

**CLAIMS UNDER THE ADMINISTRATIVE PROCEDURE ACT
BEFORE THE COURT OF INTERNATIONAL TRADE – A
GENERAL OVERVIEW AND ANALYSIS OF SIGNIFICANT
RECENT JURISPRUDENCE**

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At first blush, the subject matter of this paper would seem a particularly anomalous topic for discussion at a conference devoted to the jurisprudence of the U.S. Court of International Trade (“CIT”). After all, among the some four thousand published decisions the CIT has issued since its creation in 1980, relatively few have involved causes of action predicated explicitly on the Administrative Procedure Act (“APA”).¹ One might reasonably ask why we should bother devoting an entire panel discussion to an issue that so infrequently commands the CIT’s attention.

The first answer is that all is not as it seems, and the just-quoted statistic regarding the frequency of APA claims at the CIT is, in fact, misleading. Although very few complaints lodged under the CIT’s residual jurisdiction explicitly cite the APA as the basis for the plaintiff’s cause of action, there is a compelling statutory argument, supported by the Federal Circuit’s recent en banc decision in *Motion Systems Corp. v. Bush*,² that the overwhelming number of claims filed under the CIT’s jurisdictional statute³ (“§ 1581(i)”) are necessarily predicated on the APA. The second answer is that even if one were to take issue with that conclusion, it is worth considering whether the increase in the number of high-profile actions explicitly predicated on the APA in recent years re-

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¹ Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2000).

² *Motion Sys. Corp. v. Bush*, 437 F.3d 1356 (Fed. Cir. 2006), cert. denied, 127 S.Ct. 69 (2006).

³ 28 U.S.C. § 1581(i) (2000).

flects a potential structural change in the content of the Court's docket, or rather is merely coincidental.

To address these issues, this paper first presents a brief statutory analysis of the relationship between APA claims and the CIT's § 1581(i) jurisdiction, followed by a survey of the CIT's § 1581(i) jurisprudence and broad categorization of the types of complaints invoking the Court's jurisdiction under that provision. This paper then analyzes the recent cases in which APA claims have featured prominently at the CIT, and closes with some thoughts regarding to what degree, if any, these cases reflect a structural change in the nature of claims likely to be brought before the CIT in the future.

1. THE RELATIONSHIP BETWEEN THE CIT'S § 1581(i) JURISDICTION AND CLAIMS UNDER THE APA

Although it was assumed otherwise for many years, the Supreme Court settled in *Califano v. Sanders*⁴ that the APA does not constitute an independent grant of subject-matter jurisdiction to challenge agency action in federal courts. Instead, the function of the APA is to provide a limited waiver of sovereign immunity and a cause of action for challenges to certain actions of federal administrative agencies and officials.⁵

Section 702 of the APA provides, in relevant part, that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."⁶ Section 704, in turn, defines the scope of agency actions reviewable under the APA: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."⁷

⁴ *Califano v. Sanders*, 430 U.S. 99 (1977).

⁵ *See id.* at 103-04 (showing that the Court of International Trade ("CIT") and the Federal Circuit have frequently recognized this limitation of the APA); *see also* *PPG Indus., Inc. v. United States*, 696 F. Supp. 650, 655 (Ct. Int'l Trade 1988) (discussing how the APA is not "designed to grant an independent basis for jurisdiction Rather [it] provide[s] for additional remedies where jurisdiction has already been confirmed by statute."); *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1552 (Fed. Cir. 1983) ("The APA does not give an independent basis for finding jurisdiction in the Court of International Trade.") *vacated sub nom.*, *E.C. McAfee Co. v. United States*, 842 F.2d 314 (Fed. Cir. 1988).

⁶ 5 U.S.C. § 702 (2000).

⁷ *Id.* § 704.

Although the Supreme Court has observed that the APA's "'generous review provisions' must be given a 'hospitable' interpretation,"⁸ the APA tends to serve a residual function inasmuch as "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."⁹ Therefore, in the context of CIT litigation, a cause of action predicated on the APA would seem relevant only to the extent that the various statutes referenced in § 1581 do not provide for judicial review of the particular claim. In fact, with one exception, subsections (a)–(h) of § 1581 reference statutes that specifically provide for judicial review by the CIT of the administrative determinations or actions specified therein.¹⁰ The lone exception is § 1581(e), which references section 305(b)(1) of the Trade Act of 1974, a statutory provision that makes no mention of judicial review at the CIT or elsewhere. Claims arising under § 1581(e), therefore, presumably would have to be predicated upon the APA.¹¹ All other claims filed under the CIT's specific jurisdictional grants in §§ 1581(a)–(h) would thus be non-APA claims. Because the overwhelming majority of cases brought before the CIT invoke the Court's jurisdiction

⁸ *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967)).

⁹ *Id.* at 903.

