the Customs Court.45 The Customs Court rejected this position and maintained that it possessed jurisdiction to entertain the challenge to the underlying dumping finding, since the situation presented was one in which the importer could challenge a decision of the Customs Service without prior payment of the duties assessed upon the merchandise.46

A similar question arose in Lowa, Ltd. v. United States.47 The plaintiff in Lowa had filed a vessel repair entry and posted a bond in order to obtain delivery of an airplane that had been repaired abroad.48 Upon discovering that the aircraft was not subject to vessel repair duties, the plaintiff sought to file a substitute entry summary.49 The substitute entry summary submitted, however, claimed duty-free status for the aircraft, due to a change in the law that had occurred after the aircraft’s original entry into the United States.50 The Customs Service refused to accept the substitute entry summary, and the plaintiff filed a protest challenging the rejection. Upon denial of the protest, the plaintiff commenced suit in the Court of International Trade contending that the Court possessed jurisdiction because the protest concerned “the exclusion of [its] merchandise from entry or delivery” within the meaning of section 514(a)(4).

The Court rejected the plaintiff’s contention. According to the Court, the plaintiff had obtained delivery of the merchandise when it filed its original vessel repair entry.51 Since the plaintiff had obtained delivery, the merchandise had entered the United States

45 Id. at 310.
46 Id. at 310-11.
48 561 F. Supp. at 443. When the Customs Service learned that the aircraft was not documented under United States laws, it recommended that the plaintiff substitute a new entry in order to allow cancellation of the repair entry, and thus invalidation of the bond. Id.
49 Id. The plaintiff contended that the aircraft was entitled to duty-free entry since it was “used solely for corporate and personal purposes” and played no role in commerce or trade. Id.
50 Id. at 444.
51 Id. at 445.
commerce and thus had not been excluded from entry within the meaning of section 514(a)(4) when the proffered substitute entry was rejected. *Alberta Gas II* was distinguished solely upon the ground that the plaintiff in that case had not obtained delivery of the merchandise.\(^{52}\)

The *Lowa* decision appears to be more closely in accord with congressional intent than does the decision in *Alberta Gas II*. Entry of merchandise into the customs territory of the United States is clearly prohibited by statute unless the importer files entry papers\(^ {53}\) and deposits an amount equal to the duties which it is estimated will be imposed upon importation.\(^ {54}\) An importer may not file an action in the Court of International Trade unless all liquidated duties have been paid.\(^ {55}\) These statutes demonstrate a clear congressional intent to condition the right to import merchandise and the right to challenge an assessment of duties upon prior payment of the duties assessed. The decision in *Alberta Gas II* permits an importer to circumvent this congressional intent. By tendering entry papers that the Customs Service rejects, the importer can prompt a refusal to permit delivery of the merchandise. According to the *Alberta Gas II* rationale, the importer could then protest the exclusion of the merchandise and file an action upon denial of the protest without paying the duties assessed.

It can be argued that the decision in *Alberta Gas II* possesses too little practical significance to merit undue concern with its result. The actual situation presented in *Alberta Gas II* is unlikely to recur, since section 1581(c), in combination with 19 U.S.C. § 1516a, now establishes another mechanism by which an importer can challenge a dumping finding.\(^{56}\) Moreover, an importer would stand to gain little from using *Alberta Gas II* to evade the payment of duties requirement, since it would incur the costs of storing the excluded merchandise, as well as the risk that the merchandise might be sold at auction by the Customs Service before the conclu-

\(^{52}\) *Id.*


\(^{55}\) *Id.* § 1514(c)(2). Section 1514(c), requires in relevant part, that "[a] protest of a decision, order, or finding . . . shall be filed . . . within ninety days after but not before . . . notice of liquidation or reliquidation. . . ." *Id.*

\(^{56}\) See 28 U.S.C. § 1581(c) (1982); 19 U.S.C. § 1516(c)(2) (1982). Section 1516a grants both the Court of International Trade, and the International Trade Commission the power to enjoin the liquidation of some or all entries after a proper request is made and it is demonstrated that the requested relief should, under the circumstances, be granted. *Id.*
tion of the case, thus rendering it moot.\(^57\)

Although it is plausible to conclude that few importers would be willing to incur these extra costs and the additional risk, a means of reducing this risk was discovered and used by the plaintiff in *Alberta Gas II*. After the Court decided that it possessed jurisdiction, but before the case was resolved on its merits, the plaintiff realized that the Customs Service was about to sell the excluded merchandise at auction.\(^58\) The plaintiff successfully obtained an injunction from the Court under the All Writs Act, prohibiting the sale until the case was resolved.\(^59\) The availability of such injunctions justifies concern about the long-term implications of *Alberta Gas II*.

Moreover, *Alberta Gas II* is inconsistent with the principle of judicial economy. The dumping finding issued by the Secretary of the Treasury in that case did not automatically result in the imposition of dumping duties, because the Customs Service was required to examine each entry of merchandise after the finding was issued to determine the specific amount of dumping duty to be assessed. It is therefore conceivable that the methanol shipment excluded would not have been assessed with dumping had it been imported. If this had occurred, no action would have been filed. By permitting the plaintiff to commence an action on the ground that its merchandise had been excluded before it could know whether dumping duties would be assessed, the Court permitted a suit to proceed when it may not have been necessary to do so.\(^60\)

"[R]e­fu­sal to reli­quid­ate an entry under section 520(c) of the Tariff Act of 1930" is another permissible ground for protest.\(^61\)

\(^{57}\) See 19 U.S.C. § 1609 (1982) (absent filing of claim or posting of bond within 20 days, customs officer shall declare merchandise forfeited and shall sell it at public auction).


\(^{59}\) Id. at 1332; see also 28 U.S.C. § 1651 (1982).


\(^{61}\) 19 U.S.C. § 1514(a)(7) (1982); see *Godchaux-Henderson Sugar Co.* v. United States, 496 F. Supp. 1326 (Cust. Ct. 1980). In *Godchaux-Henderson*, the plaintiff did not make entry of merchandise while it was duty free pursuant to the Generalized System of Preferences because it assumed that the merchandise was not eligible for duty-free treatment. *Id.* at 1328-29. By the time the plaintiff realized its mistake and made entry, the merchandise was no longer eligible for duty-free treatment and the entry was liquidated with duty. *Id.* at 1330-31. The plaintiff subsequently attempted to obtain reliquidation pursuant to § 520(c). *Id.* at 1329. The court held that § 520(c) applied to an error in any "entry, liquidation or other customs transaction," but did not apply to the situation presented in this case—failure to make an entry. *Id.* at 1330-31.
Section 520(c)(1) authorizes the reliquidation of an entry to correct:

a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer . . . in any . . . customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction.62

In St. Regis Paper Co. v. United States,63 the Court dismissed a civil action that alleged failure to reliquidate an entry pursuant to section 520(c) because the importer did not bring the error involved to the attention of the customs officer within the time period specified in that section,64 even though a timely protest had been filed and a timely civil action was commenced upon its denial.65 In Adorence Co. v. United States,66 the Court again dismissed an action involving section 520(c)(1) when the mistake was called to the attention of the Customs Service more than 1 year after entry.67 The plaintiff contended that it acted in reliance upon erroneous information and the liquidation constituted a "transaction" within the meaning of the statute.68 According to the plaintiff, it had complied with the statute's terms, since the statute per-
mitted it to bring the error to the attention of the Customs Service within 1 year of the liquidation even though it failed to bring the error to the attention of the Customs Service within 1 year of entry. 69

The Adorence Court rejected this position, asserting that the relevant error for section 520 purposes occurred when the plaintiff supplied incorrect information on its entry papers. 70 To hold otherwise, reasoned the Court, would render the statutory language redundant; if all errors occurring before liquidation could be challenged under section 520, there would be no need for the statute to refer to specific preliquidation events. 71

The decision in Adorence was distinguished by the Court in Lester Engineering Co. v. United States. 72 In Lester, the Customs Service substantially advanced the entered values upon liquidation, some 15 months after entry. 73 Eight months after the liquidation, the plaintiff requested the Customs Service to reliquidate the entries according to section 520(c)(1). The Customs Service refused on the ground that the case involved an error in the construction of the law that could have been remedied had the plaintiff filed a protest within 90 days of liquidation. Since no protest had been filed, the liquidation was final unless the plaintiff could obtain reliquidation pursuant to section 520(c)(1). Reliquidation appeared to be foreclosed, however, since liquidation had occurred more than 9 months after entry, and the version of the statute then in force required any errors to be brought to the attention of the Customs Service within 90 days after liquidation. 74 By bringing the error to the attention of the Customs Service 8 months after liquidation, the plaintiff in Lester apparently had not complied with the statute. 75

Notwithstanding these facts, the Court held that the plaintiff had timely brought the error to the attention of the Customs Service. 76 Under a Customs Service regulation then in effect, it was permissible for an error that “occurred in the liquidation” to be

69 Id.
70 Id. at 1218.
71 Id.
73 Id. at 16.
74 Id. at 17-18. Lester also involved the pre-amendment version of § 520(c). See supra notes 15 & 18.
75 16 Cust. B. & Dec. No. 29, at 18.
76 Id. at 19.
brought to the attention of the Customs Service within 1 year of the liquidation, even if liquidation occurred more than 9 months after entry.\textsuperscript{77} For this reason, the plaintiff's action in bringing the error to the attention of the Customs Service was timely under the regulation.\textsuperscript{78}

The \textit{Lester} decision appears to be an incorrect resolution of the same issue presented in \textit{Adorence}. The relevant statutes clearly indicate that Congress intended a liquidation made more than 9 months after the date of entry to become "final and conclusive" unless a protest has been filed within 90 days of the liquidation. Section 520(c) provides a very limited exception to this principle. The \textit{Lester} Court, in permitting an importer to challenge a liquidation long after the 90-day period had elapsed, read section 520(c) too broadly to comport with the intent of the statute. The Court relied upon a regulation that attempted to circumvent the clear language of the statute by defining the term "transaction" to include liquidation. In this manner, the regulation purported to allow an importer to bring an error allegedly occurring in a liquidation to the attention of the Customs Service within 1 year of liquidation, despite the fact that liquidation occurred more than 9 months after entry. This regulation was contrary to the clear language of the statute, and thus should not have been relied upon by the Court.\textsuperscript{79}

2. Time Within Which A Protest Must Be Filed

Section 514(c)(2) currently provides that a protest must be filed within 90 days of liquidation; if no protest is filed within that time, the liquidation becomes final and conclusive.\textsuperscript{80}

\textsuperscript{77} \textit{Id.} at 17. 19 C.F.R. § 173.4(c)(2) (1978). The customs regulation provided, in pertinent part, that "except . . . in cases where the error originates in the liquidation, reliquidation, or exaction, the 1-year limitation provided for . . . shall apply." \textit{Id.}

\textsuperscript{78} 16 Cust. B. & Dec. No. 29, at 19. The \textit{Lester} court distinguished \textit{Adorence} by noting that the error in \textit{Adorence} had occurred in the entry, not in the liquidation. \textit{Id.} at 18. In contrast, in the \textit{Lester} case, the Customs Service had advanced the entered values when it liquidated the entry, so the error occurred in the liquidation, not in the entry. \textit{Id.} at 19.

\textsuperscript{79} \textit{Cf.} Adorence Co. v. United States, 539 F. Supp. 1216, 1217 (Ct. Int'l Trade 1982) (rejecting argument that term "transaction" as used in § 520(c) be interpreted to include liquidation). The Court's treatment of the time limits concluded in § 520(c) as jurisdictional limits parallels its treatment of the time limits in § 514. \textit{See} Farrell Lines, Inc. v. United States, 657 F.2d 1214, 1218 (C.C.P.A. 1981) (tolling of 90-day limitations period until final agency action taken permitted to prevent elevation of procedure over substance).

\textsuperscript{80} 19 U.S.C. § 1514(c)(2) (1982).
In *American Export Lines, Inc. v. United States,* the plaintiff filed a vessel repair entry as soon as its ship, which had been repaired abroad, returned to the United States. Shortly thereafter, the plaintiff filed a petition for remission of the duties that ordinarily would be assessed upon the cost of the repairs. However, plaintiff failed to supply certain required information with its petition.

About 2 weeks after liquidation, the plaintiff sent a letter to the Customs Service requesting cancellation of the duties. After an exchange of letters, the Customs Service denied the plaintiff's request for cancellation on January 14, 1977. The plaintiff wrote to the Customs Service again on April 7, 1977, supplying supplemental information and requesting the reasons for the denial of its earlier request for cancellation. This request was denied on July 28, 1977. The plaintiff filed a formal protest within 90 days of the denial, and after denial of the protest, filed a civil action.

The action was dismissed for lack of jurisdiction because it was not timely filed. According to the Court, the November 5, 1975 letter requesting cancellation of the duties constituted a timely protest of the October 24, 1975 liquidation. This protest, stated the Court, had been denied by the Customs Service on January 14, 1977. Since the civil action was filed more than 180 days from the date of denial of the protest, dismissal was mandatory. The Customs Service's July 28, 1977 response to the plaintiff's letter of April 7, 1977 was construed as merely reaffirming the Customs Service's January denial of the request for cancellation and thus as not causing the 180-day statutory period to recommence.

The Court of Customs and Patent Appeals reversed. According to the appellate court, the Customs Court acquired jurisdiction

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82 496 F. Supp. at 1322.
83 *Id.* Pursuant to the current version of § 466(a) of the Tariff Act of 1930, duties are assessed upon the cost of repairs made upon American vessels, 19 U.S.C. § 1466(a) (1982). The statute permits the Secretary of the Treasury to remit the duties, however, upon receipt of good and sufficient evidence that the repairs were required, due to the stress of weather or to other casualties, in order to insure the safety and seaworthiness of the vessel. *Id.* § 1466(d). Evidence of the necessity of the repairs it had made was the information not submitted by the plaintiff ship owner in *American Export Lines.* 496 F. Supp. at 1322.
84 *Id.* Supp. at 1323.
85 *Id.*
86 *Id.*
to entertain the civil action pursuant to its own jurisdictional statute, not by virtue of section 514. Thus, the 90-day period contained in section 514 was not jurisdictional; rather, it was nothing more than a statute of limitations that could be tolled.

The appellate court then examined the facts presented and determined that the 90-day period was tolled from November 5, 1975, when the plaintiff first requested cancellation of duties, until July 28, 1977, when the Customs Service finally denied the plaintiff's request for cancellation. Since less than 90 days, excluding the days during which the 90-day period was tolled, had elapsed between when the entry was liquidated and when the plaintiff's formal protest was filed, the court concluded that the protest had been timely filed.

The suggestion by the Court of Customs and Patent Appeals that the 90-day period specified in section 514 is merely a statute of limitations is subject to great doubt. The jurisdictional statute then in force gave the Customs Court exclusive jurisdiction "of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended," had been denied. Since the phrase "pursuant to the Tariff Act of 1930, as amended" incorporates by reference the section 514 requirement that a protest be filed within 90 days of liquidation, failure to file a timely protest should have resulted in a dismissal for lack of jurisdiction.

Even if the 90-day period is viewed as a statute of limitations, however, that type of statute generally has been construed as jurisdictional when applied to suits against the United States, because such statutes are normally viewed as part of the government's con-

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68 Id. at 1217 n.7; cf. 28 U.S.C. § 1582 (1982) (Court of International Trade has exclusive jurisdiction of actions commenced by the United States to recover duties or on a bond "relating to the importation of merchandise").

69 657 F.2d at 1217-18. Compare id. (petition entertainable despite lack of formal protest because party informally brought matter to attention of Customs Service after liquidation) with United States v. Reliable Chem. Co., 605 F.2d 1178, 1184 (C.C.P.A. 1979) (protest may not be filed before notice of liquidation) and Hambro Automotive Corp. v. United States, 603 F.2d 850, 853 (C.C.P.A. 1979) (failure to file timely protest under § 1514 preempted access to Customs Court).

70 657 F.2d at 1218.


sent to be sued. Any suit instituted without complying with such a statute is barred by the doctrine of sovereign immunity and must be dismissed for lack of jurisdiction.

3. Payment of Duties

Section 2637(a) of Title 28 of the United States Code provides that an action may be commenced in the Court of International Trade pursuant to section 1581(a) only if “all liquidated duties . . . have been paid at the time the action is commenced . . .”

In *Heraeus-Amersil, Inc. v. United States*, the Customs Service, upon liquidation, assessed an amount of duties greater than the estimated duties deposited upon entry. The importer filed a protest with the Customs Service concerning the additional duties, and refused to pay the entire sum demanded. Before rendering a decision on the protest, the Customs Service proposed to revoke the importer’s immediate delivery privileges because of its refusal to remit the sum due. The importer brought an action intended, in part, to enjoin the revocation of its immediate delivery privileges. The Court held that when a protest is filed, additional duties assessed are not due until the protest is denied and a civil action is filed in the Court of International Trade under section 1581(a) or until the time for filing such an action has expired. Since the importer’s protest had not been denied, the time for filing a civil action had not expired and the additional duties thus were not due and payable. Since the additional duties were not due and payable,

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*E.g.*, Soriano v. United States, 352 U.S. 270, 274-75 (1957). In *Schering Corp. v. United States*, 626 F.2d 162 (C.C.P.A. 1980), the plaintiff filed a protest more than 90 days after liquidation, contending that since the entry papers were not made available to it at the time of liquidation, the liquidation was void, *id.* at 164-65. The court indicated that failure to make the entry papers available would not render the liquidation void, but could toll the time within which a protest must be filed. 626 F.2d at 166 n.8; *see also* American Air Parcel Forwarding Co. v. United States, 573 F. Supp. 117, 120 (Ct. Int’l Trade 1983) (no subject matter jurisdiction where importer failed to pay § 2637(a) additional duties before filing protest); United States v. Uniroyal, Inc., 687 F.2d 467, 471 & n.12 (C.C.P.A. 1982) (legislative history of § 1581 indicates Congressional intent to prevent subsection (i) from being used to replace administrative review).

*28 U.S.C. § 2637(a) (1982).*


515 F. Supp. at 772.

*Id.* at 774-75.
the Court held that the Customs Service could not revoke the importer's immediate delivery privileges due to failure to pay the additional duties.\textsuperscript{99}

In \textit{Eddietron, Inc. v. United States},\textsuperscript{100} the Court interpreted the predecessor of section 2637(a), which provided that no action could be commenced in the Customs Court pursuant to the predecessor of section 1581(a) unless all liquidated duties have been paid. The plaintiff in \textit{Eddietron} had tendered a single promissory note for duties assessed on six entries.\textsuperscript{101} The plaintiff had paid approximately $7,000 on this note, an amount less than the face amount but sufficient to pay the duties on one of the six entries.\textsuperscript{102} Upon examination of the statutes relating to the payment of duties, the Court held that tender of a promissory note to the Customs Service constituted only a provisional payment of the duties assessed and, thus, did not satisfy the requirement that all duties must "have been" paid before a civil action could be commenced.\textsuperscript{103} The Court applied the $7,000 payment to one of the entries, however, and held that this entry was properly before it, since by protecting the government's position and putting the importer "at a financial disadvantage" the payment satisfied the purpose of the payment of duties requirement.\textsuperscript{104}

In \textit{Dynasty Footwear v. United States},\textsuperscript{105} the plaintiff protested the liquidation of seventeen entries and filed requests for reliquidation.\textsuperscript{106} Fifteen of the seventeen protests were resolved in the plaintiff's favor. One of the remaining two protests was denied on September 12, 1980.\textsuperscript{107} On March 11, 1981, the last day possible under the statute, the plaintiff filed suit in the Court of Interna-

\textsuperscript{99} Id. at 775.
\textsuperscript{100} 493 F. Supp. 585 (Cust. Ct. 1980).
\textsuperscript{101} Id. at 588.
\textsuperscript{102} Id. at 589.
\textsuperscript{103} Id. at 590.
\textsuperscript{104} Id. at 589-90.
\textsuperscript{105} 551 F. Supp. 1138 (Ct. Int'l Trade 1982).
\textsuperscript{106} Id., at 1139. The plaintiff in \textit{Dynasty Footwear} was contesting the appraised value of shoes imported from Taiwan. Id. During the review period, the plaintiff had reached an agreement with customs officials to suspend temporarily the collection of duties assessed on the plaintiff's liquidated entries. Id. The suspension was based in part on the "drastic effect" that collection was having on the plaintiff's financial stability, and was conditioned on the plaintiff taking whatever action was necessary to expedite reliquidation. Id.
\textsuperscript{107} Id. The plaintiff owed $19,983.60 in additional duties on the protested entry, number 233148. Id.
The government’s motion to dismiss, based on the ground that the plaintiff had not paid the duties assessed before commencing the action, was denied by the Court. The Court observed that one of the protests that the plaintiff had filed was granted on October 31, 1980. Since the protest was granted, the plaintiff was due a refund that would be more than sufficient to pay the duties assessed upon the entry before the Court under the denied protest. The entry that had been the subject of the granted protest was not liquidated until May 27, 1981, and the Customs Service did not offset the amount due from the plaintiff as a result of the denied protest against the refund owed until June, 1981—after the civil action had been commenced.

The Court found that under the circumstances present in this case, there was no reason why the offset could not have been made in October 1980, before the plaintiff had begun the action. It concluded, therefore, that since, at the time the action was filed, the United States had in its possession funds belonging to the plaintiffs that were more than sufficient to pay the duties resulting from the denied protest, the duties should be considered as having been paid prior to the institution of the suit. This result was not inconsistent with the purpose of section 2637(a), which was designed to prevent the importer from retaining the use of funds representing the assessed duties during the pendency of the court proceedings.

4. Premature Protests

The original version of section 514 provided that a liquidation “shall, upon the expiration of sixty days after the date of such liq-

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110 551 F. Supp. at 1139. The refund due the plaintiff on the successfully protested entry was $24,588, which exceeded the amount it owed to the Customs Service on entry number 233148. Id.
111 551 F. Supp. at 1139.
112 Id. at 1141. Since the court found that the Customs Service could have, and should have, completed the setoff before March 11, 1981, it exercised its equity power and deemed the setoff to have occurred prior to that date. Id.
uidation . . . be final and conclusive . . . unless the importer . . . shall, within sixty days after, but not before such liquidation . . . file a protest . . . .”\textsuperscript{114}

In \textit{United States v. C.O. Mason, Inc.},\textsuperscript{115} entries had been liquidated between 1957 and 1959 pursuant to section 319 of the Tariff Act and a statute enacted by the legislature of the Commonwealth of Puerto Rico.\textsuperscript{116} In a decision that became final in 1960, the Customs Court held the statute unconstitutional. Shortly thereafter, the importer filed protests against the 1957 and 1959 liquidation and, upon denial of the protests, filed an action in the Customs Court.\textsuperscript{117} The United States moved to dismiss on the ground that the protests had not been filed within 60 days of the liquidation.\textsuperscript{118} The Customs Court granted this motion, not because the protests had been filed late, but because they had been filed prematurely.\textsuperscript{119}

The Court of Customs and Patent Appeals affirmed, following the lower court’s reasoning that the civil action was “premature,” since in the absence of valid liquidation there could be no valid protests.\textsuperscript{120} The court accordingly dismissed the action and ordered that the entries be properly liquidated this time, presumably without regard to the unconstitutional statute.\textsuperscript{121}

In \textit{A.N. Deringer, Inc. v. United States (A.N. Deringer I)},\textsuperscript{122}

\begin{footnotes}
\footnotetext{115}{51 C.C.P.A. 107 (1964), cert. denied, 379 U.S. 999 (1965). The cases in this section predate the formation of the Court of International Trade, but familiarity with them is essential to understanding some of the court’s recent decisions.}
\footnotetext{116}{Id. at 110.}
\footnotetext{117}{Id. at 109.}
\footnotetext{118}{Id. At the time of the \textit{Mason} case, § 514 of the Tariff Act provided for a 60-day filing period. Id.}
\footnotetext{119}{51 C.C.P.A. at 110.}
\footnotetext{120}{Id. at 112, 114. The \textit{Mason} court noted that the protested liquidations had been made under an inoperative law, since the statute’s invalidity dated from the time of its enactment. Id. Thus, the statute could provide no basis for the liquidations or for subsequent protests. Id. Since the contested liquidations were “void,” the court concluded that the filing actually occurred before a liquidation, in contravention of the requirements of § 514. Id. at 113. The court later applied the same reasoning in \textit{United States v. Cajo Trading, Inc.}, 403 F.2d 268, 269 (C.C.P.A.), cert. denied, 393 U.S. 827 (1968). The \textit{Cajo-Mason} doctrine was, at one time, a means for circumventing the 60-day period specified in § 514. \textit{But see infra} note 134 (\textit{Cajo-Mason} doctrine overruled by amendment to § 514).}
\footnotetext{121}{551 C.C.P.A. at 114. The court called for a liquidation “in the manner provided by law.” Id. Liquidation pursuant to an unconstitutional provision was not a liquidation as provided by law. Id. at 113.}
\footnotetext{122}{447 F. Supp. 453 (Cust. Ct. 1978), \textit{vacated and remanded}, 593 F.2d 1015 (C.C.P.A.}}
the plaintiff's merchandise was refused entry because it was not labeled in accordance with regulations of the Food and Drug Administration.\textsuperscript{123} The merchandise was liquidated despite the denial of entry, and the plaintiff filed a timely protest against the liquidation.\textsuperscript{124} In the subsequent civil action, the Court held that the liquidation had occurred in violation of a Customs Service regulation requiring suspension of liquidation until a determination whether the merchandise may be admitted is made.\textsuperscript{125} Since this liquidation had occurred after the Customs Service had decided that the merchandise should be excluded, the Court accordingly found the liquidation to be void. The Court therefore dismissed the action because the protest was "premature."\textsuperscript{126}

The Court of Customs and Patent Appeals vacated the dismissal.\textsuperscript{127} Although the Customs Court had construed the Customs Service regulation as prohibiting liquidation altogether if the merchandise was refused admission, the Court of Customs and Patent Appeals construed the regulation as merely prohibiting liquidation until it was determined whether the merchandise was to be admitted.\textsuperscript{128} Since the merchandise in \textit{A.N. Deringer I} was liquidated after it had been determined that admission would be refused, the entry had been liquidated in accordance with the regulation. The case was therefore remanded to the Customs Court to determine whether the plaintiff was entitled to a refund.\textsuperscript{129}

The facts in \textit{A.N. Deringer, Inc. v. United States (A.N. Deringer I) 1979}. 1246 F. Supp. at 455; see infra note 155.

\textsuperscript{123} Id. at 453-54.

\textsuperscript{124} Id. at 454. Liquidation of the disputed entries took place after the merchandise was exported from the United States under customs supervision, 17 days prior to the liquidation date. Id.

\textsuperscript{125} Id. at 455. The court reasoned that liquidation of merchandise denied entry was "a useless act" since the duties deposited would be refunded once the goods were exported or destroyed in accordance with the governing statute. Id.; see 19 U.S.C. § 1558(a)(2) (1982) (providing for refund upon supervised exportation or destruction of merchandise).

\textsuperscript{126} United States v. A.N. Deringer, Inc., 593 F.2d 1015, 1017 (C.C.P.A. 1979).

\textsuperscript{127} Id. at 1019. The regulation provided that "liquidation . . . shall be suspended until it is determined whether admission . . . is permitted." Id. at 1018 n.3. The court thus held that a liquidation performed after a determination was valid under the regulation, since "[w]hether that determination results in the goods being admitted or not is simply irrelevant to the question of a liquidation's conformance with § 12.6." Id. The court limited its holding, however, to a finding that the entry had been liquidated in conformance with the regulation, and explicitly stated that it did not hold "that the liquidation is, in all respects, correct." Id. at 1019 n.7.

\textsuperscript{128} Id. at 1019.

\textsuperscript{129} Id. at 1019.
were similar to those in *A.N. Deringer I*, except that in *A.N. Deringer II* the merchandise had been liquidated before notice of refusal was given and a protest was not filed until after the expiration of the period specified in section 514. Despite these differences, the Court reached the same result as in *A.N. Deringer I*; it dismissed the action holding that since the liquidation was void, the protest was a nullity.

This dismissal was affirmed by the Court of Customs and Patent Appeals, which held that the liquidation had not conformed with the regulation because it had occurred prior to determination of whether the merchandise was to be admitted. However, the court rejected the Customs Court’s holding that a non-conforming liquidation was necessarily void. Instead, the court determined that, under the statute, the invalidity of a liquidation could only be challenged by a protest filed within the time specified in section 514. Since the protest in this case had not been filed within the specified time period, the court held that the Customs Court had never possessed jurisdiction to entertain the challenge.

### B. Section 1581(b)

Section 1581(b) grants exclusive jurisdiction to the Court of International Trade to entertain any civil action commenced under section 516 of the Tariff Act of 1930. Pursuant to section 516, which establishes the so-called “American manufacturer’s protest,” an American manufacturer may request the Secretary to furnish the classification and rate of duty imposed upon merchandise pro-

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131 Id. at 452.

132 Id. at 453.


134 Id. at 1020-21. The court further held that the *Cajo-Mason* doctrine had been overruled, in effect, by an amendment to § 514. Id. at 1020; see supra note 120. When the doctrine was first developed, the statute required the Customs Service to liquidate an entry “as provided by law.” 593 F.2d at 1020. The *Mason* court, in reliance on such language, held that a liquidation that did not occur “as provided by law” was void. Id.; see supra note 120. Section 514 as amended, however, simply directs the Customs Service to “liquidate” the entry. 593 F.2d at 1020. Given the omission of the phrase “as provided by law” from the amended version and the fact that the present version mandates the filing of a protest to challenge a liquidation, “including the legality of all orders and findings entering into the same,” 19 U.S.C. § 1514(a) (1982), the court held that a challenge to a liquidation, even one allegedly resulting from a violation of a regulation, must be made by means of a timely protest. 593 F.2d at 1020-21.

duced by the party requesting the information. In *Stewart-Warner Corp. v. United States*, the plaintiff, an American manufacturer, had not requested the Secretary to provide information concerning the classification or rate of duty prior to filing its petition with the Secretary advocating a change in the classification as rate of duty. The Court held that this failure did not amount to a jurisdictional defect. The Court noted that a civil action may be commenced without a preliminary request for information if the petitioner already possesses the information and, in this case, it was not disputed that the plaintiff possessed the information. The Court noted that "to require more of a plaintiff would be a mindless formalism."

C. Section 1581(c)

Section 1581(c) vests in the Court of International Trade exclusive jurisdiction to entertain any civil action commenced under section 516A of the Tariff Act. Section 516A was enacted by the Trade Agreements Act of 1979 (Trade Agreements Act), which completely revised the antidumping and countervailing duty laws. Since section 516A contains the judicial review provisions applicable to these revised statutes, its provisions are inextricably intertwined with the provisions of those statutes.

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136 19 U.S.C. § 1516(a) (1982). If the requesting party believes that the appraised value, classification, or rate of duty is incorrect, it may file a petition with the Secretary requesting an appropriate change. If the Secretary denies the petition, the requesting party may file a notice of a desire to contest the Secretary's decision. If a notice is filed, then the Secretary is to supply the petitioner with the information that is required to enable the petitioner to contest the appraised value, classification or rate of duty imposed on one entry of the merchandise. *Id.*


Id. at 25 n.1.


1. Transitional Rules

The substantial revisions of the antidumping and countervailing duty laws contained in the Trade Agreements Act gave rise to the question of the effect of the new provisions upon administrative determinations regarding antidumping and countervailing duties made pursuant to the old laws. Congress attempted to answer this question by building certain transitional rules into the statute. These transitional rules were designed so as to continue in effect antidumping and countervailing findings made under the previous laws and to subject those findings to the new administrative procedures. For example, section 751 of the Tariff Act as amended by the new law requires the International Trade Administration of the Department of Commerce (ITA) to conduct an annual review of each outstanding antidumping order to determine the amount of duty to be assessed on imports subject to the order during the preceding year as well as the estimated duties to be deposited until the next annual review. The transitional rules also make clear that countervailing duty orders in effect upon the effective date of the new amendments are to remain in effect, and shall similarly be subject to an annual review pursuant to section 751. Section 751(b) provides that under certain circumstances, the International Trade Commission (ITC) may conduct a review in order to determine whether an industry in the United States would be threatened with material injury if an antidumping order were to be modified or revoked. Four cases have been decided by the Court of International Trade interpreting these transitional rules in a jurisdictional context.

In *Matsushita Electric Industrial Co. v. United States*, a representative of the domestic industry intervened in an action brought by various importers and manufacturers to challenge the outcome of a 751(b) review in which the ITC had determined that

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143 19 U.S.C. § 1675(a)(1) (1982). The ITA is also charged with the responsibility of determining whether a subsidy has been provided within the meaning of the countervailing duty laws or whether sales have been made at less than fair market value according to the antidumping laws. *Id.* § 1675(a)(2).

144 See *id.* § 1671.

145 *Id.* § 1675(b)(1). The ITC is charged with the responsibility of determining whether subsidized imports or imports sold in this country at less than fair value, are causing injury to an American industry. *Id.* § 1671d(b)(1).

a 1971 antidumping finding should not be revoked.\textsuperscript{147} The intervenor moved to dismiss the action for lack of jurisdiction on the ground that section 751(b) did not authorize the ITC to review dumping findings made under the prior law.\textsuperscript{148} The intervenor's argument was based on a prior antidumping law that termed the final result of the administrative process a "finding," whereas the new law terms the final result of the administrative process an "order."\textsuperscript{149}

Section 751(a), which established the annual review process, specifically provides that an annual review shall be conducted of both "orders" and "findings."\textsuperscript{150} Both section 751(b), which provided for a review in order to determine whether an antidumping decision should be revoked, and section 751(c), which authorized revocation, however, do not refer to "findings."\textsuperscript{151} The intervenor contended that this language showed that Congress intended antidumping findings to be subject to annual review under section 751(a), but did not contemplate the revocation of a finding under sections 751(b) and 751(c).\textsuperscript{152}

After examining the statutory language, the Court rejected the intervenor's contention. The Court observed that Congress specifically provided in section 106 of the Trade Agreements Act that "findings" shall remain in effect and be subject to review under "section 751" —a reference that was not limited to section 751(a), but included sections 751(b) and 751(c) as well.\textsuperscript{153}

Section 102(b)(2) of the Trade Agreements Act provided that preliminary determinations made by the Secretary of the Treasury under the old law but not made final by the effective date of the superseding Act were to be treated as if they were preliminary determinations made under the Trade Agreements Act.\textsuperscript{154} The time

\textsuperscript{147} Id. at 671.

\textsuperscript{148} Id. The original dumping finding was made under the Antidumping Act of 1921, ch. 14, tit. 2, §§ 201-212, 42 Stat. 11, (codified as amended at 19 U.S.C. §§ 160-171 (1982)), which was repealed in 1979 and superseded by the Trade Agreements Act, see infra note 153. In effect, the intervenor was arguing that determinations under the old law were not subject to review, modification, or revocation, except for an annual review to determine the amount of the duty as authorized under 19 U.S.C. § 1675(a). 529 F. Supp. at 671.

\textsuperscript{149} 529 F. Supp. at 671.

\textsuperscript{150} See id.

\textsuperscript{151} See id. at 672.

\textsuperscript{152} Id. at 671; see infra note 181.


limits and procedures of the new law were thus to apply to deter-
minations made from that point forward. In *Southwest Florida Winter Vegetable Growers Association v. United States,* the Secretary of the Treasury instituted an antidumping investigation under the old law. Shortly before the effective date of the Trade Agreements Act, the Secretary issued a tentative determination that there were no sales at less than fair value. The plaintiffs, at whose request the investigation was commenced, filed an action after the effective date of the Trade Agreements Act to challenge the Secretary’s tentative decision. They contended that under the Trade Agreements Act, the Secretary’s tentative decision must be treated as if it were a negative preliminary decision, specifically subject to judicial review under section 516A of the Tariff Act.

The Court disagreed and held that, pursuant to section 102(b)(2), the tentative determination was to be treated, for administrative purposes, as if it were a negative preliminary determination made under the new law. However, the Court noted that the transitional rules governing the availability of judicial review of such determinations specifically provided that administrative decisions were subject to judicial review “in the same manner and to the same extent as if made on the day before the effective date” of the Trade Agreements Act. Since tentative determinations by the Secretary of the Treasury were not subject to judicial review under the old law, the Court dismissed the action for lack of jurisdiction.

A similar result was reached in *Goldsmith & Eggleton, Inc. v. United States.* The old law stipulated that an importer who wished to challenge an antidumping finding had to import the merchandise, pay any antidumping duties assessed, file a protest, and on denial of the protest, file an action in the Customs Court.

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155 Id.
157 Id. at 911.
158 Id. at 911-12.
159 Id. at 913.
160 Id. at 913. The court interpreted the statutory language as clearly stating that, for the purpose of judicial review, the law to be applied was the law in effect on the day before the Trade Agreements Act became effective. Id. Such judicial review was to proceed “without regard to the amendments made by title X of the [Trade Agreements Act].” Id.
161 Id. at 915.
163 See supra notes 53-58 and accompanying text.
Obviously, this process required liquidation of at least one entry. Often, it would take some time after the issuance of a dumping finding to determine the exact amount of the dumping duty to be assessed on an entry of merchandise. Thus, under the old law, an importer frequently was not provided with an opportunity to challenge a dumping finding until some time after its issuance when an entry, subject to the finding, was finally liquidated.

In contrast, merchandise subject to an antidumping order under the new law is not liquidated during the period between the issuance of the order (or the last annual review) and the completion of the first annual review under section 751; instead, the amount of antidumping duty to be assessed on all entries made during the pre-review period is determined in the section 751 review.\(^{164}\)

Ordinarily, these differences between the new and old laws would have little significance. Under the old law, however, an importer who challenged certain administrative decisions under the antidumping and countervailing duty laws was entitled to a trial de novo in the Customs Court,\(^{165}\) whereas under the new law, an importer is entitled only to review based on the administrative record.\(^{166}\) Congress preserved this right to a trial de novo in section 1002(b)(3) of the new law only in regard to those importers not accorded a right to challenge a dumping finding due to the failure to liquidate an entry prior to the effective date of the new law.\(^{167}\)

In Goldsmith & Eggleton, Inc., an antidumping finding was issued in 1973, but no entries were liquidated as of the date the action was filed.\(^{168}\) The ITA conducted an annual review under section 751 of the new law; the plaintiff, however, did not partici-


\(^{166}\) See 19 U.S.C. § 1516(c) (1982).

\(^{167}\) Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1002(b)(3), 93 Stat. 144, 306-07 (codified at 19 U.S.C. § 1516 (1982)). In Diversified Prods. Corp. v. United States, 572 F. Supp. 883 (Ct. Int'l Trade 1983), the Court of International Trade determined that § 1002(b)(3) applied only to judicial review, not to administrative review. Id. at 886. Therefore, the ITA is authorized to review fully a dumping finding made before passage of the Trade Agreements Act in order to determine the finding's scope. Id.

Subsequently, the plaintiff instituted suit, under the new law, to challenge the final results of the review, alleging a violation of its constitutional right of due process. The United States contended that the plaintiff was precluded from challenging the determination because it had not participated in the administrative process; the plaintiff argued, to the contrary, that its failure to participate was excused because it received no notice of the annual review.

The Court dismissed the action for reasons other than those initially advanced by the United States. Since no entries had been liquidated under the finding issued in 1973, the Court reasoned that the transitional rules governing judicial review rendered the finding subject to judicial review under the old law. Thus, the plaintiff could not challenge the finding until duties were assessed on the entries involved.

2. Judicial Review Under The New Law

Section 516A divides ITA and ITC determinations that may be made under the antidumping and countervailing duty statutes into preliminary and final determinations. Preliminary and final determinations are subject to different standards of judicial review, different time limits, and different methods for filing an action.

The new law requires the ITA and ITC to make preliminary determination within specified periods of time after the commencement of a countervailing duty investigation. The ITC makes a preliminary determination as to whether a domestic industry is being injured by the importation of the merchandise.

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169 Id. The plaintiff in Goldsmith was allegedly the sole purchaser of the subject merchandise, which a 1973 dumping determination had found to be injuring a domestic industry. Id. During an administrative review of the determination, initiated in 1980, the ITA submitted a questionnaire to the exporter of the merchandise without attempting to contact the plaintiff. Id. The ITA thereafter issued a determination whose final results were identical to those made in the preliminary findings. Id. at 1379.

170 Id. at 1377-78.

171 Id. at 1379; see Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001(a), 93 Stat. 144, 300-03 (codified at 19 U.S.C. § 1516a (1982)) (action before the court may only be brought by “an interested party to the proceeding in connection with which the matter arises”).

172 563 F. Supp. at 1379.

173 Id. at 1380. Since the right to judicial review accrues only after an assessment is made, the plaintiff’s protest was premature. Id.


under investigation. If this determination is negative, the investigation is terminated.\textsuperscript{178} If the ITC’s preliminary determination is affirmative, however, the ITA proceeds to issue a preliminary determination as to whether there is a reasonable basis to believe or suspect that the merchandise is being subsidized.\textsuperscript{177} If the ITA’s preliminary determination is affirmative, liquidation of entries for the merchandise is suspended from the date the determination is published in the Federal Register, and importers are required to post security in the amount of the estimated countervailing duty.\textsuperscript{178} If the ITA’s preliminary determination is negative, the investigation continues until the ITA makes a final determination.\textsuperscript{179} If that final determination is affirmative, the ITC will issue a final determination.\textsuperscript{180} Thus, a negative ITC preliminary determination results in a termination of the investigation, whereas, the principal difference between an affirmative and a negative ITA preliminary determination is that liquidation is suspended only upon publication of an affirmative preliminary determination.

The judicial review provisions of the Trade Agreements Act of 1979 recognize these distinctions by specifically providing for judicial review of negative ITC and ITA preliminary determinations.\textsuperscript{181} Since they do not mention affirmative ITA or ITC preliminary determinations, a number of cases have had to address the question of the reviewability of such determinations. \textit{Republic Steel Corp. v. United States}\textsuperscript{182} involved an ITA investigation conducted to de-

\begin{footnotesize}
\begin{enumerate}
\item Id. § 1671b(b).
\item Id. § 1671b(d) (1982).
\item Id. § 1671d(a)(1).
\item Id. § 1671(b)(1).
\item Id. § 1516a(a)(1)(A)(iii), (B)(ii) (1982). Negative preliminary ITA determinations presumably are reviewable because they do not result in suspension of liquidation or the imposition of a security deposit for the payment of estimated countervailing duties. \textit{See} 19 U.S.C. § 1671b(d) (1982) (liquidation suspension and duty payment requirements only applicable to affirmative preliminary determinations). This is the case despite the fact that the existence of a preliminary affirmative ITC determination necessarily demonstrates the existence of evidence that the imported merchandise is causing injury to the domestic industry. \textit{See} id. § 1671b(b).
\item The lack of reviewability of affirmative preliminary determinations is paralleled by the reviewability requirements concerning decisions to institute an investigation. A decision not to institute an investigation under the antidumping or countervailing duty laws is subject to judicial review pursuant to § 516A(a)(1)(A). 19 U.S.C. § 1516a(1)(A) (1982). The Court of International Trade indicated in \textit{National Latex Prods. Co. v. United States}, 16 Cust. B. & Dec. No. 42, at 12 (Ct. Int’l Trade Sept. 13, 1982), however, that a decision to institute such an investigation is not subject to immediate judicial review. \textit{Id.} at 15.
\end{enumerate}
\end{footnotesize}
termine whether a number of programs made available by the Federal Republic of Germany to producers of certain types of steel constituted subsidies within the meaning of the countervailing duty statute. The ITA’s preliminary determination was that some of the programs appeared to constitute subsidies whereas others did not. The plaintiffs, members of the domestic steel industry, instituted suit in the Court of International Trade to challenge the preliminary determination for failure to find that all of the programs constituted subsidies. The United States moved to dismiss for lack of jurisdiction on the ground that the determination was “monolithic” and had to be classified as “affirmative” in its entirety to be reviewable. Consequently, the United States argued that the plaintiffs had to await the final determination in order to bring this challenge.