¹⁰ See, e.g., 28 U.S.C. § 1581(a) (2000) (providing that judicial review of the denials of protests against Customs decisions is provided for by 19 U.S.C. § 1515(c) (2000)); 28 U.S.C. § 1581(b) (providing that judicial review of the Secretary of Treasury's determinations on petitions by domestic interested parties under section 1516 is provided for by 19 U.S.C. § 1516(f) (2000)); 28 U.S.C. § 1581(c) (providing that judicial review of certain determinations under section 1516a is provided for by 19 U.S.C. § 1516a(a)(1) & (a)(2)); 28 U.S.C. § 1581(d) (providing that judicial review of determinations of the Secretary of Labor under sections 223, 251, and 271 of the Trade Act of 1974 is provided for by 19 U.S.C. § 2395); 28 U.S.C. § 1581(f) (providing that judicial review of any civil action involving an application for an order directing the Department of Commerce or International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930 is provided for by 19 U.S.C. § 1677f(c)(2)); 28 U.S.C. § 1581(g) (providing that judicial review of the Secretary of Treasury's determinations under sections 641(b)(2) and (3), 641(c)(1), 641(b)(5) and (c)(2), and 641(d)(2)(B) of the Tariff Act of 1930 is provided for by 19 U.S.C. § 1641(e) and judicial review of Customs' decisions under section 499(b) of the Tariff Act of 1930 is provided by 19 U.S.C. § 1499(b)(2)); 28 U.S.C. § 1581(h) (providing that for judicial review of actions that would have been filed under section 515 of the Tariff Act had the actions been filed after the importation).

¹¹ The authors' search revealed that no actions ever have been filed under 28 U.S.C. § 1581(e).

under §§ 1581(a)-(h),¹² the APA will necessarily be of limited relevance in such cases.¹³

In contrast to §§ 1581(a)-(h), § 1581(i) does not reference any specific statutes; rather, it provides for “residual jurisdiction” by the CIT of any action arising out of any law of the United States that falls within enumerated categories and of any action arising out of the administration and enforcement with respect to the matters referred to in §§ 1581(a)-(h).¹⁴ The “residual” nature of § 1581(i) indicates that it is intended to confer jurisdiction upon the CIT where the CIT otherwise would not have jurisdiction under §§ 1581(a)-(h).¹⁵ Since the APA is intended to provide a “residual”

¹² The authors’ tally using the CIT’s Case Management / Electronic Case Files (“CM/ECF”) database showed that most cases before the CIT are brought pursuant to §§ 1581(a)-(h). The CM/ECF System is an online database that allows practitioners to electronically file or download pleadings and other court documents in the CIT proceedings. Three hundred twenty-one actions were commenced before the CIT in the first three quarters of 2006, nearly 80 percent of which were filed under just two provisions: 28 U.S.C. § 1581(a) (showing 186 cases) and 28 U.S.C. § 1581(c) (showing sixty-eight cases). See CM/ECF Database, <http://www.cit.uscourts.gov/cmecf/new-cm-ecf.htm>.

¹³ The fact that the causes of action in cases brought under 28 U.S.C. §§ 1581(a)-(h) are not predicated on the APA does not mean that the APA is wholly irrelevant in such cases. In some instances, the CIT will be required to look to the APA for the standard of review to apply. For example, in *Harak v. United States*, No. 05-00365 (Ct. Int’l Trade July 18, 2006), the CIT held that the standard of review of the APA is applicable to an action brought under 28 U.S.C. § 1581(g) because “the relevant statutes [19 U.S.C. § 1641(e)] are silent regarding the proper standard of review in considering the legal questions in . . . [such] cases” *Harak*, slip op. at 8. The cause of action in *Harak*, however, arose under 19 U.S.C. § 1641, not the APA. In addition, the CIT’s application of the “substantial evidence” standard of review in 28 U.S.C. § 1581(c) cases naturally draws upon jurisprudence regarding the analogous APA standard of review.

¹⁴ See 28 U.S.C. § 1581(i), which provides exclusive jurisdiction for:

any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for: (1) revenue from imports or tonnage; (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

¹⁵ See *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (“Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.”); see also *Abitibi-*

cause of action for challenges to agency action for which judicial review is not otherwise provided by statute, it would seem to follow that most claims heard by the CIT under § 1581(i) would have to be predicated upon the APA.

This conclusion is reinforced by the statutory provisions governing standing and scope and standard of review in cases brought before the CIT. First, a person seeking to bring a claim before the CIT must satisfy the standing requirements set forth in 28 U.S.C. § 2631.¹⁶ Each subsection of 2631 specifies the persons who have standing to bring actions before the CIT under each corresponding subsection of § 1581. With respect to actions brought under § 1581(i), § 2631(i) provides that “[a]ny civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)–(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of § 702 of title 5.”¹⁷ In other words, § 2631(i) allows any person who has standing to bring an APA claim to bring an action under § 1581(i).

Second, 28 U.S.C. § 2640 specifies the scope and standard of review for different actions brought before the CIT. Subsections (a)–(d) of § 2640 set forth the scope and standard of review applicable in actions brought under specific statutes, most of which are those referenced in §§ 1581(a)–(h). Section 2640(e) further states that “[i]n any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5.”¹⁸ Since actions brought under § 1581(i) are not specified in § 2640, the scope and standard of review provided for by the APA under 5 U.S.C. § 706 will apply to actions brought under § 1581(i).

Emerging from the foregoing statutory analysis is a scheme under which (1) persons who have standing to bring APA claims are deemed to have standing to bring claims under the CIT’s §

Consol. Inc. v. United States, 437 F. Supp. 2d 1352, 1356 (Ct. Int’l Trade 2006) (citing *Miller & Co. v. United States*, 824 F.2d 961 (Fed. Cir. 1987)) (“The shorthand rule provides that the Court’s residual jurisdiction under section 1581(i) attaches only if a remedy under another section of 1581 is unavailable or ‘manifestly inadequate.’”).

¹⁶ 28 U.S.C. § 2631.

¹⁷ *Id.* § 2631(i).

¹⁸ *Id.* § 2640(e).

1581(i) jurisdiction; and (2) the scope and standard of review established by the APA are applicable to claims brought under the CIT's § 1581(i) jurisdiction. The parallel residual nature of both § 1581(i) and the APA, with the former providing for "residual" jurisdiction and the latter providing for "residual" causes of action, strongly suggests that Congress intended the APA to be the principal basis for causes of action asserted under § 1581(i).

Early decisions of the CIT support this view. In *Royal Business Machines, Inc. v. United States*,¹⁹ the CIT observed that

it is not difficult to foresee that certain grievances may arise between the final determinations and the administrative review of the final determinations, under 19 U.S.C. § 1675 for which 19 U.S.C. § 1516a would be manifestly inadequate. In those instances, the right of action under 5 U.S.C. § 702 [(the APA)] and the Court's broad residual jurisdiction under 28 U.S.C. § 1581(i) will serve to maintain the comprehensive system of judicial review established by the legislature.²⁰

Similarly, in *Sacilor, Acieries et Laminoirs de Lorraine v. United States*,²¹ the Court found that the domestic industry's attempt to invoke the Court's residual jurisdiction under § 1581(i) to prevent the Commerce Department from disclosing its confidential information was a "conventional challenge to final agency action by an aggrieved party, within the meaning of the Administrative Procedure Act"²²

For its part, the Federal Circuit long has recognized that "[u]nder section 1581(i), the Court of International Trade may conduct review under the general authority of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, but only when review would never be available under one of the other subsections of 28 U.S.C. §

¹⁹ *Royal Bus. Machs., Inc. v. United States*, 507 F. Supp. 1007 (Ct. Int'l Trade 1980), *aff'd*, 669 F.2d 692 (C.C.P.A. 1982).

²⁰ *Id.* at 1015.

²¹ *Sacilor, Acieries et Laminoirs de Lorraine v. United States*, 542 F. Supp. 1020, 1023 (Ct. Int'l Trade 1982).

²² *Id.* at 1023; *see also* *Krupp Stahl AG v. United States*, 553 F. Supp. 394, 396 (Ct. Int'l Trade 1982) ("In the area of antidumping and countervailing duties, as in other areas involving the administration of the tariff laws, if a proper action arises under the Administrative Procedure Act or elsewhere, it is clear that this Court has subject matter jurisdiction under 28 U.S.C. § 1581(i)").

1581, or when the remedy afforded by the other subsections would be 'manifestly inadequate.'"²³

A recent en banc decision of the Federal Circuit in *Motion Systems Corp. v. Bush*²⁴ seems to support the view that claims heard by the CIT under its § 1581(i) jurisdiction must be predicated on the APA or so-called "nonstatutory review."²⁵ In *Motion Systems*, the plaintiff challenged the President's determination not to grant import relief to the domestic pedestal actuator industry under § 421 of the U.S.-China Relations Act of 2000. The CIT concluded that it had jurisdiction to review plaintiff's claims under § 1581(i), and reviewed the President's decision to determine whether his actions involved a "clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority."²⁶ Applying this standard of review to the President's actions, the CIT found no basis for plaintiff's claim and granted summary judgment for the government.

On appeal, the Federal Circuit affirmed the CIT's result, but not its rationale. The Federal Circuit began its analysis by noting that "[t]here is no explicit statutory cause of action granting a petitioner who is denied import relief under section 421 the right to sue the President and the Trade Representative in the Court of International Trade."²⁷ Thus, the Federal Circuit continued, "Motions Systems has only two potential sources for relief: (1) the Administrative Procedure Act ("APA"), 5 U.S.C. § 701; or (2) some form of nonstatutory review."²⁸ The plaintiff conceded that the APA was

²³ *Shakeproof Indus. Prods. Div. of Ill. Tool Works, Inc. v. United States*, 104 F.3d 1309, 1312 (Fed. Cir. 1997).

²⁴ *Motion Sys. Corp. v. Bush*, 437 F.3d 1356 (Fed. Cir. 2006), *cert. denied*, 127 S. Ct. 69 (2006).