The Court denied the motion to dismiss. After observing that the United States’ argument conceded that the ITA’s failure to find that a particular program constituted a subsidy could be challenged by challenging the ITA’s final determination, the Court indicated it could perceive no basis for treating final and preliminary determinations differently in this respect. Moreover, the Court observed that distinguishing between the negative and affirmative portions of a single preliminary determination would be in accord with the congressional intent to prevent damage to the domestic industry during the period between the preliminary and the final determinations. Accordingly, the Court held that an investigation that concerned the existence of more than one subsidy or involved more than one producer should be treated as “resulting in a series of discrete and severable determinations.” Therefore, the ITA’s preliminary decision that a particular program did not constitute a subsidy was a negative preliminary determination subject to judicial review, even though the determination as a whole

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183 Id. at 39.
184 See id. at 40. Affirmative preliminary determinations are not subject to immediate judicial review. Id.; see supra note 31. Yet, a final affirmative ITA determination is subject to judicial review if the final ITC determination is also affirmative and an order based upon the two determinations is issued. 19 U.S.C. § 1516a(a)(2)(B)(i) (1982); see id. § 1671d(c)(2).
186 Id. Judicial review of interim administrative decisions was provided to avoid delay, “which could make an ultimate resolution of an issue in a party’s favor irrelevant because of the irreversible damage suffered during the interim period.” Id. (quoting S. Rep. No. 249, 96th Cong., 1st Sess. 245 (1979)).
was not.\footnote{188} The Court's decision appears to be erroneous. Judicial review of interim administrative decisions is extremely unusual, since it disrupts the administrative process. In recognition of this fact, Congress has stipulated that only three kinds of preliminary determinations should be subject to judicial review: a decision not to institute an investigation;\footnote{186} a negative preliminary determination by the ITC;\footnote{189} and a negative preliminary determination by the ITA.\footnote{190} All of these types of negative preliminary determinations can result in harm to domestic industry. Congress apparently was of the view that this harm justified judicial review despite the disruption to the administrative process that would result.\footnote{192} The only effects of an affirmative ITA preliminary determination, however, are that liquidation is suspended and importers are required to post security for estimated duties until the investigation is completed. Although these consequences also harm the importers, Congress apparently did not believe that this kind of harm justified the disruption of the administrative process that would occur if judicial review of these interim decisions were to be available. Moreover, the plaintiffs in Republic Steel were members of the domestic industry, not importers. The only harm that the domestic industry apparently experienced as a result of the ITA decision, that some programs did not constitute subsidies, resulted from the fact that the security that importers were required to post in order to secure the payment of estimated duties may have been smaller than it might have been had the ITA found that the programs constituted subsidies.\footnote{193} Apparently Congress did not believe that this

\footnote{186} Id. In United States Steel Corp. v. United States, 17 Cust. B. & Dec. No. 30, at 21 (Ct. Int'l Trade June 28, 1983) (mem.) and United States Steel Corp. v. United States, 17 Cust. B. & Dec. No. 28, at 42 (Ct. Int'l Trade June 16, 1983), the Court extended the theory of divisible preliminary determinations developed in Republic Steel to final countervailing duty determinations. 17 Cust. B. & Dec. No. 30, at 22-23; 17 Cust. B. & Dec. No. 28, at 43. These decisions relied solely Republic Steel and contained no further explanation. 17 Cust. B. & Dec. No. 30, at 22-23; 17 Cust. B. & Dec. No. 28, at 43. The decisions in these two United States Steel cases and Republic Steel were followed in Bethlehem Steel Corp. v. United States, 571 F. Supp. 1265 (Ct. Int'l Trade), rev'd, 742 F.2d 1405 (Fed. Cir. 1984), though the Court stated that the United States Steel holdings were not determinative. Id. at 169 n.1.


\footnote{190} Id. § 1516(a)(1)(A) (1982).

\footnote{191} Id. § 1516(a)(1)(B)(ii).

\footnote{192} See supra note 186.

\footnote{193} See 19 U.S.C. § 1671b(d)(2) (1982). Although the ITA must include an estimate of the net subsidy in its determination under § 1671b(b), there is no guarantee that the esti-
type of harm justified the disruption to the administrative process that would result from permitting judicial review.

The decision in Republic Steel also appears to be contrary to the principle of conservation of judicial resources, since it permits an action to be filed before it is certain that the plaintiff will have cause to seek relief. On the facts presented in that case, it was possible that the ITA, in reaching its final determination, would decide that the programs involved constituted subsidies after all. If this occurred, the plaintiffs would have no reason to file a claim. Moreover, requiring the plaintiffs to await the final determination would not necessarily mean that judicial review would be foreclosed. According to the terms of section 516A the plaintiffs could file suit to challenge the ITA's failure to find that certain programs were subsidies if the ITA's final determination was negative or if both the ITA and the ITC final determinations were affirmative and an order was issued.

Section 516A specifies those final ITA and ITC decisions that are subject to judicial review.\textsuperscript{194} Section 516A(a)(2)(B)(ii) provides that either a final ITA negative determination "or" a final ITC negative determination is subject to judicial review, while section 516a(a)(2)(B)(i) provides that final affirmative determinations by the ITA "and" the ITC are subject to judicial review.\textsuperscript{195} Given the use of the term "and" and the fact that section 516A(2)(A)(ii) provides that civil actions challenging these determinations must be instituted within 30 days after the publication of an "order" based on those determinations,\textsuperscript{196} it appears that section 516A authorizes judicial review of a final affirmative ITA determination only if two conditions are fulfilled: (1) the ITC final determination must also be affirmative, and (2) the two final determinations result in the issuance of an "order."

The Republic Steel holding raised the question whether a challenge to the amount of a subsidy constituted a challenge to a negative final ITA determination if the amount is included in a final determination which the ITA considers to be affirmative. This question was answered in the negative in the United States Steel


\textsuperscript{195} Id. § 1516(a)(2)(B)(i).

\textsuperscript{196} Id. § 1516a(2)(A)(ii).
In these cases, the Court held that a challenge to the methodology applied in a final affirmative ITA determination to calculate the amount of a subsidy cannot be viewed as a challenge to a final negative ITA determination. Thus, such a methodology must await the issuance of a final affirmative ITC determination and the issuance of a countervailing duty order. The only explanation given for this result was merely that a determination as to amount does not present the same potential for interim injury as did the preliminary determinations involved in Republic Steel. This decision appears to be correct, not because there is a great distinction between decisions involving the existence of a subsidy and those involving calculation of the subsidy's amount, but because it seems clear that Congress did not intend to subject an ITA final affirmative determination to judicial review unless the final ITC determination was also affirmative and an order was issued.

Another question concerning the types of decisions that are subject to judicial review arose in cases filed by the American Spring Wire Corporation. In the American Spring Wire case, the ITA issued final affirmative determinations, while the ITC issued final negative determinations. The plaintiff instituted separate actions to challenge the ITA final affirmative determinations and the ITC final negative determinations, and the United States moved to dismiss the challenges on the ground that final ITA affirmative determinations may be challenged only if the final ITC determinations are also affirmative and an order is issued. Alternatively, the United States moved to suspend the challenges to the final ITA affirmative determinations pending disposition of the challenges to the final ITC negative determinations. The Court denied the motion to dismiss but suspended the challenges to the ITA determinations, apparently rejecting the government's
contention.

To a degree, this suspension order accords with common sense. If the challenges to the ITC negative determinations were to fail to be sustained, the ITA affirmative determinations would become irrelevant and the need to consider them would never arise. Dismissal of the challenges to the final ITA affirmative determinations, however, would have been more closely in accord with the statute. As noted, if the challenges to the ITC determinations are rejected, the ITA determinations would become irrelevant. In contrast, if the challenges to the ITC are sustained, then countervailing duty orders would be issued and the plaintiff could challenge the affirmative ITA determinations, pursuant to section 516(a)(2)(B)(i), by instituting suit within 30 days after issuance of the orders. Indeed, section 516A appears to contemplate this situation in that it permits challenges to final affirmative ITA determinations to be instituted only after the issuance of an “order,” whereas challenges to all other kinds of actions must be brought within 30 days of the “determination.” By providing for the institution of suit after the issuance of an order, the statute prevents a challenge to a final affirmative ITA determination from becoming time barred in situations in which a final affirmative ITA determination is followed by a successfully challenged negative final ITC determination. Upon reversal of the negative final ITC determination, an order will be issued, and the plaintiff may then institute suit challenging the final ITA determination according to the statutory plan. The requirement that judicial review of a final affirmative ITA determination must await the issuance of an order creates one remaining problem. Suppose that the ITA were to issue a final affirmative determination that some manufacturers were receiving subsidies and others were not. In making its injury determination, the ITC considers only those manufacturers the ITA had found to be receiving subsidies, and issues a final negative determination. A domestic manufacturer may challenge the final negative ITC determination. What the domestic manufacturer needs to challenge is the determination as to which manufacturers were receiving subsidies. It cannot allege that the ITC failed to consider the other foreign manufacturers, however, because the ITC does not possess the

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authority to determine whether these manufacturers received a subsidy. Nor can it challenge the ITA final affirmative determination, because an ITA final affirmative determination is not subject to judicial review unless the ITC determination is also affirmative and an order is issued.

One possible solution to this conundrum would entail the filing of civil actions contesting both determinations. These actions could be consolidated on the theory that the Court’s jurisdiction to entertain the challenge to the negative ITC determination gives it “pendent” or “ancillary” jurisdiction over the challenge to the affirmative ITA determination. The Court could then proceed with the challenge to the ITA determination and, in effect, suspend the challenge to the ITC determination until the challenge to the ITA determination was resolved. One major difficulty with this course of action is that the plaintiff may not realize that it needs to challenge the ITA determination until after the ITC determination is issued. Since this may occur more than 30 days after the ITA determination is published, it would be difficult to hold that the Court possessed ancillary or pendent jurisdiction to entertain the challenge.

These difficulties might be eliminated by regarding a challenge to a final affirmative ITA determination as part of the challenge to the negative ITC determination only in this kind of situation. Another possibility would be to permit a challenge to the final affirmative ITA determination to be premised upon section 1581(i). Although the latter solution would permit a challenge to the ITA affirmative determination to be raised at any time within 2 years of its publication, the doctrine of laches could be used to dismiss any civil action challenging the final ITA determination that was not instituted shortly after publication of the determination.

The importance of the issuance of an order is highlighted by another set of circumstances. Section 704 of the Tariff Act authorizes the ITA to enter into an agreement to eliminate or completely offset a subsidy. The ITA suspends its investigation when it enters into such an agreement. However, if a party requests the ITA to continue the investigation within 20 days of the

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204 But see Melamine Chems., Inc. v. United States, 2 Ct. Int'l Trade 113, 115-16 (1981) (fact that ITC investigation may proceed upon preliminary ITA finding does not make the ITC proceedings part of the record in reviewing final ITA determination).


suspension, it must do so.\textsuperscript{207} Such a continued investigation does not result in the issuance of an order.\textsuperscript{208} Instead, the completed investigation has one of two effects. If the continued investigation results in a final negative determination by either the ITA or the ITC, the agreement will have no force or effect. If the continued investigation results in affirmative determinations by both the ITA and ITC, the results will be held in abeyance unless and until the agreement is violated. If the agreement is subsequently violated, the ITA must issue a countervailing duty order based on the results of the investigation.\textsuperscript{209}

An ITA determination to suspend an investigation on acceptance of an agreement is subject to judicial review pursuant to section 516A(a)(2)(B)(iv).\textsuperscript{210} Certain aspects of an investigation, continued on request, after acceptance of such a suspension agreement, are likewise subject to judicial review. Since the continued investigation must be conducted as stipulated in section 705, a resulting negative ITA determination or a negative ITC determination will be subject to judicial review according to section 516A(a)(2)(B)(ii).\textsuperscript{211} If the continued investigation results in affirmative determinations by both the ITA and the ITC, however, no order will be issued unless and until the suspension agreement is violated. It therefore appears to follow that neither affirmative determination alone is subject to judicial review.

These issues also arose in another group of actions brought by the American Spring Wire Corporation.\textsuperscript{212} In those actions, the plaintiff challenged a Commerce Department decision to enter into a suspension agreement with the government of South Africa.\textsuperscript{213} The investigation was continued, and upon the ITA’s issuance of a final affirmative determination, the plaintiff instituted another

\textsuperscript{207} Id. § 1671c(g).

\textsuperscript{208} Id. § 1671c(f)(3)(B). Even if the conditional investigation results in affirmative final determinations by both the ITA and the ITC, the ITA may not issue an order as long as the agreement remains in force and continues to meet the other requirements of the section, and the parties to the agreement carry out their obligations under its terms. Id.

\textsuperscript{209} Id. § 1671c(i)(1)(c).

\textsuperscript{210} Id. § 1516a(a)(2)(B)(iv).

\textsuperscript{211} Id. § 1516a(a)(2)(B)(ii). Section 704 of the Tariff Act, as amended, requires the ITA to continue its investigation upon discovering violation of the suspension agreement, id. § 1671c(g), and issue a final determination according to § 705, see id. § 1671c(f)(A)(3).


\textsuperscript{213} Id.
The United States moved to dismiss the second action on the ground that judicial review of an affirmative ITA determination, issued as the result of a continued investigation, is available only if an order is issued, and no order is issued unless and until the agreement is violated. The Court denied the motion and consolidated the civil action challenging the suspension agreement with the civil action challenging the ITA affirmative determination. Thus, the Court apparently rejected the view that no judicial review of final affirmative determinations, resulting from an investigation continued under section 704 of the Tariff Act, is possible absent violation of the suspension agreement.

A similar situation arose in actions instituted by the American Spring Wire Corporation involving a suspension agreement the ITA had entered into with the government of Brazil. The investigation was continued on the request of an interested party, and the plaintiff filed civil actions challenging the ITA's final affirmative determination as well as the ITC's subsequent final negative determination. The United States moved to dismiss the action challenging the final affirmative ITA determination on the ground that section 516A did not provide for judicial review of final affirmative ITA determinations absent a final affirmative ITC determination and the issuance of an order based on both

214 Id.
215 Id. (order dated Mar. 22, 1983) In its order consolidating the American Spring Wire cases, the Court cited United States Steel Corp. v. United States, 17 Cust. B. & Dec. No. 2, at 20 (Ct. Int'l Trade Dec. 20, 1982), without explanation. In United States Steel, intervenors moved to dismiss the plaintiff's challenge to the ITA's decision on the grounds that the plaintiff could not bring such a challenge unless and until it requested a continuation of the investigation and the investigation resulted in affirmative determinations by both the ITA and the ITC. Id. at 17.

The court denied the motion on the same theory it had used in Republic Steel—that is, that the harm done to domestic industry by the negative portions of the preliminary determination rendered judicial review appropriate. Id. at 17-18; see supra notes 183-188 and accompanying text. The court noted that since the decision to enter into the suspension agreement had terminated the suspension of liquidation, the plaintiff, a domestic manufacturer, was being harmed if the decision were erroneous. 17 Cust. B. & Dec., No. 2, at 17-18. This harm, as well as the fact that the agreement could not completely offset the subsidy if the suspension agreement were not in accordance with law, made the court unwilling to require the plaintiff to await the results of the continued investigation in order to challenge the decision. Id.

216 American Spring Wire Corp. v. United States, No. 82-6-00881 (Ct. Int'l Trade) (consolidated Mar. 22, 1983).
determinations.\textsuperscript{218}

Although the Court refused to dismiss the challenge to the ITA affirmative determination, it suspended the action, pending resolution of the challenge to the ITC final negative determination. The Court apparently was of the view that the plaintiff could challenge the ITC's negative determination, since it had been issued as the result of an investigation conducted under section 705.\textsuperscript{219} If the negative ITC determination were to be sustained, the challenge to the affirmative ITA determination would become moot. The Court seemed to believe, however, that if the negative ITC determination were to be reversed, the plaintiff should be entitled to challenge the final ITA determination even though no order would be issued unless and until the agreement was violated.\textsuperscript{220} By suspending the challenge, the Court implicitly rejected the government's contention that no challenge to the affirmative determination should be permitted.\textsuperscript{221}

The question of which determinations are subject to judicial review was presented in a slightly different context in \textit{Smith-Corona Group v. United States}.\textsuperscript{222} In that case, the ITA issued an affirmative preliminary antidumping determination, suspending

\textsuperscript{218} American Spring Wire Corp. v. United States, 566 F. Supp 1538 (Ct. Int'l Trade 1983).
\textsuperscript{219} \textit{Id.} (order suspending action pending resolution of American Spring Wire Corp. v. United States, No. 83-3-00455).
\textsuperscript{220} See infra notes 238-245 and accompanying text.
\textsuperscript{221} The plaintiff in \textit{American Spring Wire} had also challenged the ITA's decision to enter into the suspension agreement with the Brazilian government. American Spring Wire Corp. v. United States, 569 F. Supp. 73, 74 (Ct. Int'l Trade 1983). Once the ITC issued its final negative determination, the government joined the intervenor's motion to dismiss the challenge to the ITA decision upon the ground that the final negative ITC determination rendered the agreement null and void according to § 704(f)(3)(A). \textit{Id}; see 19 U.S.C. § 1671c(f)(A) (1982). The court accordingly granted the motion and dismissed the civil action as moot. 569 F. Supp. at 75.

A potential anomaly exists under this rationale. Suppose the suspension agreement provides that the foreign government will offset any subsidy found to exist in a continued investigation. Upon continuing the investigation, the ITA determines that certain programs do not constitute subsidies, and a domestic manufacturer seeks to challenge this determination because the foreign government is not required to offset the effect of these programs under the agreement. A challenge to the affirmative ITA determination, however, appears to be foreclosed because no order will be issued unless and until the agreement is violated. This problem might be solved by requiring the domestic manufacturer to challenge the suspension agreement and, in the course of that action, permitting it to challenge the portion of the ITA's final determination that finds certain programs not to be subsidies.

\textsuperscript{222} 507 F. Supp. 1015 (Ct. Int'l Trade 1980).
liquidation.\textsuperscript{223} Both the ITA and the ITC subsequently issued final affirmative determinations. The ITA accordingly issued an antidumping order pursuant to section 736 of the Tariff Act.\textsuperscript{224} Under the terms of section 736, the ITA must direct the Customs Service to require importers, subject to an antidumping order, to deposit estimated dumping duties in an amount determined by the ITA until the actual amount of dumping duty to be imposed is assessed.\textsuperscript{225} This requirement imposes a burden on the importer, because the deposit the ITA requires may exceed the amount of the duty ultimately imposed. In recognition of this fact, Congress granted the ITA the authority to require the posting of security in lieu of a deposit, if the ITA is satisfied that it will be able to assess the dumping duties to within 90 days from the publication of the order. In \textit{Smith-Corona}, the ITA decided that it could make the determination required by section 736(c) within the 90-day period required by the statute. Accordingly, it permitted the importer to post security instead of depositing estimated duties.\textsuperscript{226} The determination of the actual amount of dumping duties to be assessed was made within the 90-day period, and the plaintiff instituted suit challenging this decision. An intervenor moved to dismiss on the ground that section 516A did not specifically provide for judicial review of decisions made pursuant to section 736(c).\textsuperscript{227} The intervenor recognized that section 516A(a)(2)(B)(iii) specifically authorized judicial review of a determination of the amount of dumping duties, but contended that section 516A did not authorize judicial review of determinations made under section 736(c).\textsuperscript{228}

The Court denied the motion.\textsuperscript{229} Section 736(c) was viewed by

\textsuperscript{223} \textit{Id.} at 1016-17.
\textsuperscript{224} See 19 U.S.C. § 1673e(c)(1) (1982). Section 736 also requires the ITA, within a specified period of time, to determine the actual amount of the duties to be assessed. This determination is applied to all entries that are subject to the suspension of liquidation, and serves as a basis for estimating the amount of dumping duties to be deposited until the next annual review. \textit{Id.}
\textsuperscript{225} \textit{Id.} at 1025. More precisely, the complaint challenged the foreign market value attached to typewriters, which necessarily would affect the amount of duties assessed. \textit{See id.}
\textsuperscript{226} \textit{Id.} at 1019.
\textsuperscript{227} \textit{Id.} \textit{Compare} 19 U.S.C. § 1516a(a)(2)(A) (1982) ("[w]ithin thirty days after the date of publication in the Federal Register . . . [petitioner] may commence an action in the United States Court of International Trade . . . contesting . . . the determination. . . .") \textit{with id.} § 1673e(c) ("determination of foreign market value . . . shall be the basis for the assessment of anti-dumping duties . . . and also shall be the basis for deposit of estimated anti-dumping duties").
\textsuperscript{228} \textit{507 F. Supp.} at 1024.
\textsuperscript{229} \textit{507 F. Supp.} at 1024.
the Court as dependent on section 751(a) for its effectiveness; the Court reasoned that although section 736(c) served as the basis for the liquidation a direction to assess a specific amount of dumping duties must be issued pursuant to section 751(a). In effect, section 736(c) merely provides for a “fast track” section 751(a) review. Therefore, the section 736(c) determination was found to be reviewable under the provision providing for judicial review of decisions under section 751(a).