²⁵ According to a leading treatise, nonstatutory review procedures "are procedures which, although governed by statute, are general remedies rather than those which arise as specific relief pursuant to an agency statute. . . . [E]xamples [of nonstatutory review remedies] include [mandamus], habeas corpus, injunctions, declaratory relief, and prohibition. . . . [T]hese procedures are [only] remedies, not jurisdictional grants, and . . . only the statute governing mandamus includes a grant of jurisdiction in order to apply the remedy beyond its traditional jurisdiction in the District of Columbia." JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, *ADMINISTRATIVE LAW* § 45.01, 45-12 to -14 (2006).

²⁶ *Motion Sys. Corp. v. Bush*, 342 F. Supp. 2d 1247, 1254-60 (Ct. Int'l Trade 2004) (citation omitted) *aff'd*, 437 F.3d 1356 (Fed. Cir. 2006), *cert. denied*, 127 S.Ct. 69 (2006).

²⁷ *Motion Systems*, 437 F.3d at 1359.

²⁸ *Id.*

unavailable because the President is not an "agency" under the APA, thus leaving it to "resort to some form of nonstatutory review as its only potential source for relief."²⁹ The Federal Circuit concluded that the President's action was nonreviewable because the allegedly violated statute committed the decision to the discretion of the President, and there was "no colorable claim" that the President had exceeded his statutory authority.³⁰

Implicit in the Federal Circuit's analysis is that § 1581(i), although granting the CIT jurisdiction, does not itself establish a cause of action and that plaintiffs must look to the APA or elsewhere when seeking review under that provision. In a lengthy and vigorous concurrence, Judge Gajarsa, joined by Judge Newman, took strong exception to the majority's conclusion that the President's decision was nonreviewable, and reached the merits of the case, reviewing the President's actions employing the same deferential standard of review the CIT had used. In the concurring judges' view, in enacting § 1581(i), Congress intended the President to fall within the category of "officers" identified in the statute, thus authorizing judicial review of Presidential action under trade statutes such as the United States-China Relations Act of 2000³¹ pursuant to nonstatutory review claims.³² Prior to *Motion Systems*, the Federal Circuit had held in *Humane Society of the United States v. Clinton* that § 1581(i) "not only states the jurisdictional grant to the Court of International Trade, but also provides a waiver of sovereign immunity over the specified classes of cases."³³ At least one judge of the CIT had interpreted this statement in *Hu-*

²⁹ *Id.*

³⁰ *Id.* at 1360. As for the USTR, the Federal Circuit summarily concluded that "because the acts of the Trade Representative were not final actions, the Court of International Trade also lacked jurisdiction to review those acts." *Id.* at 1362. The Federal Circuit did not cite § 704 of the APA's requirement that only "final agency action" be reviewable for this conclusion. 5 U.S.C. § 704. Nonetheless, by focusing on the lack of finality of the USTR's actions as a bar to judicial review, the court was implicitly acknowledging that the plaintiff was raising an APA cause of action in its claim against the USTR, who otherwise properly would have been subject to suit as an "officer" of the United States within the meaning of § 1581(i).

³¹ United States-China Relations Act of 2000, 22 U.S.C. §§ 6901-7002 (2000).

³² *Motion Sys. Corp.*, 437 F.3d at 1362-76 (Gajarsa, J., concurring).

³³ *Humane Soc'y of the U.S. v. Clinton*, 236 F.3d 1320, 1328 (Fed. Cir. 2001); accord *Corus Group PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1368 (Fed. Cir. 2003) (holding that § 1581(i) grants jurisdiction to the Court of International Trade).

mane Society as arguably standing for the proposition that § 1581(i) provides a cause of action independent of the APA.³⁴

At bottom, whether § 1581(i) itself creates a cause of action or instead requires claims heard under the CIT's residual jurisdiction to be predicated upon the APA or some form of nonstatutory review is of little practical import, except in cases challenging the actions of the President under discretionary trade statutes where the Supreme Court has held the APA to be inapplicable. If § 1581(i) were deemed to provide a separate cause of action, and if the President were properly considered an "officer" under that provision, then the fact that § 1581(i) created an independent cause of action would have significance in that very limited class of disputes. But since the Federal Circuit has resolved these questions in the negative, the potential distinction now would seem to be largely academic. Nonetheless, considering the statutory analysis presented above, there is a strong case to be made for the proposition that virtually all § 1581(i) claims against agencies or officers other than the President have been and must be predicated upon the APA.