This decision is correct. Indeed, no question about the result would arise but for the fact that initially section 751(a) does not seem to apply to the assessment of dumping duties for the period between the first issuance of an order and the first annual review. Nevertheless, it is plain that Congress intended a party to be able to obtain judicial review of such an assessment.

3. Time Within Which A Civil Action Must Be Instituted

Section 516A(a)(2)(A)(ii) requires a civil action contesting a final affirmative ITA antidumping determination and a final ITC antidumping determination to be instituted within 30 days of the publication in the Federal Register of an antidumping “order” based upon these determinations. The Customs Courts Act of 1980, however, provides that an action contesting a final affirmative ITA determination and a final affirmative ITC determination must be instituted within 30 days of the publication of the “determination” in the Federal Register. In British Steel Corp. v. United States, the Court held that the use of the term “determination” in the Customs Courts Act of 1980 had not altered the

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230 Id. Compare 19 U.S.C. § 1675 (1982) (“at least once during each 12-month period . . . the administering authority” shall review and update antidumping duties) with id § 1673e(c) (allowing early antidumping determination within 90 days of publication of antidumping order). Section 736(c) merely authorizes the ITA to direct the Customs Service to assess dumping duties within a specified period of time and dictates that their amount shall equal the difference between the foreign market value and the United States price. Id. § 1673e(c). Section 751, on the other hand, authorizes the administering authority to determine the specific foreign market value and the United States price. Id. § 1675a(2).

231 Section 751(a) provides that antidumping duty orders and other related orders must be reviewed “at least once during each 12-month period beginning on the anniversary of the date of publication.” 19 U.S.C. § 1675(a) (1982). The reference to the 12-month period makes it appear that § 751(a) does not apply to the first determination with respect to the amount of duties rendered after publication of an order.

meaning of the provision in section 516A. The Court accordingly dismissed a civil action instituted within 30 days of the publication of a final ITA determination for lack of jurisdiction.

The question of the time within which a civil action must be instituted has also arisen in several other cases. Section 516 requires a civil action contesting a final negative determination to be instituted within 30 days of the publication of the determination. Section 516A(a)(2)(A)(ii), as noted above, requires a civil action, challenging both a final affirmative ITA determination and a final affirmative ITC determination, to be instituted within 30 days of the publication of the order based upon those determinations. If the negative portion of a final affirmative ITA determination is a negative determination for the purposes of judicial review, according to Republic Steel and the United States Steel cases, the question arises as to when an action challenging such determination must be instituted. Must the action be brought within 30 days of publication of the negative portion of the “determination,” or within 30 days of publication of the “order” based upon the ITC and ITA determinations? Apparently, the Court in United States Steel was of the opinion that the plaintiffs possessed a choice as to when to file suit. United States Steel involved two civil actions: one filed within 30 days of the final affirmative ITA determination that challenged the negative portions of that determination, and one filed within 30 days of the issuance of the order based upon the same ITA determination and a subsequent final affirmative ITC determination. The second complaint challenged the same negative portions of the final ITA determination that were challenged in the first complaint. Without explanation, the Court denied the motion to dismiss the first complaint as premature, and consolidated the civil actions instituted by the two complaints.

235 Id. at 47.
236 Id. at 49.
238 Id. § 1516(a)(2)(A)(ii).
241 See 17 Cust. B. & Dec. No. 30, at 23; 17 Cust. B. & Dec. No. 28, at 43-44. Each of these actions involved two complaints. In each, the court dismissed as premature the part of the first complaint dealing with quantification of subsidies, and consolidated the rest of that
This “optional jurisdiction” theory was rejected by the Court in *Bethlehem Steel Corp. v. United States.* On essentially the same facts as those presented in the *United States Steel* cases, the Court dismissed the second civil action as untimely, even though it was filed within 30 days of the publication of the order. A negative portion of a final ITA affirmative determination, according to the Court, was also a negative determination for the purpose of determining when the statutory period for filing a civil action had run.

The decision in *Bethlehem Steel* is correct only if *Republic Steel* and its progeny are correct. If a negative portion of an affirmative determination is to be subject to judicial review as if it were a negative determination, then it must be considered a negative determination for the purposes of the time within which a suit must be instituted as well. Moreover, there appears to be no basis for the holding in *United States Steel* that Congress intended to provide plaintiffs with a choice as to when to institute suit. Congress carefully established specific time limits within which a civil action must be instituted for each of the types of decisions subject to judicial review, and these limits should be observed.

**D. Section 1581(d)**

Section 1581(d) grants exclusive jurisdiction to the Court of International Trade to entertain suits challenging a decision by the Secretary of Labor denying a request for adjustment assistance. A
suit challenging a decision of the Secretary of Labor pursuant to section 1581(d) must be instituted within 60 days after notice of the determination. In *Tyler v. Donovan*, the United States contended that the 60-day period was jurisdictional and that the period commenced upon the date the Secretary mailed his notice of denial of the request for adjustment assistance to the plaintiff. The United States contended that the plaintiff had not commenced the suit within the 60-day period and that, therefore, the civil action should be dismissed. Without explicitly indicating its view as to whether the 60-day period was jurisdictional, the Court held that the 60-day period commenced upon the publication by the Secretary in the Federal Register of a notice of denial of the request for assistance. Since the Secretary had not published his notice of denial in this case, the Court held that the 60-day period had not commenced. In a subsequent case, the Court explicitly held that a civil action pursuant to section 1581(d) was barred unless it was commenced within the 60-day period. A suit which is not instituted within this period must be dismissed for lack of jurisdiction.

E. Section 1581(f)

Section 1581(f) grants exclusive jurisdiction to the Court of International Trade to entertain any civil action involving an application for an order directing the ITA or the ITC to make confidential information available to the plaintiff under section 777(c)(2) of the Tariff Act of 1930. Administrative proceedings under the antidumping and countervailing duty laws may be divided into several stages. One stage involves the initial investigation which is usually commenced by the filing of a petition with the ITA by a member of a domestic industry. This investigation is concluded, if both the ITA and the ITC final determinations are affirmative, by the issuance of an order. The order is then subject to an annual

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248 Id. at 692.
249 Id. at 694.
review pursuant to section 751. Finally, section 751 contains certain procedures which may be utilized to determine whether an order should be revoked.

In *In re United States International Trade Commission Investigation No. AA1921-147A (Electric Golf Carts From Poland)*, plaintiff, an importer of golf carts from Poland, was a participant in a proceeding conducted by the ITC under section 751 in order to determine whether an antidumping order, which applied to merchandise which plaintiff imported, should be revoked. The proceeding had been instituted at the request of the plaintiff. In the course of the proceeding, the plaintiff requested access to certain confidential information submitted to the ITC concerning the price of domestic golf carts. When the ITC denied the request, the plaintiff instituted suit alleging jurisdiction pursuant to section 1581(f) and seeking to compel the ITC to release the information.

The Court examined the language and the legislative history of section 777(c)(2) and noted that it created a cause of action to contest the denial of a request by the ITC for confidential information “submitted by the petitioner or an interested party in support of the petitioner . . . .” In the Court’s view, the term “petitioner” was limited to one who seeks the initiation of an antidumping or countervailing duty investigation; there is no “petitioner” in a revocation proceeding conducted pursuant to section 751. The Court therefore held that the suit was not a suit contesting a denial of access to confidential information under section 777(c)(2) and thus dismissed the action.

**F. Section 1581(h)**

Section 1581(h) grants exclusive jurisdiction to the Court of International Trade to entertain certain civil actions commenced to challenge a ruling of the Treasury Secretary issued prior to the importation of goods. The party filing the suit must demonstrate to the Court that it would be “irreparably harmed” unless given an opportunity to obtain judicial review “prior to the importation” of the merchandise in question. Thus, in *Bally/Midway Manufac-

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253 *Id.* at 1357.
254 *Id.* at 1358.
255 *Id.* at 1359.
257 *Id.*
the Court made clear that it did not possess jurisdiction pursuant to section 1581(h) if the goods involved had already been imported. Similarly, in American Air Parcel Forwarding Co. v. United States (American Air Parcel II), the Court held that an “internal advice” is not a “ruling” and thus may not be challenged pursuant to section 1581(h).

The Court also considered the nature of the “ruling” to which section 1581(h) refers in Pagoda Trading Co. v. United States. In that case, the Customs Service issued “guidelines” which were to “aid” customs officers in classifying certain kinds of merchandise. The Court held that it did not possess jurisdiction to entertain a challenge to these guidelines pursuant to section 1581(h). According to the Court, section 1581(h) was applicable only to “specific contemplated import transactions which contain[ed] identifiable merchandise and which [would] feel the impact of the ruling with virtual certainty.” In other words, the Court indicated that section 1581(h) was intended to apply to classification disputes that ordinarily would be the subject of section 1581(a) actions were they not being “moved back in time” to the pre-importation period.

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266 Id. at 1046. Accord United States v. Uniroyal, Inc., 687 F.2d 467 (C.C.P.A. 1982) (“Congress did not intend the Court of International Trade to have jurisdiction over completed transactions”).
268 See 557 F. Supp. at 608. The plaintiff distributor sought reinstatement of a Customs Service ruling, based upon facts supplied by an internal advice request, that had been abrogated by a subsequent internal publication. 16 Cust. B. & Dec. No. 39, at 39. The Court granted a preliminary injunction reinstating the ruling and undoing those liquidations based upon the internal publication. Id. at 43-44. The defendant subsequently moved to dissolve the injunction and dismiss the action for lack of jurisdiction under § 1581(h), 557 F. Supp. at 605, and the Court ruled on rehearing that Congress had exempted internal advice rulings from § 1581(h) review, id. at 608. This position comports with the legislative history of § 1581. See H. R. Rpt. No. 1235, 96th Cong., 2d Sess. 46 (1980) (ruling not meant to connote “internal advice” or “request for further review”). The appellate court did not reach these issues, but held instead that the plaintiff had not made the showing of “irreparable harm” required by § 1581(h). 718 F.2d at 1552.
270 Id. at 23.
271 Id. at 24.
272 Id.
273 Id. Presumably, the argument that § 1581(h) was meant to cover disputes that would come under § 1581(a) were they not moved back to the pre-importation period would apply to valuation disputes as well. The decision in Pagoda Trading Co. is clearly in accord with such decisions as Lowa, Ltd. v. United States, 561 F. Supp. 441, (Ct. Int’l Trade 1983),
In *Manufacture de Machines du Haut-Rhin v. von Raab*, the Court explored the irreparable harm requirement of section 1581(h). In that case, certain firearms that the plaintiff had attempted to import were detained by the Customs Service on the ground that the merchandise allegedly infringed a trademark belonging to another. The importer instituted a suit seeking declaratory relief pursuant to section 1581(h).

The Court held that it did not possess jurisdiction. The Court stated that, the civil action had not been instituted prior to importation, "since the goods were detained when there was an attempt to import them," and since the plaintiff had merely established that exclusion of the merchandise might result in harm to itself, due to lost profits, loss of good will and the like, the irreparable harm required by section 1581(h) was not established. Similarly, the plaintiff had not demonstrated that it would experience irreparable harm "in connection with the commencement of an import transaction," because it neither had attempted to import the goods nor shown that importation would present any unusual or particularly difficult problems. The Court therefore concluded that since the plaintiff had not proved that it would experience the sort of irreparable harm that must be established to obtain injunctive relief, it had not satisfied the requirements of section 1581(h).

Finally, in its opinion in *American Air Parcel II*, the Court of Appeals for the Federal Circuit held that in order to fulfill the requirement of "irreparable harm" contained in section 1581(h), a plaintiff must demonstrate that it will experience irreparable harm in the future. Evidence of the financial burden created by past

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268 Id. at 881.
269 Id. at 879.
270 Id. at 878.
271 Id. at 880-81.
272 Id.
273 Id. at 882; see also United States v. Uniroyal, Inc., 687 F.2d 467, 472 (C.C.P.A. 1982) (prayer for relief addressed to future importations does not constitute showing of "irreparable harm").
transactions was held insufficient to satisfy section 1581(h).\textsuperscript{275}

It is clear that section 1581(h) cannot be utilized once the goods involved have been imported. Moreover, as the Court held in Manufacture de Machines, the statute imposes on the plaintiff the heavy burden of demonstrating the irreparable harm that would result from requiring it to import its merchandise first and then resort to traditional methods of obtaining judicial review, such as the one set forth in section 1581(a). In the absence of these safeguards, importers would prefer section 1581(h) to 1581(a), since section 1581(h) does not require payment of liquidated duties prior to the commencement of the action. As the Court noted in Manufacture de Machines, this was not the result Congress intended when it enacted section 1581(h).

G. Section 1581(i)

Section 1581(i) grants exclusive jurisdiction to the Court of International Trade, "in addition" to the jurisdiction conferred by sections 1581(a)-(h), to entertain any civil action arising out of certain laws relating to international trade or the "administration and enforcement" of those laws.\textsuperscript{276} This so-called "residual jurisdiction" has been the subject of a number of decisions and the law in this area remains somewhat unclear.

1. Actions That May Be Instituted Pursuant to Section 1581(i)

In S.J. Stile Associates v. Snyder,\textsuperscript{277} the plaintiff, a customs broker, filed suit to prevent the Customs Service from altering the method of filing entry papers in the port of New York, alleging

\textsuperscript{275} Id.

\textsuperscript{276} 28 U.S.C. § 1581(i) (1982). Section 1581(i) provides that, "in addition" to the jurisdiction granted by § 1581(a)-(h):

[T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;
(2) tariffs, duties, fees . . . on the importation of merchandise . . . ;
(3) embargoes or other quantitative restrictions on the importation of merchandise . . . ;
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

jurisdiction pursuant to section 1581(i).278 Although the Court did not discuss the jurisdiction issue, since the existence of jurisdiction was uncontested, this type of case is clearly within the jurisdiction conferred upon the Court by section 1581(i).

In *Zenith Radio Corp. v. United States*,279 the plaintiff challenged a decision to enter into settlement agreements compromising certain claims for dumping duties, made by the Secretary of Commerce pursuant to 19 U.S.C. § 1617.280 The Court of International Trade held that it possessed section 1581(i) jurisdiction.281 The decision was ultimately reversed on the ground that the decision to enter into the settlement agreements was committed to the Secretary’s discretion by law, and there thus was no law for the Court to apply.282 It appears clear, however, that had there been “law to apply,” the jurisdiction holding would have been affirmed.283

The plaintiff in *Di Jub Leasing Corp. v. United States*284 challenged the Customs Commissioner’s decision revoking its customshouse cartman’s license.285 The Court held that it possessed jurisdiction to entertain the suit pursuant to sections 1581(i)(1) and (i)(4), since the suit involved the administration and enforcement of the federal laws providing for revenue from imports or tonnage.286 The primary objective of licensing and bonding cartmen, the Court noted, “is to secure the revenue from imports on which

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278 Id. at 524-25.
280 Id. at 217. Zenith sought to overturn certain agreements in which the Secretary of Commerce, the Secretary of the Treasury, and the Attorney General settled certain balances for duties assessed against various importers. Id.
281 Id. at 218.
282 Montgomery Ward & Co. v. Zenith Radio Corp., 673 F.2d 1254, 1260 (C.C.P.A.), cert. denied sub nom. Montgomery Ward, jurisdiction could be obtained to challenge whether the Secretary’s report drew upon all relevant documents. Id. at 1578-79.
283 See, e.g., Committee to Preserve American Color Television v. United States, 706 F.2d 1574 (Fed. Cir.) (review appropriate when Secretary’s compliance with the statutory requirements is at issue), cert. denied, 104 S. Ct. 96 (1983). The court held that although a review of the contents of the Secretary’s recommendations was proscribed by Montgomery Ward, jurisdiction could be obtained to challenge whether the Secretary’s report drew upon all relevant documents. Id. at 1116.
285 Id. at 1116.
286 Id. at 1117.
customs duties have not yet been paid," so revocation of a cartman’s license pursuant to Customs Service regulations was “intertwined with and directly related to the administration and enforcement of the laws providing for revenue from imports.”

In *American Air Parcel Forwarding Co. v. United States* (*American Air Parcel I*), the Court held that it possessed jurisdiction to entertain a civil action challenging Customs Service decisions denying “immediate delivery privileges” to the plaintiff and refusing to accept entry documentation from the plaintiff that had been filed without certified checks. In its opinion, the Court analogized section 1581(i) to 28 U.S.C. § 1331 and held that it possessed jurisdiction over the plaintiff’s cause of action, within the meaning of sections 1581(i)(1) and (i)(4), because the case involved the statutory and Customs Service regulations prescribing the legal effect of the tender of uncertified checks in payment of duties.

2. Actions That May Not Be Instituted Pursuant to Section 1581(i)

Section 1581(i)(1) specifically grants the Court of International Trade jurisdiction over civil actions arising out of any law of the United States providing for “revenue from imports or tonnage.” It would appear that the Court would possess jurisdiction to entertain such an action no matter what party filed it. The phrase “commenced against the United States,” however, seems to

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287 Id. (emphasis in original); see also Bar Bea Truck Leasing Co. v. United States, 546 F. Supp. 558 (Ct. Int’l Trade 1982), modified, 713 F.2d 1563 (Fed. Cir. 1983). The Court in *Bar Bea* applied the same reasoning it had employed in *Di Jub* to hold that it possessed jurisdiction to entertain a challenge to a decision denying plaintiff’s application for a customs house cartage license. See id. at 53-55. The jurisdictional holdings in *Di Jub* and *Bar Bea* were specifically approved by the Federal Circuit in United States v. Bar Bea Truck Leasing Co., 713 F.2d 1563, 1565 (Fed. Cir. 1983); see also Old Republic Ins. Co. v. Pitman, 520 F. Supp. 1225 (Ct. Int’l Trade 1981) (jurisdiction over challenge of Customs Service refusal to accept bonds in payment of customs duties); Heraeus-Amersil, Inc. v. United States, 515 F. Supp. 770, 772-73 (Ct. Int’l Trade 1981), aff’d, 671 F.2d 1356 (C.C.P.A. 1982) (jurisdiction over challenge of decision to suspend importer’s privilege to suspend duty payment).


289 Id. at 50-51.

290 Id. at 50. Customs Service regulations permit the acceptance of an uncertified check drawn on a bank in the United States or Puerto Rico as payment for customs duties. 19 C.F.R. § 24.1(a)(3) (1982). Such acceptance, however, is expressly conditioned on the filing of a bond, the deposit of estimated duties, and the filing of summary documentation. 19 C.F.R. § 1442.13(a) (1982).
prohibit the Court from entertaining a suit by the United States seeking to collect revenue from tonnage. The Court interpreted the phrase in this manner in *United States v. Biehl & Co.*, although it observed that "this unexplained, illogical, confusing and possibly inadvertent diversion of jurisdiction over tonnage cases [to district courts] was irreconcilable with Congress’ enunciated intention" in regard to the purpose of section 1581(i)(1).

The more interesting question as to what potential for overlap exists between the jurisdiction of the district courts and that of the Court of International Trade has arisen in the context of alleged copyright infringement. Employing reasoning similar to that utilized in *DiJub* and *Bar Bea*, the Court in *Schaper Manufacturing Co. v. Regan* held that it possessed jurisdiction under section 1581(i) to entertain a challenge to a Customs Service refusal to cancel certain bonds posted by the plaintiff and accept other bonds in their place. The plaintiff was informed by the Customs Service that an importer was attempting to import goods that appeared to infringe copyrights the plaintiff owned. Customs Service regulations required the plaintiff to post a bond to indemnify the importer in the event that no infringement was ultimately found. When some of the goods turned out not to be infringing, the plaintiff asked the Customs Service to cancel the original bond, which covered all of the imported merchandise, and substitute other bonds on a model-by-model basis. The Customs Service denied this request and ordered the bond previously furnished by the plaintiff to be released to the importer, whereupon the plaintiff instituted a suit challenging these decisions. The Court held that it possessed section 1581(i) jurisdiction on the ground that the suit was based on Customs Service regulations which served "as a corollary to the acknowledged primary functions of the agency in determining the proper amount of duty to be assessed upon merchandise granted the right of importation."

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293 Id. at 1221.
295 Id. at 897-98.
296 Id. at 895.
297 Id. The Customs Service advised the plaintiff that only one bond per shipment of toys would be permitted. Id.
298 Id. at 896.
299 Id. at 898; see also *Lois Jeans & Jackets U.S.A., Inc. v. United States*, 566 F. Supp. 1523 (Ct. Int'l Trade 1983). In *Lois Jeans*, the plaintiff imported merchandise pursuant to a
The Court’s decision in Schaper should be contrasted with its decisions in Kidco, Inc. v. United States,300 and Bally/Midway Manufacturing Co. v. Regan.301 The plaintiff, copyright owner, in Kidco sought injunctive relief to prevent the Customs Service from cancelling notices of redelivery it had issued to an importer of merchandise that allegedly violated the plaintiff’s copyright.302 The Court held, despite the plaintiff’s allegations to the contrary, that it lacked section 1581(i) jurisdiction, since the merchandise was not the subject of an embargo or quantitative restriction within the meaning of section 1581(i)(3).303 Similarly, in Bally/Midway Manufacturing Co. v. Regan, another copyright owner attempted to enjoin the cancellation of a claim for liquidated damages against an importer for failure to redeliver merchandise that the Customs Service had initially determined to have infringed the copyright.304 The Court again rejected the plaintiff’s contention that the allegedly piratical merchandise was the subject of an embargo or quantitative restriction within the meaning of section 1581(i)(3).305

The Bally, Kidco, and Schaper decisions should be contrasted with the decision in Carlingswitch, Inc. v. United States (Carlingswitch I).306 In Carlingswitch II, the plaintiff made a tender to the Customs Service before a penalty notice was issued. The statute of limitations expired before the government sued to recover a civil penalty from the plaintiff, and the plaintiff thereupon requested a refund of the amount it had tendered.307 When the Cus-
toms Service refused to comply with this demand, the plaintiff sued to recover the money, alleging the existence of jurisdiction in accordance with section 1581(i). After holding that section 1581(i) did not create any new causes of action, the Court considered the plaintiff's alternative contentions that it was entitled to a return of the funds according to either 19 U.S.C. section 1618 or principles of equitable restitution. The Court rejected these contentions on their merits and dismissed the suit for failure to state a claim upon which relief could be granted.

With the possible exception of the decision in Carlingswitch II, these decisions appear to be correct. All of the governmental acts involved in the cases in which the Court found that it possessed jurisdiction were directly and substantially related to the administration of the laws governing international trade, and thus presented issues that were within the Court's special expertise. Given the types of suits specifically identified in section 1581(i) which come within the purview of the Court of International Trade, it does not appear that Congress would have desired these suits to be heard by the district courts. In contrast, the real issue presented by Bally/Midway and Kidco was whether the imported merchandise infringed the plaintiff's copyright and this issue was properly determined to be within the district court's jurisdiction.

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205 Id. at 48-49. The plaintiff attempted to analogize § 1581(i) to 28 U.S.C. § 1331, which permits a putative federal law claim to be brought in federal court, even though no statute specifically creates an applicable cause of action. Id. at 48.

206 Id. at 49. Section 1618 of title 19 of the United States Code authorizes the Secretary of the Treasury to remit a "fine, penalty, or forfeiture" upon finding that "such fine, penalty, or forfeiture was incurred without willful negligence or without any intention ... to defraud the revenue or to violate the law." 19 U.S. § 1618 (1982). Alternatively, mitigation may be obtained under this statute if the circumstances so warrant. See id.

207 Id. at 49-50; see also O'Hare Servs., Inc. v. United States, 16 Cust. B. & Dec. No. 17, at 24 (Ct. Int'l Trade Mar. 30, 1982). In the O'Hare case, the Court apparently assumed that it possessed jurisdiction to entertain a civil action in which the plaintiff sought to recover certain sums allegedly due as a result of the Customs Service's allegedly erroneous interpretation of regulations relating to the distribution of proceeds resulting from auctions of unclaimed merchandise. See id. at 24-25.

The Carlingswitch II holding, that the Court possessed jurisdiction to entertain the plaintiff’s claim for “equitable restitution,” was certainly unanticipated, and probably not intended by Congress, at the time the Customs Courts Act of 1980 was enacted. As courts of limited jurisdiction, the federal courts possess only that jurisdiction conferred on them by the federal constitution or by Congress. Thus, in a diversity case, for example, a federal court must determine whether it possesses jurisdiction to entertain the action before reaching the merits. Suits against the United States present the additional question of whether the United States has consented to the suit. In the absence of such consent, the action must be dismissed, even if the court would have possessed jurisdiction had the action involved only private parties.

The Tucker Act granted the Claims Court exclusive jurisdiction to entertain non-tort claims for money damages against the United States. Since this statute contains the only consent of the United States to suit on a claim for damages that does not sound in tort, the doctrine of sovereign immunity prohibits a

over actions arising under the federal laws “relating to patents, plant variety protection, copyrights and trademarks”). The Court specifically noted in Kidco that related litigation involving the copyright’s validity was already pending in the district court. 16 Cust. B. & Dec. No. 40, at 51. The principal issue presented in Schaper, however, was not the validity of the plaintiff’s copyright, but the validity of certain bonding practices adopted by the Customs Service. 566 F. Supp. at 898-99; cf. Lois Jeans & Jackets U.S.A., Inc. v. United States, 566 F. Supp. 1523, 1529 (Ct. Int’l Trade 1983) (staying decision on whether plaintiff’s goods infringed a trademark pending decision in district court action on this issue).


See, e.g., Naartex Consulting Corp. v. Watt, 722 F.2d 779, 792 (D.C. Cir. 1983) (failure properly to allege diversity jurisdiction would justify dismissal of claim by federal court); see Anderson v. Watt, 138 U.S. 694, 702 (1891) (federal courts must dismiss actions if diversity falsely stipulated in averments because jurisdiction of federal courts is limited).


See e.g., United States v. Sherwood, 312 U.S. 584, 586-87 (1941); Kansas v. United States, 204 U.S. 331, 341-343 (1907).

Ch. 359, 24 Stat. 505 (1887) (codified at 28 U.S.C. §§ 1491-1508 (1982)).


Id. Another portion of the Tucker Act confers upon the district courts concurrent jurisdiction to entertain claims for money against the United States that are not tort claims and that do not exceed $10,000. Id. § 1346(a)(2). The jurisdiction possessed by the district
district court from entertaining such a claim pursuant to its general federal question jurisdiction. Even if section 1581(i) were analogous to the general federal question jurisdiction statute for some purposes, the Tucker Act contains the only potentially applicable consent by the United States to a suit for "equitable restitution," and that consent confers exclusive jurisdiction of such actions on the Claims Court. It follows that the "equitable restitution" claim of the plaintiff in Carlingswitch II should have been dismissed for lack of jurisdiction.

It is true that in the Customs Courts Act of 1980, Congress excluded from the Claims Court's jurisdiction under the Tucker Act "any civil action within the exclusive jurisdiction of the Court of International Trade." This amendment, however, cannot be construed as a consent on the part of the United States to suits in the Court of International Trade to which it had not consented before passage of the amendment, since a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." When Congress has intended to waive the immunity of the United States in regard to claims for money, it has done so by means of explicit legislation. The limitation on the Tucker Act, as contained in the Customs Courts Act, is not phrased affirmatively as a waiver of immunity to suit in the Court of International Trade, but is phrased negatively as a mere withdrawal of the consent of the United States to certain types of suits previously brought in the Court of Claims. The Tucker Act is phrased in very broad terms; a suit by an importer to obtain a refund of customs duties could conceivably be viewed as coming within its literal terms. Section 1581(a) makes clear, however, that the con-

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320 *Id.* § 1491(b).
323 *Id.* § 1491. The Tucker Act provides:

Nothing . . . shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade . . . .

*Id.* (emphasis added).
sent of the United States to a suit of this type only extends to the Court of International Trade. In fact, the only purpose of the Tucker Act amendment was to make clear that this type of suit was governed by the consent to suit contained in section 1581(a), therefore clarifying the demarcation between the jurisdiction of the Court of International Trade and that of the district court.\textsuperscript{325}

The amendment to the Tucker Act thus cannot be read as an affirmative consent of the United States to suit in the Court of International Trade.

If it is followed in the future, the decision in \textit{Carlingswitch II} could have important consequences. The jurisdiction of the Court of Claims is limited to claims founded upon a constitutional provision, a statute, a regulation, or a contract that allegedly requires the United States to pay money to the plaintiff.\textsuperscript{326} In the absence of a constitutional provision, statute, regulation, or appropriate kind of contract, a suit against the United States for money is barred by the doctrine of sovereign immunity.\textsuperscript{327} In \textit{Carlingswitch II}, however, no constitutional provision, statute, regulation, or contract required the United States to return the sum the plaintiff had paid. Thus, had the plaintiff instituted suit in the Court of Claims seeking "equitable restitution", the court would no doubt have dismissed the suit for lack of jurisdiction. Nor could the plaintiff have instituted suit in a federal district court, since the district courts do not possess jurisdiction to entertain any non-tort claim against the United States for an amount in excess of $10,000. Even in those instances involving claims for a lesser amount, the jurisdiction of the district courts is no greater than that of the Court of Claims. Thus, even if the plaintiff in \textit{Carlingswitch II} had sought less than $10,000 in damages and commenced an action in a district court, its action still would have been dismissed, just as it would have been dismissed had it been instituted in the Court of Claims.\textsuperscript{328}

& Ad. News 3729, 3779.
\textsuperscript{327} E.g., United States v. Testain, 424 U.S. 392, 400-01 (1976).
\textsuperscript{328} The Administrative Procedure Act contains a waiver of sovereign immunity, 5 U.S.C. § 702 (1982), that might be applicable to an action brought pursuant to § 1581(i). The legislative history of § 1581(i) indicates, however, that this subsection is inapplicable to civil actions seeking to challenge a decision that ultimately will be incorporated into a decision pursuant to § 516A. \textit{See} H. REP. No. 96-1235, 96th Cong., 2d Sess. 48, \textit{reprinted in} 1980 U.S. Code Cong. 
& Ad. News 3729, 3759-60. Moreover, § 704 of the Administrative
It is clear, therefore, that a suit instituted against the United States for "equitable restitution" would have been barred by the doctrine of sovereign immunity prior to the decision in Carling-switch II. By considering the claim of the plaintiff on the merits in that case, the Court of International Trade appears to have considerably expanded the types of monetary claims that may be asserted against the United States without its explicit consent.

The decision in O'Hare Services, Inc. v. United States also possessed important jurisdictional consequences. In O'Hare Services, the plaintiff sought to recover certain sums which it claimed from the government due to the Customs Service's allegedly erroneous interpretation of regulations relating to the distribution of proceeds from auctions of unclaimed merchandise. The Court of Claims apparently would have possessed jurisdiction to entertain such a suit had one been started in that court. The rationale of the Court in O'Hare Services may indicate that the Court believes that it possesses concurrent jurisdiction with the Court of Claims in some instances, despite the absence of an affirmative congressional statement on this subject.

H. Summary

The Court's approach to jurisdictional questions involving individual subsections of section 1581 has focused upon the purposes

Procedure Act specifically provides that "a preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704 (1982). Thus, the act, by its terms, does not authorize judicial review of an agency action under the countervailing or antidumping statutes that will be incorporated into a final determination. When such an agency action does become final, it will be subject to review as provided in § 518A, not as provided in the Administrative Procedure Act.

330 Id. at 24-25.
331 See id. at 24-25. The O'Hare Court dismissed the instant motion, noting that the 2-year statute of limitations for bringing an action in the Court of International Trade had run, see 28 U.S.C. § 2636(i) (1982), even though civil actions brought against the United States generally may be brought within 6 years of their accrual, 28 U.S.C. § 2401(a) (1982); see 16 Cust. B. & Dec. No. 17, at 24-25. The Court construed confinement of the instant action to a forum with a shorter statute of limitations as a withdrawal by the government of its consent to suit. Id. at 25-26. But see Rapp v. United States, 2 Ct. Cl. 694, 696 (1983) (Court of Claims action to contest Customs Service failure to deliver books plaintiff bought at auction of unclaimed goods permitted to proceed).
332 See 16 Cust. B. & Dec., No. 17, at 24-25. One example of a statute expressly granting concurrent jurisdiction is 28 U.S.C. § 1346(a)(2) (1982), which grants to the district court jurisdiction concurrent with that of the Court of Claims, id.
served by the various aspects of each subsection. The Court generally has held that it possesses jurisdiction when it determines that the assertion of jurisdiction is consistent with the statutory scheme or purposes, and has held, with few exceptions, that it lacks jurisdiction when the existence of jurisdiction would be inconsistent with that scheme or its purposes. This conclusion is demonstrated by the approach which the Court had adopted with respect to section 1581(a).

A comparison of section 1581 with statutes having a similar function will help to delineate the nature of the Court's approach. The Federal Tort Claims Act requires a plaintiff who institutes suit pursuant to the act to demonstrate that he has satisfied the statutory requirement of having filed an administrative claim before commencing the action. The federal courts have generally required strict adherence to this requirement. Similarly, the Contract Disputes Act requires a contractor with a claim against the government for an amount in excess of $50,000 to submit a certified claim to the contracting officer before instituting suit. The Court of Claims has strictly construed this requirement.

The Court of International Trade, however, has adopted a slightly different approach to the jurisdictional prerequisites contained in section 1581(a). The Court does ask plaintiffs bringing suit under section 1581(a) to demonstrate that the decision being challenged was subject to protest, that a timely protest was denied, that the civil action was commenced in a timely fashion, and that all duties were paid prior to the institution of the suit. Once the Court determines that a good faith attempt has been made to satisfy these prerequisites, however, literal compliance with the statutory requirements is not always necessary. Instead, the Court examines the purposes of the particular requirements at issue. If the plaintiff's actions have fulfilled these purposes, the Court generally holds that it possesses jurisdiction. The decisions in Dynasty Foote-
wear and Eddietron furnish examples of this principle.\textsuperscript{337} Similarly, the Court has held that certain types of decisions are subject to judicial review, despite the absence of a specific reference to them in the relevant statutes, because the availability of judicial review was obviously consistent with the statutory scheme. For example, prior to its amendment in 1970, section 514 did not include refusal to reliquidate an entry on account of a clerical error or mistake of fact among the types of decisions that could form the subject of a protest.\textsuperscript{338} Notwithstanding this fact, the Court of Customs and Patent Appeals held that a decision of this nature came within the provision contained in that version of section 514, since it permitted a protest to be filed against “all decisions of the . . . [Customs Service] as to the rate and amount of duties chargeable.”\textsuperscript{339}

This focus upon the statutory scheme and its purposes is also illustrated by many of the Court’s decisions relating to the existence of jurisdiction pursuant to section 1581(c) alone. For example, in Smith-Corona Group, the Court held that it possessed jurisdiction to entertain a challenge to an early dumping duty decision because it was obvious from the statutory scheme that Congress intended to provide for the availability of judicial review.\textsuperscript{340} In contrast, in Nakajima All Co. v. United States,\textsuperscript{341} the Court held that it did not possess section 1581(c) jurisdiction to entertain an intervenor’s cross-claim challenging an antidumping determination that would have been untimely had it been filed as a separate suit.\textsuperscript{342} To permit the cross-claim to be asserted in this circumstance, the Court explained, would have circumvented the statutory time limitations established for judicial review of decisions under the countervailing and antidumping statutes.\textsuperscript{343}

The concern that the Court has evinced for the need to maintain the integrity of each separate jurisdictional scheme contained in section 1581 has been expressed in its approach to the relation-

\textsuperscript{337} See supra notes 100-113 and accompanying text; see also Stewart-Warner Corp. v. United States, 577 F. Supp. 25, 25 n.1 (Ct. Int’l Trade 1983).


\textsuperscript{340} See supra notes 222-231 and accompanying text.


\textsuperscript{342} Id. at 46-47.

\textsuperscript{343} Id.; see also supra notes 232-244 and accompanying text.
ship between sections 1581(h) and 1581(a). The decisions in American Air Parcel II, Manufacture de Machines du Rhin, and Pagoda Trading Co. show that the Court has recognized that section 1581(h) contains an exception to section 1581(a). Failure to construe section 1581(h) strictly thus could render section 1581(a) meaningless and thereby destroy one of the statutory schemes for judicial review established by Congress. The Court has sought to avoid this outcome by interpreting section 1581(h) in a manner which prevents its use to circumvent the separate jurisdictional scheme established by section 1581(a).

The decisions interpreting section 1581(i) in isolation show a similar trend. Decisions such as S.J. Stile, Bar Bea Truck Leasing Corp., and American Air Parcel I show that the Court has recognized that this subsection was designed to transfer to the Court of International Trade from the district courts jurisdiction over types of cases that were closely related to the areas of the Customs Court’s traditional jurisdiction. The decisions in Bally/Midway and Kidco illustrate, however, that the Court also has recognized that section 1581(i) was not intended to obliterate the distinction between the jurisdiction possessed by the district courts and that possessed by the Court of International Trade. Moreover, it must be emphasized that, with some notable exceptions (such as the decisions in Alberta Gas II and the appellate decision in American Export Lines) the Court of International Trade and the Federal Circuit have not taken their liberal approach toward jurisdictional requirements to the point of asserting jurisdiction where such a holding would disrupt the scheme established by section 1581(a) and the statutes to which it makes reference.

III. INTERPRETATIONS OF THE RELATIONSHIPS BETWEEN THE SUBSECTIONS OF SECTION 1581

As noted above, the structure of section 1581 requires the Court to consider the separate jurisdictional schemes established by the individual subsections of section 1581. This structure necessarily requires the Court to consider the relationships between the

344 See supra notes 256-275 and accompanying text.
345 See supra notes 277-278, 284-290 and accompanying text.
346 See supra notes 300-05, 312 and accompanying text.
various subsections. For example, a broad interpretation of section 1581(h) could completely deprive section 1581(a) of its independent status, while a broad interpretation of section 1581(i) could render all of the other subsections meaningless.

The principal difficulty the Court has encountered in interpreting section 1581, however, has been defining the relationship between section 1581(a) and section 1581(i) and discerning the relationship between section 1581(c) and section 1581(i). Subsections (a), (c), and (i) are all contained in part of the statute that defines the Court's jurisdiction. The structure of the statute suggests no basis for according section 1581(i) greater status than that accorded to any other subsection of section 1581. Section 1581(i) specifically provides that the jurisdiction it confers upon the Court is "in addition" to that jurisdiction conferred by the Court is "in addition" to that jurisdiction conferred by the other subsections.

Given these facts, one would expect the Court to interpret section 1581(i) in the same manner in which it has construed sections 1581(a), 1581(c), and 1581(h)—as establishing a coherent jurisdictional scheme in and of itself. It likewise would be reasonable to expect the Court to interpret section 1581(i) in a manner that would prevent it from being used to circumvent the separate schemes established by the other subsections of section 1581. Since the Court has been careful to interpret section 1581(h) so as to avoid the destruction of the statutory scheme established by section 1581(a), it would be expected to reach a similar result when called on to consider the relationships between sections 1581(a) and 1581(i) or between sections 1581(c) and 1581(i).

The Court has, however, tended to view section 1581(i) differently from the other subsections of section 1581. Some courts such as the Court in Bar Bea Leasing Co.,348 have interpreted section 1581(i) as establishing a separate jurisdictional scheme that is coherent in and of itself.349 Others, however, appear to accord section 1581(i) a superior status not possessed by the other subsections contained in section 1581. This troubling trend in the case law merits closer examination.

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A. The Relationship Between Section 1581(i) and Section 1581(a)

The legislative history of section 1581(i) does not indicate an intention to create any new causes of action, and the decisions of the Court have interpreted this section accordingly. However, the exact nature of the relationship between section 1581(i) and the other subsections contained in section 1581, particularly subsection (a), remained unclear. In one of its early decisions, the Court held that it possessed jurisdiction pursuant to section 1581(i), without discussing the possibility that section 1581(i) jurisdiction did not exist because the plaintiff might have invoked jurisdiction pursuant to section 1581(a) but did not. Similarly, in another early decision, the Court held that it possessed jurisdiction pursuant to section 1581(i), even though it recognized that it already possessed jurisdiction pursuant to section 1581(a). Finally, in Wear Me Apparel Corp. v. United States, the Court viewed section 1581(a) as merely constituting a requirement that a plaintiff exhaust its administrative remedies before commencing suit. According to this view, in an appropriate case the Court could dispense with that requirement and assume jurisdiction pursuant to section 1581(i).

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351 Associated Dry Goods Corp. v. United States, 521 F. Supp. 473, 476 (Ct. Int'l Trade 1981), vacated as moot, 682 F.2d 212 (C.C.P.A. 1982). In Associated Dry Goods, the Court indicated that the roster of administrative actions it could review pursuant to § 1581(i) was broader than the list of actions it could review pursuant to § 1581(a). Id. Merchandise that the plaintiff attempted to import had been excluded from entry because the quota to which it was subject had been filled. Id. at 475. The plaintiff protested the exclusion and, upon denial of the protest, instituted a civil action challenging the President's interpretation of the international agreement that imposed the quota. Id. at 476. The United States conceded that the Court possessed § 1581(a) jurisdiction to review whether the Customs Service correctly applied the quota to the plaintiff's merchandise, but alleged that the President's interpretation of the agreement was not subject to judicial review. Id. The Court of International Trade disagreed, holding that it possessed jurisdiction to review the President's determination. Id. This holding appears to have confused the question of jurisdiction with the question of whether the plaintiff stated a cause of action upon which relief may be granted. Cf. Florsheim Shoe Co. v. United States, 570 F. Supp. 734, 746-47 (Ct. Int'l Trade 1983) (finding “no statutory authority” to review administrative findings that formed the basis of a presidential order and dismissing for failure to state a claim upon which relief can be granted), rev'd, 744 F.2d 787 (Fed. Cir. 1984).


353 Id. at 817.

The effect of the decision in Wear Me Apparel is illustrated by Sanho Collections, Ltd. v. Chasen.\textsuperscript{355} In that case, the government reduced the quota on Korean sweaters.\textsuperscript{356} Due to the reduction, sweaters ordered by the plaintiff before the reduction became effective were denied entry. Most of these sweaters were in Korea awaiting shipment to the United States. The plaintiff filed a protest against the exclusion, alleging that the quota reduction was unlawful, and instituted suit in the Court of International Trade before its protest had been denied.\textsuperscript{357}

The Sanho Court dismissed the portion of the civil action relating to the protested entry and held, without detailed explanation, that it possessed section 1581(i) jurisdiction to entertain that portion of the complaint relating to the sweaters awaiting shipment.\textsuperscript{358} The Court reasoned that the plaintiff possessed an administrative remedy with respect to the entry that was the subject of the protest, and that it was "appropriate" to require the exhaustion of this administrative remedy before assuming jurisdiction.\textsuperscript{359} The Court therefore held that the portion of the action that related to the protested entry was not "ripe" for judicial review, since the protest had not been denied.\textsuperscript{360} With respect to the portion of the action relating to the goods awaiting shipment, however, the Court held that there was "presently no protestable administrative action pursuant to section 514 and thus no administrative remedy."\textsuperscript{361} The Court held that it "unquestionably" possessed section 1581(i) jurisdiction "without administrative review."\textsuperscript{362}

missing action challenging extra duties assessed against sureties because assessment did not constitute "charges or exactions" under 28 U.S.C. § 1582(a)(3)). The Wear Me Apparel Court did not draw such careful distinctions between the requirements of § 159(a) and those of § 1581(i) as those drawn by the Grey Tool and St. Paul decisions between the types of administrative decisions protestable under § 514(a) of the Tariff Act. See 511 F. Supp. at 816-17.