2. A BRIEF HISTORY OF SECTION 1581(i) CLAIMS BEFORE THE CIT

There have been very few cases decided by the CIT where the parties or the Court explicitly stated that the cause of action arose under the APA. Prior to 2004, in the more than two decades following the CIT's creation, only a handful of published decisions explicitly identified the plaintiff's cause of action as being predicated upon the APA.³⁵ In the past three years, the number of such

³⁴ In *Tokyo Kikai Seisakusho, Ltd. v. United States*, 403 F. Supp. 2d 1287, 1292 n.3 (Ct. Int'l Trade 2005), the court wrote:

The complaint invokes this court's jurisdiction under 28 U.S.C. § 1581(i) but does not assert that its [cause of] action arises solely thereunder. *See, e.g., Humane Soc'y of the U.S. v. Clinton*, 236 F.3d 1320, 1328 (Fed. Cir. 2001) (stating that § 1581 is both a waiver of sovereign immunity and a grant of jurisdiction). Construing the complaint as alleging a cause of action under 28 U.S.C. § 1581 would not overcome the jurisdictional shortcomings arising from the lack of ripeness and the potential availability of jurisdiction under 28 U.S.C. § 1581(c)

³⁵ For examples of cases pleading the APA, *see, e.g., Shinyei Corp. of Am. v. United States*, 248 F. Supp. 2d 1350 (Ct. Int'l Trade 2003) (challenging Commerce's liquidation instructions), *rev'd*, 355 F.3d 1297 (Fed. Cir. 2004); *Friedman v. Kantor*, 977 F. Supp. 1242 (Ct. Int'l Trade 1997) (seeking to compel United States agencies to assist plaintiff, a potential importer of merchandise, with his business difficul-

cases has increased, but still very few cases before the CIT plead APA causes of action.³⁶ In a few more, where the plaintiff did not indicate the basis for its claim, the CIT has inferred *sua sponte* that it arose under the APA.³⁷ Although many more cases implicate the

ties in Mexico), *aff'd sub nom.* Friedman v. Daley, 156 F.3d 1358 (Fed. Cir. 1998); Humane Soc'y of the U.S. v. Brown, 920 F. Supp. 178 (Ct. Int'l Trade 1996) (seeking enforcement of High Seas Driftnet Fisheries Enforcement Act with respect to Italy), *aff'd sub nom.* Humane Soc'y of the U.S. v. Clinton, 236 F.3d 1320 (Fed. Cir. 2001); Nakajima All Co. v. United States, 682 F. Supp. 52 (Ct. Int'l Trade 1988) (seeking to direct Commerce to complete and publish various preliminary and final administrative review results in an antidumping duty investigation); Nat'l Corn Growers Ass'n v. Baker, 643 F. Supp. 626 (Ct. Int'l Trade 1986) (challenging Customs' classification of certain imported ethanol brands from Brazil), *rev'd*, 840 F.2d 1547 (Fed. Cir. 1988); Bonanza Trucking Corp. v. United States, 642 F. Supp. 1170 (Ct. Int'l Trade 1986) (challenging Customs' decision to revoke plaintiff's Customs licenses); Sacilor, Acieries et Laminoirs de Lorraine v. United States, 542 F. Supp. 1020 (Ct. Int'l Trade 1982) (seeking to enjoin Commerce from disclosing confidential information that producers had submitted in response to questionnaires in antidumping investigations).

³⁶ See, generally *Tembec I*, 441 F. Supp. 2d 1302 (Ct. Int'l Trade 2006) (challenging USTR's authority to trump a negative ITC determination issued pursuant to binational panel review by implementing an ITC affirmative determination issued under Section 129 of the Uruguay Round Agreements Act), *amended by Tembec II*, 461 F. Supp. 2d 1355 (Ct. Int'l Trade 2006); Shandong Huarong Mach. Co. v. United States, 435 F. Supp. 2d 1261 (Ct. Int'l Trade 2006) (challenging, among others, Commerce's liquidation instructions for failure to include instructions regarding a particular product); Abitibi-Consol. Inc. v. United States, 437 F. Supp. 2d 1352 (Ct. Int'l Trade 2006) (challenging Commerce's use of sampling in selecting respondents in an antidumping duty administrative review); Can. Lumber Trade Alliance v. United States, 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006) (challenging Customs' distribution of antidumping and countervailing duties collected from imports of goods from Canada pursuant to the Byrd Amendment); Auto Alliance Int'l, Inc. v. United States, 398 F. Supp. 2d 1326 (Ct. Int'l Trade 2005) (challenging Customs' imposition of a value advance on plaintiff's entries); Int'l Labor Rights Fund v. United States, 391 F. Supp. 2d 1370, 1370 (Ct. Int'l Trade 2005) (challenging the "federal government's failure to investigate allegation that cocoa imported from Cote d'Ivoire had been produced by forced child labor."); Int'l Custom Prod. v. United States, 374 F. Supp. 2d 1311 (Ct. Int'l Trade 2005) (challenging Customs' reclassification of and imposition of a rate advance on plaintiff's entries), *rev'd in part and vacated in part*, 467 F.3d 1324 (Fed. Cir. 2006); Gilda Indus. v. United States, 353 F. Supp. 2d 1364 (Ct. Int'l Trade 2004) (challenging USTR's compilation and administration of WTO retaliation list), *aff'd in part and vacated in part*, 446 F.3d 1271 (Fed. Cir. 2006).