\textsuperscript{355} 505 F. Supp. 204 (Ct. Int'l Trade 1980).
\textsuperscript{356} Id. at 206.
\textsuperscript{357} Id.
\textsuperscript{358} Id. at 207-08.
\textsuperscript{359} Id. at 207.
\textsuperscript{360} Id. at 207-08. One purpose of the ripeness doctrine is to ensure that cases are presented in concrete factual situations. Id. at 208. Since the goods awaiting shipment in Korea might conceivably be allowed entry into the United States, the portion of the action relating to the goods awaiting shipment was even "less ripe" for judicial review than the portion of the action that was the subject of the pending protest. Id.
\textsuperscript{361} Id. at 207-08.
\textsuperscript{362} Id. at 207-08. In Sneaker Circus, Inc. v. Carter, 566 F.2d 396 (2d Cir. 1977), which
The decision in *Uniroyal, Inc. v. United States* appeared to clarify the situation. In that case, the Customs Service issued notices of redelivery to an importer of rubber products on the ground that its merchandise was not properly marked with the name of the country of origin. Instead of filing a protest, the importer submitted a request for internal advice as to whether the merchandise came within an exception to the statute requiring the marking of imported merchandise. When the Customs Service answered this question in the negative, the importer instituted suit pursuant to section 1581(i), seeking a declaration that the merchandise it imported need not be marked. The importer subsequently requested injunctive relief to prevent the Customs Service from issuing future notices of delivery.

The United States moved to dismiss on the grounds that the importer was not entitled to suit unless it first filed a protest against the notices of redelivery and waited till the protest was denied. The Court denied this motion, stating that section 1581(i) did not require the filing and denial of a protest prior to the institution of suit. As in the *Wear Me Apparel* decision, the Court saw the question as one of whether or not the plaintiff should be required to exhaust its administrative remedies by filing a protest. Although the Customs Service could have denied the request for internal advice, once the Customs Service issued the internal ad-

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1. Id. at 662.
3. 529 F. Supp. at 662.
4. *Id.*
5. *Id.* The United States maintained that a notice of redelivery was a protestable decision under § 514(a)(4) of the Tariff Act. *Id.*
6. *Id.* at 662-63. The *Uniroyal* court determined that “the finding or denial of a protest” is not necessary when the court asserts § 1581(i) jurisdiction. *Id.* at 663 (citing *Wear Me Apparel Corp. v. United States*, 511 F. Supp. 814, 817 (Ct. Int'l Trade 1981)).
vice the advice became binding upon it.\textsuperscript{370} It would be futile to require the importer to file a protest, reasoned the Court, because the Customs Service would have no choice but to deny such protest due to the internal advice. The Court therefore held that it possessed jurisdiction under section 1581(i).\textsuperscript{371}

The Court certified the jurisdictional question as suitable for an interlocutory appeal. The Court of Customs and Patent Appeals granted leave to appeal and reversed.\textsuperscript{372} The appellate court assumed \textit{arguendo} that the notices of redelivery were not protestable at the time they were issued,\textsuperscript{373} and viewed the question presented as whether the importer could obtain review of the internal advice by filing a claim under section 1581(i).\textsuperscript{374} The court answered this question in the negative, noting that the importer could have raised the question of whether the merchandise came within an exception to the marking statute by filing a protest contesting assessments of marking duty or liquidated damages had the Customs Service made such assessments in response to the importer's failure to comply with the notices of redelivery.\textsuperscript{375} Since the merchandise that had already been imported would be subject to protest, the importer could not institute suit under section 1581(i) to obtain review of the internal advice.\textsuperscript{376} According to the court, "Congress did not intend the Court of International Trade to have jurisdiction over appeals when the appellant had failed to utilize an avenue for effective protest before the Customs Service."\textsuperscript{377}

\textsuperscript{370} \textit{Id.} at 663-64.
\textsuperscript{371} \textit{Id.} at 664.
\textsuperscript{372} \textit{United States v. Uniroyal, Inc.}, 687 \textit{F.2d} 467, 470 (C.C.P.A. 1982).
\textsuperscript{373} \textit{Id.} at 472.
\textsuperscript{374} \textit{Id.} at 470. The court noted that pursuant to an amendment to § 514, notices of redelivery are specifically identified as a type of decision that may form the subject of a protest. \textit{Id.} at 469 n.5; see \textit{19 U.S.C. § 1514(a)(4)} (1982).
\textsuperscript{375} 687 \textit{F.2d} at 471-72.
\textsuperscript{376} \textit{Id.} As support for its view that Congress did not intend § 1581(i) to confer jurisdiction in this type of case, the \textit{Uniroyal} court noted that Congress had considered the requirement that a protest must be filed, and had decided to dispense with that requirement only when the merchandise had not been imported under the circumstances specified in § 1591(h). \textit{Id.} at 471 (citations omitted). The court, considering this legislative history, apparently concluded that § 1581(i) could not be utilized in a case in which the merchandise had been imported and the plaintiff could have filed, or in the future would be in a position to file a protest. 687 \textit{F.2d} at 471-72.
\textsuperscript{377} 687 \textit{F.2d} at 471. With respect to the fact that the importer sought relief as to future transactions, the court held that the importer could not institute suit pursuant to § 1581(h) because the importer had not demonstrated the "irreparable harm" required by that section as a prerequisite to the institution of suit. \textit{Id.} at 472.
In her concurring opinion, Judge Nies observed that the majority had characterized the case as presenting the question of whether the importer could obtain review "of an internal advice." Since, according to the legislative history of the Customs Courts Act, an importer could never obtain review of an internal advice, Judge Nies asserted that the Court of International Trade actually had held that the issuance of a notice of redelivery was a protestable decision. If that categorization of the notices was correct, then, in this case, the notices became "final and conclusive" under section 514, since the importer had not filed a protest within the time specified. As this statutory finality requirement could not be circumvented by instituting suit under section 1581(i), Judge Nies concluded that notices of redelivery were not protestable.

Notwithstanding this conclusion, however, Judge Nies did not view the section 514 finality provision as foreclosing all challenges to a notice of redelivery. She noted that an importer could challenge a decision that the goods were improperly marked when and if the Customs Service assessed either marking duties, or liquidated damages, or both. Given the fact that the importer was not foreclosed from raising the marking issue in a protest, the importer had to do so, since section 1581(i) provides no alternative challenge mechanism. Section 1581(i), according to Judge Nies, could not be viewed as an "all embracing alternative" to the other remedies contained in section 1581. Instead, section 1581(i) properly could be utilized only if no other remedy was available or when the remedies provided under the other subsections of section 1581 were "manifestly inadequate." Since the importer had not demonstrated that these conditions were fulfilled, Judge Nies concluded that the trial court did not possess jurisdiction pursuant to section 1581(i).
The "manifestly inadequate" argument used by the concurring judge in Uniroyal derives from the decision of the Court of Customs and Patent Appeals in United States Cane Sugar Refiners' Association v. Block. In that case, an association of sugar refiners challenged a presidential proclamation imposing import quotas on sugar. The United States moved to dismiss on the ground that, in order to challenge the proclamation, the association, or one of its members, had to attempt to import sugar, file a protest in the event of exclusion, and institute suit in the Court of International Trade on denial of the protest. The Court of International Trade denied the motion, relying in large measure on its decision in Wear Me Apparel. It noted that it would be futile to require the plaintiff to exhaust its administrative remedies, since the Customs Service would possess no alternative under the circumstances outlined by the government but to deny any protest of the exclusion decision. The Court therefore held that it possessed section 1581(i) jurisdiction. The appellate court affirmed, noting that it found the lower court's exercise of section 1581(i) jurisdiction to be proper. It was "persuaded that [since there was] potential for immediate injury and irreparable harm to an industry and a substantial impact on the national economy, the delay inherent in proceeding under section 1581(a) makes relief under the provision manifestly inadequate ...."

After the decisions in Uniroyal and United States Cane Sugar Refiners, the Court of International Trade generally required plaintiffs to follow the procedures required to establish jurisdiction under section 1581(a) in the absence of a demonstration that the remedy available under that subsection was "manifestly inadequate." For example, in Lowa, Ltd. v. United States, the damages could not address whether the marking statute had been violated or whether one of the statutory exemptions was applicable. Id. (Nies, J., concurring). Section 514, however, specifically provides that a protest may challenge not only a specific decision, but also the legality of all orders and findings entering into it. 28 U.S.C. § 1514 (1982). Therefore, it would appear that, contrary to Judge Nies's concurrence, a protest of the assessment of marking duties could raise the question of whether the goods violated the marking statute.
plaintiff imported an aircraft that had been repaired abroad. On importation, the plaintiff filed a vessel repair entry at the request of the Customs Service, and posted a bond to cover the estimated vessel repair duties. It was subsequently discovered that the aircraft was not of American registry and, therefore, was not subject to such duties. The Customs Service decided, however, that the aircraft was subject to the imposition of ordinary duties under a tariff provision in effect at the time the aircraft was imported and requested the importer to file new entry papers reflecting this fact.

The importer's new entry papers did not reflect the fact that the aircraft was subject to duty under the tariff item in effect at the time of its importation. Instead, the entry papers reflected the plaintiff's contention that the aircraft was duty-free due to a post-importation change in the law that rendered the tariff item on which the Customs Service relied inapplicable to the type of aircraft involved. When the Customs Service refused to accept

\[\text{[391] 561 F. Supp. at 442.}\]
\[\text{[392] Id. at 443. The Customs Service discovered that "the aircraft was not documented under the laws of the United States." Id.}\]
\[\text{[393] Id.}\]
\[\text{[394] Id. at 442.}\]
\[\text{[395] Id.}\]
\[\text{[396] See, e.g., Manufacture de Machines du Haut-Rhin v. von Raab, 569 F. Supp. 877, 882-83 (Ct. Int'l Trade 1983); Maple Leaf Fish Co. v. United States, 566 F. Supp. 899, 902 n.3 (Ct. Int'l Trade 1983); see also Lois Jeans & Jackets, U.S.A., Inc. v. United States, 17 Cust. B. & Dec., No. 23, at 22-23 (Ct. Int'l Trade May 12, 1983); Rey Cafe Coffee Co. v. Pitman, 17 Cust. B. & Dec., No. 15, at 70-72 (Ct. Int'l Trade Mar. 23, 1983). In Lois Jeans, the plaintiff sought to enjoin the Customs Service from issuing or enforcing notices of redelivery, even though no protest had been filed or, of course, denied. 17 Cust. B. & Dec., No. 23, at 22. The court therefore dismissed the action for lack of jurisdiction. Id. at 23. In Rey Cafe, the Customs Service seized coffee imported by the plaintiff because the country of origin did not accord with the markings on the merchandise. 17 Cust. B. & Dec., No. 15, at 70. After the Customs Service notified the plaintiff of the seizure, the plaintiff sued to enjoin it from detaining the merchandise. Id. at 71. Since the merchandise had previously been excluded from entry, the plaintiff could have protested the exclusion and, upon denial of the protest, instituted a civil action pursuant to § 1581(a). The court did not dismiss the action on this ground, however, or even discuss the possible existence of such an action; instead, it apparently assumed that it possessed § 1581(i) jurisdiction and denied the relief requested by the plaintiff on the merits. See id. at 72.}\]

It is possible that the importer in Rey Cafe believed that it could not have protested the exclusion because it had admitted that the country of origin was other than that listed on its certificate of origin. See id. at 70. The appellate opinion in Uniroyal, however, had specifically rejected the contention that a protest need not be filed if filing would be futile. See 687 F.2d at 472. Alternatively, in lieu of finding that it possessed § 1581(i) jurisdiction, the court could have held that the importer was required to await institution of a forfeiture action in a district court by the United States.
these entry papers, the importer filed a protest and, on denial of the Customs Court, filed suit in the Court of International Trade.\footnote{Lowa, 561 F. Supp. at 443. The plaintiff construed the rejection of the entry papers as a protestable decision, and, accordingly, filed a protest with the Customs Service. Id. After Customs rejected the protest as premature, the plaintiff instituted the civil action. Id.}

After finding that it lacked section 1581(a) jurisdiction, the Court considered the plaintiff’s contention that jurisdiction existed pursuant to section 1581(i).\footnote{Id. at 445-46. The Court determined that since the rejection of the entry papers was not a protestable decision under 19 U.S.C. § 1514(a)(4), jurisdiction did not exist. Id.} The plaintiff contended that the Court should find that it possessed section 1581(i) jurisdiction in view of the delay that would result in resolving the administrative issues raised by the Customs Service, the financial loss the plaintiff had suffered, and the fact that the issue presented was strictly a legal issue, not a factual one.\footnote{Id. at 447.} The United States argued that the plaintiff should be required to file entry papers prior to filing protest, and, on denial of the protest, pay the duties and file suit pursuant to section 1581(a).\footnote{Id.}

The Court held that it lacked jurisdiction under section 1581(i)\footnote{Id. at 448. The Court reaffirmed the principle that equitable circumstances may allow the Court to assume jurisdiction under § 1581(i). Id. The Court held, however, that such circumstances did not exist in this case. Id.} and that even though the question presented could be viewed as “strictly legal,”\footnote{Id.} invocation of section 1581(i), in this case, “would frustrate the orderly administration of the customs law by permitting the plaintiff to circumvent the usual and normal administrative review process.”\footnote{Id. at 445-46. The Court determined that since the rejection of the entry papers was not a protestable decision under 19 U.S.C. § 1514(a)(4), jurisdiction did not exist. Id.\footnote{Id.}} The plaintiff, noted the Court, had “shown no statutory or judicial authority, extraordinary hardship, or irreparable injury which would justify a departure from the long settled rule” that no one is entitled to judicial relief until the prescribed administrative remedies have been exhausted.

The position that section 1581(i) jurisdiction does not exist unless the remedies provided by the other subsections of section 1581 are “manifestly inadequate” was further clarified in Ameri-
In that case, an importer and its surety filed suit to prevent the assessment of additional duties upon imported merchandise dictated by an internal advice issued by the Customs Service. The Customs Service subsequently revoked the internal advice and liquidated the entries with additional duties. The importer filed protests but instituted suit prior to their denial, which sought to compel the Customs Service to reinstitute its internal advice, to prevent liquidation of further entries pending reinstatement of the internal advice, to cancel the liquidations made after the revocation of the internal advice, and to allow all the importer’s protests filed on the liquidated entries.

The trial court initially granted a preliminary injunction. In view of the appellate decision in Uniroyal, however, the Court granted the government’s motion to dissolve the injunction and dismissed the suit for lack of jurisdiction, noting that “where a litigant has access to . . . the court under traditional means, such as [section 1581(a)], it must avail itself of this avenue of approach complying with all the relevant prerequisites thereto.”

The Federal Circuit affirmed the dismissal and rejected the importer’s contention that the section 1581(a) remedy was inadequate because the assessment of additional duties had driven it into bankruptcy, presumably rendering it unable to meet the payment of duties requirement before instituting suit.

The court also rejected the plaintiff’s contention that the section 1581(a) remedy was inadequate on due process grounds. Three reasons were given to support the due process claim: the complaint raised a constitutional question; the Customs Service regulations built unconscionable delay into the protest and review procedure; and procedures to safeguard the rights of the public were involved. The court held, with respect to the presentation of a constitutional question in the complaint, that the fact that the plaintiff cast its allegations in constitutional language was insufficient to

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405 718 F.2d at 1548.
406 Id. at 1549.
407 Id.
408 557 F. Supp. at 606 & n.1.
409 Id.
410 557 F. Supp. at 606, 609.
411 718 F.2d at 1551.
412 Id.
render the remedy provided by section 1581(a) "manifestly inadequate." If the mere presence of constitutional language in the complaint were sufficient to establish section 1581(i) jurisdiction, reasoned the court, every importer could circumvent section 1581(a) by phrasing its challenge in constitutional terms. Congress could not have intended that this section be so easily circumvented. The court likewise rejected the plaintiffs' allegation that the Customs Service had "built unconscionable delays" into the protest and review procedure. It noted that, by failing to utilize the established administrative procedure for obtaining accelerated disposition of its protests and requesting further review of a protest about to be denied, the plaintiffs had delayed their own ability to proceed under section 1581(a). The court found no relationship between the plaintiffs' contention that "the Customs Service must follow its own regulations which are designed to protect the public," and the jurisdiction issue. Violation of a regulation, noted the court, could be raised in a protest or in a civil action instituted after the denial of a protest but these facts do not confer jurisdiction.

The decision in American Air Parcel II was followed by the Court in American Air Parcel III. In that case, the plaintiffs paid the liquidated duties upon the denial of their protest and filed suit in the Court of International Trade. The plaintiffs sought interlocutory injunctive relief to prevent the Customs Service, pending a decision on the merits, from acting on any protests it filed, from liquidating certain entries in a manner allegedly violative of a prior Customs Service decision, and from collecting additional duties on other entries. The Court held that it possessed jurisdiction only over the entry that was made the subject of the
denied protest\textsuperscript{422} and dismissed the action as to all other entries. Since section 1581(a) was available to the plaintiffs, assumption of jurisdiction under section 1581(i), reasoned the Court, was not “necessary . . . to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies.”\textsuperscript{423}

The legislative history of section 1581(i) demonstrates that this provision was intended to eliminate the confusion concerning the location of the boundary between the jurisdiction of the district courts and the jurisdiction of what was then called the Customs Court.\textsuperscript{424} According to the predecessor of section 1581(a), a plaintiff that conceivably could obtain access to the Customs Court was required to do so; it could not circumvent the jurisdiction of the Customs Court by commencing an action in a district court.\textsuperscript{425} Section 1581(i) was intended neither to change this body of substantive law nor to permit circumvention of section 1581(a). A plaintiff who can obtain access to the Court of International Trade pursuant to section 1581(a) must do so and only if it cannot do so may it commence an action under section 1581(i).

For example, in Jerlian Watch Co. v. United States,\textsuperscript{426} the plaintiff wished to challenge rules concerning the classification of watches in a district court because it allegedly could not afford the payment of liquidated duties required in order to obtain Customs Court jurisdiction.\textsuperscript{427} The court held that since the plaintiff could obtain access to the Customs Court it was required to do so, not-

\textsuperscript{422} Id.
\textsuperscript{423} Id. The American Air Parcel III decision suggests that the enactment of § 1581(a) may not have altered the rule established in cases such as United States v. Boe, 543 F.2d 151 (C.C.P.A. 1976). The American Air Parcel III opinion uses a rationale similar to that found in the Boe opinion, which was decided under the predecessor of § 1581(a). In Boe, the government sought a writ of prohibition and mandamus to prevent the Customs Court from extending jurisdiction over a particular civil action. 543 F.2d at 152. The Court of Customs and Patent Appeals granted the writ, id. at 161, holding that since the disputed entries had not yet been liquidated, the protests were premature, id. at 155-56, and the Customs Court lacked jurisdiction because the “jurisdiction-conferring” requirements of the statute were not satisfied, id. at 155, 157.
\textsuperscript{425} E.g., Jerlian Watch Co. v. United States, 597 F.2d 687, 691-92 (9th Cir. 1979) (Congress intended Customs Court to have exclusive jurisdiction in customs law matters except for narrow exception that does not include “financial impossibility”); Consumers Union Inc. v. Committee for the Implementation of Textile Agreements, 561 F.2d 872, 873-74 (D.C. Cir.) (Customs Court has exclusive jurisdiction over matters concerning quota limitations on imports), cert. denied, 435 U.S. 933 (1978).
\textsuperscript{426} 597 F.2d 687 (9th Cir. 1979).
\textsuperscript{427} Id. at 689-90.
withstanding the financial hardship that the plaintiff might suffer as a result of meeting the payment of duties requirement. As the decisions in American Air Parcel II and American Air Parcel III indicate, the same result should be obtained after the enactment of section 1581(i); a plaintiff would be required to proceed in the Court of International Trade pursuant to section 1581(a) and would not be permitted to proceed pursuant to section 1581(i). Similarly, in Timken Co. v. Simon, the court held that a plaintiff unable to obtain access to the Customs Court, according to the predecessor of section 1581(a), could bring an action in the district court. As the decisions in Old Republic Insurance Co. and American Air Parcel I indicate, the same result should be obtained after the enactment of section 1581(i), except that instead of instituting suit in a district court, the plaintiff's option is to sue in the Court of International Trade pursuant to section 1581(i).

There are good reasons for requiring a plaintiff capable of obtaining access to the Court pursuant to section 1581(a) to do so. A civil action under section 1581(a) may not be instituted in the Court of International Trade unless all liquidated duties, charges, or exactions have been paid. If a plaintiff capable of obtaining access to the Court, pursuant to section 1581(a), is permitted to obtain access pursuant to section 1581(i), these revenue protection provisions would be thwarted. Moreover, the requirement that a plaintiff file a protest before commencement of an action may render some actions unnecessary. For example, it is true that on the facts presented in United States Cane Sugar Refiners, the Customs Service could not ignore or invalidate the sugar quota at issue. However, since it was possible that the refiners' sugar would not be subject to the quota, or that the quota could accommodate all of the sugar that the members of the plaintiff association desired to import, the refiners should have been required to seek access to the Court pursuant to section 1581(a). If all of their sugar was eventually allowed entry, no civil action would have been commenced, and the Court would not have been required to undertake the delicate task of determining the validity of a Presidential act.

428 Id. at 692.
429 539 F.2d 221 (D.C. Cir. 1976).
430 Id. at 225. In Timken, the plaintiff's action was not protestable under § 516 of the Tariff Act of 1930, and thus did not fulfill the prerequisites for jurisdiction under 28 U.S.C. § 1582, the previous version of § 1581(a). 539 F.2d at 225-26; see 28 U.S.C. 1582(b) (1982).
The prerequisites to suit under section 1581(a) meet the salutary purposes of ensuring that cases are presented in a concrete setting and preventing the Court from having to hear cases unnecessarily, purposes whose circumvention the Court should not permit.\(^{432}\)

Furthermore, the Court of International Trade is a court of limited jurisdiction, as are all federal courts. Section 1581 and the statutes related to it, considered as a whole, represent a comprehensive congressional scheme that governs the Court’s jurisdiction. Thus, as the appellate court recognized in *American Air Parcel II*, sections 1581(a) and 1581(i) necessarily possess different requirements with respect to standing, statutes of limitation, amendment of claims, burden of proof, and standards of appellate review.\(^{433}\) It follows that the Court is not free to ignore this scheme by selecting one jurisdictional basis over another simply because it is of the opinion that one basis is “manifestly inadequate.” Indeed, Congress expressly provided that section 1581(i) jurisdiction was “in addition” to the jurisdiction provided in the other subsections contained in section 1581. Given the fact that the legislative history expressly states that Congress did not intend section 1581(i) to be utilized to circumvent section 1581(a),\(^{434}\) the phrase “in addition” must be construed as if it provided that jurisdiction exists under section 1581(i) only if it does not or could not exist under some other subsection of section 1581.

Finally, the introduction of the “manifestly inadequate” concept into the legislation, defining the jurisdiction of the Court of International Trade, appears to have been unwise. Section 1581(i) was designed to eliminate confusion, not to create it. At the time section 1581(i) became law, some plaintiffs were confused about the difference between the jurisdiction of the district courts and that of the Customs Court because the boundary lines defining each were so vague.\(^{435}\) Institution of suit in district court virtually

\(^{432}\) Cf. Sanho Collections, Ltd. v. Chasen, 505 F. Supp. 204, 207-08 (Ct. Int’l Trade 1980) (finding § 1581(i) jurisdiction existed to review administrative action that would become protestable in the future). In *Sanho*, the Court dismissed the plaintiff’s complaint in part due to the plaintiff’s failure to exhaust the administrative remedies available. *Id.* at 207. The Court preserved the plaintiff’s challenge to the implementation of a reduced import quota on sweaters that were still in their country of manufacture based on § 1581(i), since no presently protestable administrative decision existed. *Id.* at 206-08.

\(^{433}\) 718 F.2d at 1550.


\(^{435}\) See H.R. REP. No. 1235, 96th Cong., 2d Sess. 33, 47, reprinted in 1980 U.S. CODE
became a lottery, and the plaintiff was often unable to determine in advance whether the court would possess jurisdiction. Interjection of the "manifestly inadequate" concept into the task of determining whether section 1581(i) jurisdiction exists may not create confusion as to the distinction between the jurisdiction of the district courts and that of the Court of International Trade, but it does blur the lines defining the jurisdiction of the Court of International Trade. Consequently, this concept is not only likely to generate a great deal of fruitless litigation, but it will also make advance determinations of whether an individual plaintiff will be able to establish jurisdiction pursuant to section 1581(i) nearly impossible, and this is the very situation Congress intended to prevent by enacting section 1581(i).

1. Summary

The difficulty that the Court of International Trade has experienced in reconciling section 1581(a) and section 1581(i) is illustrated by the approach the Court adopted in Wear Me Apparel, which culminated in its decisions in Sanho and Uniroyal. In those cases, the Court apparently adopted the view that the section 1581(a) requirement, that a plaintiff must exhaust its administrative remedies, was merely discretionary, so that the Court could, under section 1581(i), excuse the plaintiff's failure to fulfill that requirement.

The appellate opinion in United States Cane Sugar Refiners, which was handed down before the trial court's decision in Uniroyal, adopted a slightly different approach. In United States Cane Sugar Refiners, the court held that a plaintiff who could ultimately institute suit pursuant to section 1581(a) could bring an action under section 1581(i) if the relief available pursuant to section 1581(a) was "manifestly inadequate."\(^3\)\(^6\) The latter approach apparently has supplanted the original approach of Wear Me Ap-
parel and its progeny.

In decisions rendered subsequent to the appellate court decisions in Uniroyal and American Air Parcel II, such as Iowa and American Air Parcel III, the Court has imposed a heavy burden upon a plaintiff who attempted to demonstrate that the remedy available under section 1581(a) was "manifestly inadequate." As long as the Court relies upon this interpretation, the "manifestly inadequate" principle is unlikely to result in decisions that differ substantially from those that would be rendered in the absence of the principle, except in rare instances such as that presented in United States Cane Sugar Refiners. This principle is likely, however, to cause confusion and to generate a great deal of litigation by plaintiffs hoping to establish section 1581(a) jurisdiction by demonstrating that the jurisdiction conferred upon the Court pursuant to some other subsection of section 1581 is "manifestly inadequate."

B. The Relationship Between Section 1581(c) and Section 1581(i)

The problems the Court has experienced in defining the relationship between section 1581(c) and section 1581(i) are similar to those it has encountered in defining the relationship between section 1581(a) and section 1581(i). Section 1581(c) incorporates by reference section 516A of the Tariff Act, which sets forth a comprehensive scheme for judicial review of agency actions made pursuant to the countervailing and antidumping duty laws. Again, section 1581(i) could be used to circumvent the jurisdictional scheme contained in section 1581(c), despite the fact that the legislative history of the Customs Courts Act of 1980 is even more emphatically opposed to this problem than it is to the use of section 1581(i) to circumvent section 1581(a).437

The relationship between sections 516A and 1581(i) was illustrated by Royal Business Machines, Inc. v. United States.438 In Royal Business Machines, the ITC issued an antidumping order concerning electric typewriters from Japan.439 More than 30 days after issuance of the order, the plaintiff, an importer of electric

439 507 F. Supp. at 1009 & n.5.
typewriters from Japan, brought suit in the Court of International Trade, claiming that a particular kind of typewriter it imported was not subject to the order.\textsuperscript{440} The plaintiff alleged the existence of jurisdiction according to section 1581(i) and sought injunctive relief which would have excluded the kind of typewriters the plaintiff imported from the purview of the antidumping order.\textsuperscript{441}

The plaintiff recognized that it would be unlikely for it to be able to establish section 1581(i) jurisdiction if its suit could have been instituted under section 1581(c) since it had not filed the suit within the 30-day period required by section 516A. Accordingly, the plaintiff contended that its suit challenged the scope of the antidumping order issued under section 736 of the Tariff Act.\textsuperscript{442} Since section 516A does not address judicial review of the scope of an order issued under section 736, the plaintiff contended that it could not have brought an action under section 516A, and that section 1581(i) jurisdiction therefore existed.

The Court of International Trade dismissed the suit for lack of jurisdiction.\textsuperscript{443} The issuance of an antidumping order was purely a ministerial act, according to the Court, in that the terms of such an order were fixed by the results comprising the underlying determinations.\textsuperscript{444} Thus, the plaintiff's true disagreement was with the scope of the determination that formed the basis of the order, and not with the order itself.\textsuperscript{445} Under these circumstances, the plaintiff's exclusive remedy consisted of an action challenging the underlying determinations. Since the plaintiff had not met the section 516A requirement that such an action must be commenced within 30 days of the publication of the order premised on the determinations, the Court dismissed the action.\textsuperscript{446}

\begin{itemize}
\item \textsuperscript{440} \textit{Id.} at 1012, 1015.
\item \textsuperscript{441} \textit{Id.} at 1008-09.
\item \textsuperscript{442} \textit{Id.} at 1015.
\item \textsuperscript{443} \textit{Id.}
\item \textsuperscript{444} \textit{Id.} at 1012-13.
\item \textsuperscript{445} \textit{Id.} at 1015.
\item \textsuperscript{446} \textit{Id.} The Court expressly noted that not every suit involving the countervailing and antidumping duties laws must be instituted pursuant to § 516A, but held that the instant action was not the kind of action that could be brought under § 1581(i). \textit{Id.}
\end{itemize}

The court of appeals affirmed the trial court's decision in all respects including its conclusion that not all suits involving the countervailing and antidumping duties laws must be brought pursuant to § 516A. 669 F.2d 692, 701, 703 (C.C.P.A. 1982). In dismissing this aspect of the decision below, however, the appellate court observed:

The Customs Regulations indicate that the . . . factual findings and legal conclusions upon which the determination is based comprise only one aspect of the de-
The decision in *Royal Business Machines* should be compared with the decision in *Sacilor, Acieries et Laminoirs de Lorraine v. United States*. In that case, certain foreign manufacturers submitted confidential information to the ITA in connection with an antidumping investigation. The ITA, alleged the plaintiffs, decided to release this information to those American manufacturers whose petitions had caused the ITA to commence the investigation, whereupon the foreign manufacturers sued to prevent disclosure of the information to their American competitors.

The Court held that it possessed jurisdiction under section 1581(i) because the specific grants of jurisdiction found in the rest of section 1581 did not limit the jurisdiction granted by that subsection. The existence of section 1581(f), which grants the Court jurisdiction to require disclosure to a domestic producer under section 777(c)(2) of the Tariff Act, thus was not found to imply that the Court lacked jurisdiction in a case instituted by a foreign producer seeking to prevent disclosure to the petitioner. With respect to the effect of section 516A upon section 1581(i), the Court held that the ITA’s decision to release the information was “final and . . . independent, factually and legally, from the later determinations that will be made. The correctness of this [ITA] decision cannot be reviewed in a meaningful way in a judicial review at a later stage of the administrative proceedings.” Thus, the Court maintained that the assumption of jurisdiction did not violate the

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Id. at 702. The meaning of this statement is far from clear. The court appears to be saying, however, that a suit challenging the validity of an order could be brought pursuant to § 1581(i) if the order did not contain an express factual finding or legal conclusion concerning its scope.

Chief Judge Markey issued a concurring opinion in which he indicated that he would not have discussed the question of whether § 1581(i) jurisdiction existed in other types of cases. Id. at 703 (Markey, C.J., concurring).


448 Id. at 1021-22.

449 Id. at 1022-23.

450 Id. at 1023. Title 28 of the United States Code provides the “scope and standard of review” for the Court of International Trade. 28 U.S.C. § 2640 (1982). Subsection (d) of this section provides that in any civil action not specified in this section, the court “shall review the matter as provided in section 706 of title 5.” Id. § 2640(d). Section 2640 thus implies that civil actions instituted to block the disclosure of confidential information would be reviewed in accordance with 5 U.S.C. § 706. See 5 U.S.C. § 706 (1982) (defining scope of judicial review of administrative decisions).

451 542 F. Supp. at 1023.
congressional intent that section 1581(i) not be utilized to review a decision that will be later incorporated into a decision reviewable under section 516A. 453

Royal Business Machines and Sacilor, read together, establish the principle that section 1581(i) should not be utilized to circumvent the statutory scheme established by section 1581(c) and section 516A. As the Court indicated in Sacilor, the greatest difficulty this principle presents arises in those cases in which a plaintiff seeks interlocutory review of an administrative decision that is not itself reviewable according to section 516A but that will be incorporated into a subsequent administrative decision specifically subject to section 516A judicial review.

This was the situation with which the Court was presented in Haarman & Reimer Corp. v. United States. 453 The Court was called upon to interpret section 733 of the Tariff Act. Section 733 requires the ITA to make a preliminary determination as to the existence of sales made for less than fair value within a specified period of time. 454 The investigation proceeds to a final determination, whether this determination is affirmative or negative. A preliminary affirmative ITA determination, however, has a different effect than a preliminary negative ITA determination, as was discussed in a previous section. Section 733(d) requires the ITA to order the suspension of liquidation and the posting of security for potential antidumping duties upon the making of a preliminary affirmative determination. 455

Such a suspension of liquidation is ordinarily effective only with respect to entries occurring on or after the date of publication of the preliminary determination in the Federal Register. Section 733(e) provides, however, that a petitioner may allege the existence of “critical circumstances.” 457 If the ITA finds that critical circum-

453 Id.
454 19 U.S.C. § 1673b(b)(1) (1982). The ITC must make a preliminary determination as to the existence of sales made for less than fair value within 160 days after the date on which a petition is filed. Id. This period, however, may be extended to 210 days in “extraordinary complicated cases.” Id. § 1673b(e).
455 See id. § 1673d(a) (1982) (ITC has 75 days after the sale of the preliminary determination to render final determination as to whether violation of antidumping laws exists). This period, however, may be extended until 135 days after the preliminary determination if a request in writing is made by either the exporter or the petitioner. Id. § 1673d(a)(2)(A)-(B).
456 Id. § 1673b(d)(1)-(2) (1982).
457 Id. § 1673b(e).
stances exist, the suspension of liquidation resulting from a preliminary affirmative ITA determination will be effective not only with respect to entries occurring on or after the date of publication of the preliminary determination, but also with respect to all unliquidated entries occurring 90 days prior to the publication date.\(^4\)

In *Haarman & Reimer*, although the plaintiff had alleged the existence of "critical circumstances," the ITA found that no such circumstances were present.\(^4\) The plaintiff instituted suit pursuant to section 1581(i), challenging this finding.\(^4\) The Court dismissed the suit for lack of jurisdiction.\(^4\) It noted that when critical circumstances are alleged, section 735(a)(3) of the Tariff Act requires the ITA to explain its ruling as to the existence of those circumstances in its final affirmative determination.\(^6\) Such a final determination, the Court held, was reviewable under section 516A, but any review of the ITA determination, concerning the existence of critical circumstances, must occur in a suit instituted pursuant to the statutory provision authorizing judicial review of the final determination.\(^4\) The plaintiff's contention, that the mere silence of section 516A on the question of the availability of judicial review of a negative critical circumstances decision necessarily implies the availability of judicial review under section 1581(i), was expressly rejected by the Court.\(^4\) The Court indicated that it must avoid "promot[ing] a patchwork of judicial review proceedings" of administrative determinations in an antidumping investigation, particularly since Congress' intent in drafting section...

\(^{458}\) Id. § 1673b(e)(2).

\(^{459}\) 509 F. Supp. at 1277-78.

\(^{460}\) Id. at 1278. The plaintiff argued that the court should maintain jurisdiction under § 1581(i), since § 516A did not provide for a judicial review of a negative preliminary determination concerning "critical circumstances." *Id.*

\(^{461}\) Id. at 1280, 1282.

\(^{462}\) Id. at 1280; see 19 U.S.C. § 1673d(a)(3) (1982) (affirmative ITA determination made as a result of investigation in which critical circumstances are alleged should include findings as to whether there is a history of dumping the kind of goods involved, whether the importer should have known about the dumping, and whether a vast amount of the goods were recently imported).

\(^{463}\) 509 F. Supp. at 1280.

\(^{464}\) Id. The Court discussed the plaintiff's argument that § 1581(i) jurisdiction existed because negative preliminary determinations as to "critical circumstances" are not reviewable under § 516A, but determined that this omission was consistent with Congress' intent and was not "unintentional." *Id.* The Court observed that Congress did not intend preliminary affirmative or negative determinations to be reviewed; rather, judicial review was to be "postponed until the time of the final determination." *Id.* (emphasis in original).
With respect to harm to the petitioner, the Court impliedly recognized that a domestic manufacturer could be harmed by the inability to obtain judicial review of a negative critical circumstances decision, because the ITA may erroneously fail to order a retroactive suspension of liquidation in the absence of judicial review. The Court noted, however, that a preliminary affirmative determination that harms an importer by suspending liquidation and requiring the posting of security is also not subject to judicial review. Thus, the fact that the plaintiff might be harmed if interlocutory review was foreclosed apparently was not viewed as determinative of whether the Court possessed jurisdiction under section 1581(i).

The concept that interlocutory judicial review of an administrative decision is precluded when the decision at issue is incorporated into a subsequent decision specifically subjected to judicial review by section 516A, was central to the opinion in Freres v. United States. The plaintiff in that case challenged a final affirmative ITA determination, alleging that the ITA had erroneously refused a request to postpone its final affirmative determination in order to consider two diplomatic notes submitted by the French government. An intervenor moved to strike this allegation from the complaint as “illusory” and immaterial. The Court denied the motion, observing that the ITA’s refusal to postpone its determination was not subject to separate, interlocutory review pursuant to section 1581(i). It therefore concluded that the challenge to the decision of the ITA, not to postpone its determination, had been properly included in its challenge to the ITA’s final determination.

A different approach to the relationship between section 516A and section 1581(i) was adopted in Krupp Stahl AG v. United States. In Krupp Stahl, the ITA commenced an antidumping

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465 Id.
466 Id. at 1281. The court’s reason for refusing to consider the possibility of plaintiff’s suffering “irreparable injury,” however, was the plaintiff’s failure to show that it was likely to be able to prove the ITA’s determination to be erroneous. Id. at 1281.
468 Id.
469 Id.
470 Id.
investigation of products exported by the plaintiff.\textsuperscript{472} In the course of its investigation, the ITA requested certain information from the plaintiff. The information was provided, but the ITA refused to consider it before making its preliminary affirmative determination, on the ground that it had not been timely submitted. The ITA noted that it was reviewing the information for possible use in its final determination. The plaintiff instituted suit, alleging section 1581(i) jurisdiction, challenging the decision not to consider the information prior to the issuance of the preliminary determination.\textsuperscript{473}

The Court dismissed the action without prejudice.\textsuperscript{474} Although it found that it possessed jurisdiction pursuant to section 1581(i), the Court held that the case was not ripe for adjudication at the moment.\textsuperscript{475} The Court noted that while the plaintiff had been harmed by the preliminary affirmative determination, and the resulting suspension of liquidation, this harm did not justify its intervention at this stage of the proceeding.\textsuperscript{476}

A similar result was reached in \textit{PPG Industries, Inc. v. United States}.\textsuperscript{477} The plaintiff in \textit{PPG Industries} requested a hearing in accordance with section 751(d) of the Tariff Act, which requires the ITA to provide a hearing to an interested party upon request in the course of an annual review of an antidumping order.\textsuperscript{478} The ITA refused on the grounds that there had been no shipments of the merchandise subject to the order during the period covered by the review and any determination made as a result of the annual review would be based on information previously submitted to the government, a fact that ITA believed would render a hearing meaningless.\textsuperscript{479} On the denial of its second request for a hearing,

\textsuperscript{472} \textit{Id.} at 395.
\textsuperscript{473} \textit{Id.}
\textsuperscript{474} \textit{Id.} at 397.
\textsuperscript{475} \textit{Id.} at 395.
\textsuperscript{476} \textit{Id.} at 395-96. Although the plaintiff would have to pay estimated dumping duties on entries as a result of the preliminary determination, the Court noted that this hardship is "closer to the normal consequences of involvement in those investigations" than to those hardships "which justif[y] judicial intrusion into an ongoing administrative investigation." \textit{Id.} at 396.
\textsuperscript{478} \textit{Id.} at 884. Section 751 of the Tariff Act of 1930 requires the ITA to conduct an annual review of previously issued antidumping orders. \textit{Id.; see} 19 U.S.C. § 1675(a) (1982). When such a review is conducted, the ITA must, if requested, conduct a hearing in connection with that review. 525 F. Supp. at 884; see 19 U.S.C. § 1675(f) (1982).
\textsuperscript{479} 525 F. Supp. at 884.
the plaintiff sued according to section 1581(i), seeking a writ of mandamus to compel the ITA to conduct a hearing. The Court dismissed the action, apparently on the ground that the plaintiff had failed to state a claim upon which relief could be granted. Since the final results of the annual review were subject to review under section 516A(a)(2)(B)(iii), the Court held that the plaintiff should await the final results of the review to seek relief. If it were still dissatisfied at that time, it could then bring an action pursuant to section 516A, alleging that the failure to grant a hearing constituted an error that should invalidate the review results.

Similarly, in Special Commodity Group on Non-Rubber Footwear from Brazil v. Baldridge, an importer whose merchandise was subject to a countervailing duty order brought suit to enjoin the ITA from completing a section 751 annual review. This plaintiff contended that under section 1504 of Title 19 of the U.S.C., every entry not liquidated with 1 year was deemed liquidated in accordance with the entry papers submitted by the importer. Liquidation of its entries, claimed the plaintiff, had been suspended for more than 1 year while the ITA continued its review. Further section 751 proceedings thus were futile, since the entries must be deemed liquidated as entered, without regard to the ultimate results of the section 751 review. The Court held that it possessed section 1581(i) jurisdiction but dismissed the complaint for failure to state a claim upon which relief could be granted. Dismissal for this reason was warranted, asserted the Court, because the plaintiff could raise its contentions as to the effect of section 1504 in an action challenging the final determination resulting from the section 751 review, which was specifically subject to judicial review under sections 516A and 1581(c).

480 Id. In addition to its demand for a hearing, the plaintiff filed a motion for an order to show cause, a motion for a preliminary injunction, and a motion to shorten the time allotted to the defendants to answer the complaint. Id.