³⁷ See, e.g. *Tokyo Kikai Seisakusho*, 403 F. Supp. 2d at 1287 (interpreting § 1581 to provide a cause of action independent of the APA); Int'l Custom Prods. v. United States, No. 05-00509, slip op. 05-145 (Ct. Int'l Trade Nov. 8, 2005) (discussing relief for single entry bonds entering into the U.S.); Jilin Henghe Pharm. Co. v. United States, 342 F. Supp. 2d 1301 (Ct. Int'l Trade 2004) (challenging Commerce's liquidation instructions), *vacating as moot*, 123 Fed. Appx. 402 (Fed. Cir. 2005). In *Tokyo Kikai Seisakusho*, for instance, the CIT observed:

APA, it is only by virtue of plaintiffs' referring to the APA in their standing and standard of review arguments, not because they identify the APA as the basis for their claim.³⁸

These statistics are misleading if one accepts the premise set forth in the preceding section, *i.e.*, that with the exception of so-called "nonstatutory review" claims, all claims heard by the CIT under its § 1581(i) jurisdiction necessarily arise under the APA. If that conclusion is correct, then tracing the history of APA claims before the CIT is tantamount to tracing the history of § 1581(i) claims before the CIT.

Although considerably less frequent than actions under §§ 1581(a)-(h), actions commenced under § 1581(i) are not rare. A search of LexisNexis' CIT database reveals that since 1980, there have been more than 160 published CIT opinions in which the parties asserted, and the CIT determined, that it had jurisdiction under § 1581(i).³⁹ The subject matters of these § 1581(i) cases, due to the "catch-all" nature of § 1581(i), are wide-ranging. Nevertheless, a rough categorization can be attempted as follows:

(1) twenty-two cases involved challenges in antidumping and countervailing duty proceedings to the liquidation instructions issued by the Department of Commerce or to the assessment of duties or imposition of cash deposits;⁴⁰

The complaint does not state expressly that plaintiffs are suing under the APA, but it relies on this provision in its allegation of standing. . . . The complaint does not appear to plead a civil action against the United States under any other statute. Accordingly, for purposes of considering defendant's motion to dismiss, the court will construe the complaint to bring an action under the APA.

Tokyo Kikai Seisakusho, 403 F. Supp. 2d at 1292 (citation omitted) (footnote omitted).

³⁸ See, *e.g.*, *Mittal Can., Inc. v. United States*, No. 05-00689, slip op. 2006-143 (Ct. Int'l Trade Sept. 22, 2006); *SKF USA Inc. v. United States*, 451 F. Supp. 2d 1355 (Ct. Int'l Trade 2006).

³⁹ In 2006 alone, there were forty-eight § 1581(i) cases filed with the CIT according to a tally by the authors using the CM/ECF database of the CIT. This number is overstated somewhat in light of the fifteen complaints raising identical issues that have been consolidated in *West Fraser Mills Ltd. v. United States*, Consol. Ct. No. 06-00157 (Ct. Int'l Trade 2006) available at <http://www.cit.uscourts.gov/mecf/new-cm-ecf.htm>.

⁴⁰ See, *e.g.*, *Mukand Int'l, Ltd. v. United States*, 452 F. Supp. 2d 1329 (Ct. Int'l Trade 2006) (challenging Commerce's liquidation instructions); *J.S. Stone, Inc. v. United States*, 297 F. Supp. 2d 1333 (Ct. Int'l Trade 2003) (seeking refund for the difference between the cash deposit rate the exporter received and the published

(2) eighteen cases sought to enjoin the initiation or continuation of antidumping or countervailing duty proceedings;⁴¹

(3) four cases challenged the Department of Commerce's decision either to disclose or withhold certain business proprietary information in antidumping duty proceedings;⁴²

(4) eight cases challenged the Byrd Amendment or its implementation;⁴³

(5) sixty-eight cases challenged the actions of Customs in matters involving entry bonds, collection of taxes, and other miscellaneous Customs issues;⁴⁴ and

(6) forty-one cases were challenges against the determinations or actions of other federal agencies or departments, such as the USTR, the Department of Interior, and the President of the United

rate determined for the exporter), *aff'd*, 111 Fed. Appx. 611 (Fed. Cir. 2004); *Ceramica Regiomontana, S.A. v. United States*, 557 F. Supp. 596 (Ct. Int'l Trade 1983) (seeking to direct Commerce to reduce estimated countervailing duty cash deposit rate).

⁴¹ See, e.g., *Dofasco Inc. v. United States*, 326 F. Supp. 2d 1340 (Ct. Int'l Trade 2004) (unsuccessfully seeking to enjoin the Department of Commerce from continuing an antidumping duty administrative review), *aff'd*, 390 F.3d 1370 (Fed. Cir. 2004); *NEC Corp. v. U.S. Dep't of Commerce*, 978 F. Supp. 314 (Ct. Int'l Trade 1997) (seeking unsuccessfully to enjoin the Department of Commerce from initiating an antidumping duty investigation).