481 Id. at 884-85. The defendants filed an opposition to plaintiff's motion for a preliminary injunction and a cross-motion to dismiss the complaint for failure to state a cause of action. Id. at 884. The Court granted the defendants' motion to dismiss the complaint. Id. at 885.

482 Id. at 885.


484 Id.

485 Id. at 1290 & n.2.

486 Id.

487 Id. at 1291.

488 Id. at 1292.
The decision in *Haarman & Reimer* and the results in *Krupp Stahl, PPG Industries, and Special Commodity Group* should be compared with the decision in *Ceramica Regiomontana, S.A. v. United States*. In that case, the ITA issued a countervailing duty order which, among other things, ordered the Customs Service to demand a cash deposit to cover potential countervailing duties. This order was to remain in effect until the first annual review pursuant to section 751 was completed. After issuance of the order, but before the first annual review, the foreign government involved in the investigation eliminated some of the programs the ITA already had found to constitute subsidies. The plaintiff then requested the ITA to reduce the deposit rate specified in its order because these programs had been eliminated. When the ITA refused, the plaintiff commenced an action pursuant to section 1581(i) to compel the ITA to reduce the deposit rate. The Court held that it possessed section 1581(i) jurisdiction on the ground that the decision rejecting plaintiff's request for a reduction in the deposit rate constituted a final agency action, which would not be incorporated into a subsequent administrative decision reviewable under section 516A. The decision on the jurisdictional issue in *Ceramica Regiomontana* appears to be at odds with the decisions in *Royal Business Machines, Sacilor, DiJub Leasing Corp., Bar Bea Truck Leasing Co., Haarman & Reimer, and the results in PPG Industries, Special Commodity Group, and Krupp Stahl.*

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489 Id. at 598.
491 Id. at 599.
492 Id. at 598.
493 Id. at 599.
494 Id. at 600. To determine the jurisdictional issue, the *Ceramica Regiomontana* Court considered the legislative history of § 1581(i), *id.*, which provides:

>Subsection (i), and in particular paragraph (4), makes it clear that the court is not prohibited from entertaining a civil action relating to an antidumping or countervailing duty proceeding so long as the action does not involve a challenge to a determination specified in section 516A of the Tariff Act of 1930.

H. Rep. No. 96-1235, 96th Cong., 2d Sess. 48, reprinted in 1980 U.S. Code Cong. & Ad. News 3729, 3760. The court held that it had jurisdiction over plaintiff's action under § 1581(i) because the "ITA's decision was not made during any proceeding that would culminate in a determination for which judicial review is provided under 19 U.S.C. § 1515a and 28 U.S.C. § 1516a(c)." 557 F. Supp. at 600 (emphasis in original). The court, however, dismissed the plaintiff's claim for failure to state a claim upon which relief may be granted because, in demanding that the ITA immediately reduce its deposit rate stated in the order, the plaintiff had requested the ITA to act beyond the scope of its authority. *Id.* at 601.
As the Court indicated in *Haarman & Reimer*, it is clear that the mere absence of a specific provision in section 516A, providing for judicial review of a particular administrative determination, should not be read as an indication that section 1581(i) review is available, given the comprehensive and detailed statutory schedule in section 516A and the explicit congressional intent that section 1581(i) should not be utilized to disrupt this scheme. To so hold would render the scheme contained in section 516A meaningless. Every administrative decision relating to the countervailing and antidumping duty laws would become subject to judicial review, either under section 516A or under section 1581(i)—a result that obviously would not be in accord with congressional intent. Indeed, given the other decisions concerning the relationship between section 1581(i) and section 516A, it could be argued that the Court has indicated that absence of a judicial review provision in section 516A gives rise to what almost amounts to a presumption that section 1581(i) judicial review is not available.

Moreover, as the Court also indicated in *Haarman & Reimer*, the harm to the plaintiff if judicial review is not available should not be determinative of the question whether jurisdiction exists under section 1581(i). There may be instances, such as the refusal to provide for judicial review of an affirmative preliminary determination, which result in a suspension of liquidation. In these instances, Congress has, in effect, decided that the disruption to the administrative process which would result from the availability of judicial review would also outweigh any harm caused by the unavailability of review.

Finally, the fact that judicial review of the particular administrative action at issue may never become available if immediate judicial review is unavailable should not be determinative. Although there is a general presumption in favor of judicial review, there are some circumstances in which Congress has decided that no judicial review should be available.

A possible approach to the problem of the relationship between section 516A and section 1581(i) is suggested by the approach adopted by the trial and appellate courts in such decisions as the decision in *Lowa*. In that case, the Court was careful to avoid a construction of section 1581(i) which would disrupt the statutory scheme established in section 1581(a) and its related statute, section 514.

If section 1581(i) should be construed in such a manner, as to
avoid disruption to the statutory scheme established by sections 1581(a) and 514, it appears to follow that section 1581(i) should also be interpreted in such a manner as to avoid any disruption to the statutory scheme established by the Congress in sections 1581(c) and 516A. The type of approach to the relationship between section 1581(i) and sections 1581(c) and 516A suggested by *Lowa* requires a careful examination of the statutory scheme established by Congress in the antidumping and countervailing duty statutes. Those statutes describe with great specificity the administrative decisions which are to be made, the sequence in which they are to be issued, and the time within which they must be rendered. Section 516A is closely related to this statutory plan. In deciding which administrative actions should be subject to judicial review, Congress considered such matters as the disruption to the administrative process specified in the statute which would be caused by the availability of judicial review, the harm to particular parties which would be caused by the fact that judicial review would not be available, and the harm to third parties if judicial review were to be immediately available. After weighing these factors, Congress specifically determined that judicial review should be available only with respect to certain administrative actions and only at discreet stages in the administrative process.

In considering whether jurisdiction exists pursuant to section 1581(i) in a particular case, the Court should focus upon this detailed statutory scheme in order to determine whether judicial review would either disrupt or complement the scheme. The Court should not hold that it possesses jurisdiction if the existence of jurisdiction would result in judicial review of an administrative action that Congress did not intend to subject to judicial review, or if it would permit judicial review at a stage in the administrative process when Congress did not wish review to occur. In contrast, the Court should hold that jurisdiction does exist if judicial review would complement the statutory scheme instead of disrupting it. The Court adopted this type of approach in decisions such as *Smith-Corona Group* and *British Steel Corp.* when it was called

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495 See Customs Courts Act of 1980; Hearings on H.R. 6394 the Subcomm. on Monopoli-

cies and Commercial Law of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 39-41


CONG. & AD. NEWS 3729, 3731.
on to interpret section 516A in isolation. It should use this same type of approach when it considers the relationship between section 1581(i) and section 516A.

For example, the Court should carefully examine the complaint in a particular case in order to determine whether the plaintiff is in reality attempting to challenge a type of decision that section 516A requires a plaintiff to challenge within a specified period of time. If the Court determines that this is indeed the case, the Court should not permit the plaintiff to circumvent the time limits established by Congress by instituting suit pursuant to section 1581(i).

Similarly, if it appears that the administrative decision that the plaintiff seeks to challenge will be subsumed by a later decision that is specifically subjected to judicial review by section 516A and the alleged error in the administrative decision may serve as a basis for challenging the later decision, then the Court should hold that the decision is not subject to immediate judicial review. This type of determination serves several purposes. It is exactly the type of determination which the legislative history indicates should be made, and it prevents the interposition of judicial review prior to the time Congress specified that judicial review should become available. It also prevents the unnecessary consumption of judicial resources. The alleged error may be corrected in the later decision or the plaintiff may be satisfied with the later decision notwithstanding the existence of the alleged error.


498 See H.R. Rep. No. 1235, 96th Cong., 2d Sess. 48, reprinted in 1980 U.S. Code Cong. & Ad. News 3729, 3760 (court not prohibited from exercising jurisdiction under subsection (i) "so long as the action does not involve a determination specified in section 516A").

In a suit for libel, if the pleadings clearly reveal the existence of a privilege, the action will be dismissed for failure to state a claim upon which relief may be granted. See, e.g., Ducosin v. Mott, 49 Or. App. 369, 371, 619 P.2d 678, 679 (1980) (absolute privilege bars slander recovery), aff'd, 292 Or. 764, 642 P.2d 1168 (1982). A similar result would obtain if the pleadings demonstrate that the action is barred by an affirmative defense, such as the statute of limitations, the statute of frauds, or the doctrine of res judicata. See e.g., Mann v. Adams Realty Co., Inc., 556 F.2d 288, 293 (5th Cir. 1977) (statute of limitations); Oppenheimer Gateway Properties, Inc. v. National R.R. Passenger Corp., 494 F. Supp. 124, 125 (E.D. Mo. 1980) (statute of frauds); Hammer v. Town of Greenburgh, 440 F. Supp. 27, 28-29 (S.D.N.Y. 1977) (res judicata), aff'd without opinion, 578 F.2d 1368 (1978); see also Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (dismissal for failure to state a claim should be granted only when no facts entitling plaintiff to relief can be proved). In contrast, a federal court case that is obviously moot probably should be dismissed for lack of jurisdiction, since federal courts may only decide "cases or controversies." See U.S. Const. art. III, § 2, cl. 1.
Assuming this approach is the proper standard for decision, the opinions in *Royal Business Machines* and *Sacilor*, and the results in *Krupp Stahl*, *PPG Industries*, and *Special Commodity Group* were clearly correct. For example, in *Royal Business Machines*, the agency action involved was certainly final and distinct. Congress had provided two opportunities for judicial review of such actions: one within 30 days of the order's publication, and one upon conclusion of an annual review. The congressional intent that the administrative process should remain undisturbed during the period between these two opportunities for review is clear. To have permitted the plaintiffs in *Royal Business Machines* to obtain judicial review when the action was first brought would have disrupted this congressionally mandated period of repose. Although the plaintiff was harmed by the fact that its merchandise was included, perhaps erroneously, within the scope of the order, this harm could be remedied at the conclusion of the next annual review.

For the same reasons, it is clear that the *Sacilor* decision is correct. The ITA's decision to release the confidential information provided by the foreign producers to the American manufacturers was clearly a final decision. Moreover, the error, if there was one, could not have been corrected at a later stage in the proceedings. Once the information had been disclosed, the foreign producers would have had no recourse—the alleged confidentiality of the information would have been violated, and any challenge to its disclosure would have been moot. Although the availability of judicial review would disrupt the administrative process, such disruption would only have the effect of temporarily depriving the ITA of the comments of the domestic industry on the information. The ITA possessed the information and therefore could analyze it while the litigation proceeded to a decision on the merits. Finally, the harm to third parties, such as members of the domestic industry, caused by the immediate availability of judicial review was relatively minor. The fact that these third parties would be deprived of the opportunity to submit comments pertaining to the information during the litigation would not detract from the ITA's major function in the proceedings. The ITA is an investigatory agency, not an adjudicatory body, and therefore could conduct its own analysis of the information while the litigation proceeded.

The result reached in *Krupp Stahl* is also correct. Since the ITA's failure to take certain information into account in rendering
its preliminary determination might or might not be repeated in the final determination, the administrative decision at issue did not amount to a final decision to ignore the information during the investigation. Even if this error were to have been repeated, however, the final result might still have been satisfactory to the plaintiff. In any event, the harm to the plaintiff caused by the suspension of liquidation and the security requirement could be remedied, in part, upon the issuance of the final determination, should that determination be negative. Finally, interruption of the administrative proceedings at that stage would possibly have required complete revision of the preliminary determination, and would have been highly disruptive.

The results in *PPG Industries* and *Special Commodity Group* also appear to be correct. The actions the plaintiffs sought to challenge in those cases would become subject to judicial review after the completion of the administrative process, so entertaining the cases beforehand would have disrupted the statutory scheme providing for judicial review. It may be argued, however, that these decisions rest on the wrong basis. As the Court noted in *Special Commodity Group*, there is a distinction between dismissal for lack of jurisdiction and dismissal for a failure to state a claim on which relief may be granted. As the Court noted in *American Air Parcel I*, dismissal for lack of jurisdiction relates to the power of the court to entertain a civil action and usually does not operate as a decision on the merits. A dismissal for failure to state a claim on which relief may be granted, in contrast, assumes that the court possesses the power to adjudicate the case on the merits and also indicates that there is some fatal bar to relief, and thus may operate as a judgment on the merits.

In *PPG Industries*, it was clear that the plaintiff, in challenging a subsequent decision that was specifically reviewable according to section 516A, could raise the failure to grant a hearing before the conclusion of the final section 751 review. Similarly, in *Special Commodity Group*, the plaintiff could raise the effect of section 1504 in a suit challenging the final results of the section 751 review, even though those results were specifically subject to review under section 516A. The Court would acquire jurisdiction to entertain the plaintiffs' suit on the merits at a subsequent stage in the administrative process because the administrative decisions at issue ultimately would be incorporated into decisions specifically subject to judicial review. In *PPG Industries* and *Special Com-
modity Group, the Court apparently viewed this potential for subsequent review as a bar to the award of relief upon the merits.

It may be argued, however, that the potential for subsequent review denied the Court the ability to entertain the cases, not merely the ability to render a decision on the merits. The Court previously dismissed, for lack of jurisdiction, cases alleging section 1581(a) jurisdiction that had challenged kinds of Customs Service decisions not specified in section 514.499 The Court also considered the question of whether a challenge to a Customs Service decision of a kind not specified in section 514 may be entertained under section 1581(i), and decided that section 1581(i) jurisdiction did not exist if the plaintiff could invoke the Court's jurisdiction pursuant to section 1581(a) or may be able to do so in the future.500 Arguably, the same result should have been reached in PPG Industries and Special Commodity Group. In each of these cases, the plaintiff ultimately could have raised the issue presented by invoking the Court's jurisdiction pursuant to section 1581(c). The legislative history of section 1581(i), however, very clearly indicates that this section was not intended to confer jurisdiction over this type of civil action.501 Accordingly, the Court should have dismissed the suits in PPG Industries and Special Commodity Group for lack of jurisdiction, rather on the grounds that each plaintiff had failed to state a claim upon which relief could be granted.502

Similar reasoning shows the jurisdictional decision in Ceramica Regiomontana to be erroneous. Since the situation presented therein was no different from the situation presented in Royal Business Machines, the result should have been the same as in that case. The statutory scheme clearly demonstrated that judicial review of the deposit rate at issue in Ceramica Regiomontana was to be available only at two stages of the administrative pro-

500 The appellate court's holding in Uniroyal is an example of a decision denying subsection (i) jurisdiction if subsection (a) jurisdiction could be obtained. See supra notes 372-377 and accompanying text.
502 Cf. British Steel Corp. v. United States, 573 F. Supp. 1145 (Ct. Int'l Trade 1983) (Court lacks § 1581(i) jurisdiction because plaintiff had not complied with the requirements of § 516(A)).
cess: on issuance of the order and on completion of an annual re-
view. Judicial review was not available in the period between those
two stages and therefore should have been denied.

1. Summary

In *PPG Industries* and *Special Commodity Group*, the Court
appeared to construe the jurisdictional scheme established by the
combination of section 1581(c) and section 516A as requiring a
plaintiff to exhaust its administrative remedies before seeking
1581(i) jurisdiction. These cases apparently held that institution of
a section 1581(i) action by a plaintiff that could eventually obtain
access to the Court pursuant to section 1581(c) should be dis-
missed for failure to fulfill this exhaustion requirement. Similarly,
in *Krupp Stahl*, the Court dismissed a challenge to an administra-
tive action instituted pursuant to section 1581(i) for lack of “ripe-
ness,” since the challenged decision would be subsequently incor-
porated into a decision specifically subject to judicial review under
sections 1581(c) and 516A.

The appellate court in *Royal Business Machines* appeared to
adopt a slightly different approach to the relationship between sec-
tions 1581(c) and 1581(i). In that case, the court focused on the
question of whether Congress intended to confer section 1581(i) ju-
risdiction on the Court of International Trade in situations in
which 1581(c) jurisdiction might be invoked, rather than upon the
question of whether the case was “ripe” for decision or whether the
plaintiff would be required to exhaust its administrative remedies.

With the lone exception of the decision in *Ceramica Regi-
omontana*, the Court has rejected every attempt to use section
1581(i) to circumvent the jurisdictional scheme established by the
combination of section 1581(c) and section 516A. This suggests
that the discussion of “ripeness” and exhaustion of remedies found
in various opinions of the Court of International Trade is only
likely to create confusion as to whether the Court will assert juris-
diction in a specific case. Consequently, such discussions are likely
to encourage futile litigation by plaintiffs hoping to convince the
Court that their cases are “ripe” for decision or that the exhaus-
tion of administrative remedies would be futile.

IV. Conclusion

Whether the Court of International Trade and the Federal
Circuit have adopted the correct approach in construing the relationship between sections 1581(a) and 1581(i) and between section 1581(c) and 1581(i) depends largely on whether they have construed correctly the “in addition” phrase in section 1581(i). In this context, the jurisdictional issue to be resolved is whether section 1581(i) applies to cases in which section 1581(i) jurisdiction is alleged by a plaintiff who could have invoked jurisdiction pursuant to section 1581(a) or section 1581(c), or who may be able to do so in the future.

If the “in addition” phrase is construed as indicating that section 1581(i) constitutes a separate grant of jurisdiction, section 1581(i) jurisdiction will exist only when jurisdiction does not exist or could not be invoked in accordance with one of the other subsections of section 1581. Accordingly, section 1581(i) would be viewed as totally inapplicable to the situation in which the plaintiff could have invoked, or can eventually invoke, jurisdiction under the terms of section 1581(a) or section 1581(c). Under this construction of the phrase, Congress could not have intended to confer jurisdiction under section 1581(i) if jurisdiction would or could exist pursuant to another subsection, since all subsections of section 1581 are of equal status. The question of whether it would be difficult or futile for the plaintiff to invoke jurisdiction pursuant to some subsection other than subsection (i) would be totally irrelevant under this construction.

Conceivably, the phrase “in addition” could be construed as conferring upon the Court jurisdiction that is supplementary to that jurisdiction conferred by the other subsections of section 1581. According to this approach, section 1581(i) would apply to every situation to which the other subsections contained in section 1581 are applicable. Thus, the Court would possess discretion to excuse a plaintiff’s failure to invoke jurisdiction pursuant to some subsection other than section 1581(i). For instance, the Court could hold that it possessed jurisdiction pursuant to section 1581(i) if it found that it would be difficult or futile for a plaintiff to invoke jurisdiction pursuant to section 1581(a). Under this construction, section 1581(i) would be superior in status to the other subsections of section 1581.

Yet, there does not appear to be any support for granting section 1581(i) superior status in the legislative history of the Customs Courts Act of 1980; indeed, this view appears to be contrary
to the intent of Congress.\textsuperscript{503} According to decisions such as \textit{Jerlian Watch}, for example, it seems clear that a district court could not have entertained an action such as the one involved in \textit{United States Cane Sugar Refiners} prior to enactment of the Customs Courts Act, since the Customs Court would have possessed exclusive jurisdiction pursuant to the predecessor of section 1581(a).\textsuperscript{504} There is no indication in the legislative history of the Customs Courts Act of 1980 that Congress intended to change this result. Accordingly, the court should have dismissed the action in \textit{United States Cane Sugar Refiners} on the ground that the plaintiff was required to invoke section 1581(a) before turning to section 1581(i). Instead, the court injected confusion into the law by holding that section 1581(i) jurisdiction existed because the jurisdiction conferred by section 1581(a) was "manifestly inadequate."

The fact that sections 1581(a) and 1581(i) are part of the same statute indicates that they are equal in status and that the difference between them should be respected. No one would suggest, for example, that a district court should claim jurisdiction pursuant to 28 U.S.C. § 1331 to entertain a case that ordinarily would be instituted under the Federal Tort Claims Act or the Tucker Act because the statutory provision establishing the jurisdiction to entertain a suit under one of those statutes was "manifestly inadequate." The same principle should apply when the Court is considering the relationship between section 1581(a) and section 1581(i) or between section 1581(c) and section 1581(i). Nonetheless, the Court of International Trade and the Court of Appeals for the Federal Circuit appear to have adopted the view that the jurisdiction conferred by section 1581(i) on the Court of International Trade is to some extent supplementary to the jurisdiction con-

\textsuperscript{503} H. REP. No. 1295, 96th Cong., 2d Sess. 48, \textit{reprinted in} 1980 U.S. \textit{CODE} CONG. \& AD. \textit{NEWS} 3729, 3759-60. When the bill that became the Customs Courts Act of 1980 was considered by the House of Representatives, Representative McClory, the ranking minority member of the subcommittee that reported the bill to the House, stated:

Simply put, subsection (i) is the embodiment of the principle that if a cause of action involving an import transaction exists, other than as provided for in subsections (a)-(h) of proposed section 1581, then that cause of action should be instituted in the U.S. Court of International Trade rather than the Federal district courts or courts of appeal.

126 \textit{CONG. REc.} 26,554 (1980); \textit{see also} H. REP. No. 1296, 96th Cong., 2d Sess. 48, \textit{reprinted in} 1980 U.S. \textit{CODE} CONG. \& AD. \textit{NEWS} 3729-60 (subsection (i) not meant "to create any new causes of action not founded on other provisions of law").

\textsuperscript{504} \textit{See supra} notes 425-427 and accompanying text; \textit{see also supra} note 424 and accompanying text.
ferred on the Court by the other subsections of section 1581.

The implications of this approach are difficult to discern. Cases involving the relationship between section 1581(i) and the other subsections contained in section 1581 are relatively few in number and the case law defining this relationship is still evolving. No doubt a more definitive interpretation of section 1581(i) and its relationship to the other portions of section 1581 will develop in the future. It is to be hoped that the Court will ultimately eliminate the potential for confusion that lurks in its present interpretation of section 1581(i).