⁴² See, e.g., *Daido Corp. v. United States*, 807 F. Supp. 1571 (Ct. Int'l Trade 1992) (seeking to compel the Department of Commerce to disclose certain confidential information in an antidumping duty administrative review); *Hyundai Pipe Co. v. United States*, No. 87-03-00535 (Ct. Int'l Trade Apr. 1, 1987) (seeking to enjoin the Department of Commerce from disclosing certain business proprietary information in an antidumping duty administrative review).

⁴³ See, e.g., *SKF USA Inc. v. United States*, 451 F. Supp. 2d 1355 (Ct. Int'l Trade 2006) (challenging the Byrd Amendment as violating the First Amendment, Due Process, and Equal Protection guarantees of the Constitution); *PS Chez Sidney L.L.C. v. U. S. Int'l Trade Comm'n*, 442 F. Supp. 2d 1329 (Ct. Int'l Trade 2006) (challenging the Byrd Amendment as violating the First Amendment and Equal Protection guarantees of the Constitution); *Can. Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006) (challenging Customs' collection and distribution of antidumping and countervailing duties collected from duty orders on imports from Canada and Mexico as violating the NAFTA Implementation Act).

⁴⁴ See, e.g., *Int'l Custom Prod. v. United States*, 374 F. Supp. 2d 1311 (Ct. Int'l Trade 2005) (challenging the single entry bonds imposed by Customs on importer's entries); *Princess Cruises, Inc. v. United States*, 217 F. Supp. 2d 1361 (Ct. Int'l Trade 2002) (challenging the assessment and collection by Customs of the Harbor Maintenance Tax on passenger cruise ships), *aff'd*, 397 F.3d 1358 (Fed. Cir. 2005).

States.⁴⁵

If the analysis set forth in this paper is correct, then virtually all of the claims raised in these cases against agencies and officers other than the President necessarily were predicated upon the APA, even though very few explicitly cited the APA as the basis for their cause of action. The fact that the number of CIT actions explicitly pleading APA claims in the past few years has increased, thus, would not seem nearly as indicative of a possible trend in pleading before the CIT as it otherwise might suggest. Nonetheless, it is worth reviewing some of these recent CIT cases in which the plaintiffs' claims were predicated upon the APA to evaluate whether any trend is evident.

3. A REVIEW OF RECENT SIGNIFICANT TRADE-RELATED CASES UNDER SECTION 1581(i)

3.1. *Shinyei Corp. of America v. United States*⁴⁶ and CIT Cases *Interpreting Its Reach*

Shinyei involved an APA challenge to Department of Commerce liquidation instructions that failed to reflect the amended final results of an administrative review following a CIT challenge. *Shinyei* initially filed a complaint with the CIT seeking a writ of

⁴⁵ See, e.g., *U.S. Ass'n of Imps. of Textiles & Apparel v. United States*, 366 F. Supp. 2d 1280 (Ct. Int'l Trade 2005) (seeking review of a decision of the Committee for the Implementation of Textile Agreements to accept "threat-based" requests pursuant to its rules governing consideration of public requests for safeguards on Chinese textile and apparel imports); *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336 (Ct. Int'l Trade 2001) (challenging administrative determinations made by the Secretaries of Commerce, State, and Treasury, as well as the National Oceanic and Atmospheric Administration to implement the 1997 International Dolphin Conservation Program Act), *aff'd*, 330 F.3d 1358 (Fed. Cir. 2003); *Humane Soc'y of the U.S. v. Clinton*, 44 F. Supp. 2d 260 (Ct. Int'l Trade 1999) (seeking to direct defendant President to impose sanctions on Italy for illegal driftnet fishing in violation of the Driftnet Act and to enjoin defendant Secretary of Commerce to rescind his certification of Italy), *aff'd*, 236 F.3d 1320 (Fed. Cir. 2001); *Timex V.I., Inc. v. United States*, 969 F. Supp. 1345 (Ct. Int'l Trade 1997) (challenging a decision by the Secretaries of Commerce and of the Interior affirming a decision by the Director of the Statutory Import Programs Staff of the Department of Commerce denying plaintiff a production incentive certificate), *rev'd*, 157 F.3d 879 (Fed. Cir. 1998).

⁴⁶ See *Shinyei Corp. of Am. V. United States*, 355 F.3d 1297, 1297 (Fed. Cir. 2004) (holding, *inter alia*, that the "statutory protest provision did not preclude relief in form of reliquidation").

mandamus directing the Department of Customs to liquidate its entries at the rate established in the final results, or alternatively a declaration that Commerce's instructions were in violation of 19 U.S.C. § 1675(a)(2), and an order remanding to Commerce to issue correct instructions. Shinyei did not seek a preliminary injunction against liquidation pending a final decision of the CIT. While Shinyei's complaint was pending, its entries were liquidated at the "as entered" rates, which were considerably higher than those established in the final review results. Shinyei then amended its complaint to allege legal error only on the part of Commerce, arguing that the instructions that led to liquidation were in violation of 19 U.S.C. § 1675(a)(2). The CIT granted the United States' motion to dismiss for lack of subject matter jurisdiction on the grounds that Shinyei's claim was rendered moot by the liquidation of its entries.⁴⁷

Upon appeal, the Federal Circuit reversed. Relying on its earlier decision in *Consolidated Bearings Co. v. United States*,⁴⁸ the Federal Circuit concluded that § 1581(i)(4) provided the CIT with jurisdiction over the case because Shinyei's action challenged Commerce's liquidation instructions under Section 702 of the APA, not the underlying final results of the administrative review.⁴⁹ Turning to the merits, the Court first rejected the CIT's holding that it was stripped of jurisdiction once the entries were liquidated because section 516A of the Tariff Act⁵⁰ (and cases interpreting that provision, such as *Zenith Radio Corp. v. United States*⁵¹) prohibited reliquidation. The Federal Circuit acknowledged that *Zenith* stood for the proposition that section 516A of the Tariff Act of 1930 "has no provision permitting reliquidation" and "that '[o]nce liquidation occurs, a subsequent decision by the trial court on the merits of [plaintiff's] challenge can have no effect on the dumping duties assessed on [plaintiff's] entries.'"⁵² However, the Federal Circuit dismissed its relevance to the case at bar because it was an "action under the APA challenging Commerce instructions as in violation

⁴⁷ *Shinyei Corp. of Am. v. United States*, 248 F. Supp. 2d 1350 (Ct. Int'l Trade 2003), *rev'd*, 355 F.3d 1297 (Fed. Cir. 2004).

⁴⁸ *Consol. Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003).

⁴⁹ *Shinyei*, 355 F.3d at 1305.

⁵⁰ See Tariff Act of 1930, 19 U.S.C. § 1654 (1930).

⁵¹ *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983).

⁵² *Shinyei*, 355 F.3d at 1308 (quoting *Zenith*, 710 F.2d at 810).

of section 1675(a)(2)(C); section 516A simply does not apply.”⁵³ Furthermore, the Federal Circuit dismissed the CIT’s concern that allowing Shinyei’s case to proceed would encourage parties to “sleep on their rights” by permitting liquidation to occur, only to try and use § 1581(i) jurisdiction to revive otherwise moot claims.⁵⁴ The Court refused to accept the characterization that Shinyei had slept on its rights, and “reject[ed] the notion that Shinyei was somehow required to seek an injunction to preserve its rights [I]ts suit was not brought under section 516A of the Tariff Act, and the injunction provisions of that statute were not available to it.”⁵⁵

The Federal Circuit also rejected the government’s alternative argument that reliquidation was authorized under the statute only through the protest process set forth in 19 U.S.C. § 1514(a). According to the Court, § 1514(a) only governed decisions of Customs, and could not be “fairly construed to prohibit reliquidation in all cases, particularly when the alleged error is with Commerce instructions as in violation of § 1675(a)(2)(C)”⁵⁶ It rejected the suggestion that the “statute’s silence as to reliquidation in the context of Commerce error can be construed as a prohibition of reliquidation in such cases,” and declined “to find that the statute as a whole was intended to preclude judicial enforcement of court orders after liquidation.”⁵⁷ For both of these reasons, the Federal Circuit reversed and remanded the case to the CIT with instructions to address Shinyei’s claim on the merits.

The Federal Circuit’s decision in *Shinyei* has the potential to be of far reaching significance. By questioning whether its prior holding in *Zenith* was applicable to jurisdiction rulings *at all*, and in any event limiting its reach in such a context to the liquidation and injunction provisions of § 516A, the Court fundamentally altered what most practitioners and CIT judges as well had concluded was settled law for two decades—namely, that the liquidation of entries mooted an underlying challenge in virtually any context. The fear of inadvertent or mistaken (let alone unlawful) liquidation pending a CIT challenge has led counsel for many parties to seek consent injunctions at the outset of CIT litigation to protect their rights pre-

⁵³ *Shinyei*, 355 F.3d at 1309.

⁵⁴ *Id.* (quoting *Shinyei*, 248 F. Supp. 2d at 1360).

⁵⁵ *Id.* at 1309–10.

⁵⁶ *Id.* at 1311.

⁵⁷ *Id.* at 1312.

cisely because of the legion of cases holding that liquidation moots out a cause of action. Although it is too soon to tell whether the decision will substantially affect the strategic choices of litigants seeking redress before the CIT, the reasoning in *Shinyei*, with its emphasis on the APA and the broad remedial powers of the CIT, clearly opens the door for parties to consider new avenues for confronting unlawful agency action in connection with the ubiquitous area of Commerce instructions to Customs in the trade remedy context. Two CIT cases interpreting *Shinyei* provide some insight into the reach that decision may have in the future.

In *Jilin Henghe Pharmaceutical Co. v. United States*,⁵⁸ plaintiffs' entries were subject to an antidumping duty order that later was invalidated by the CIT. Commerce nonetheless instructed Customs to liquidate entries made prior to the "Timken" notice of the contrary court decision at the rate specified in the invalidated determination. Plaintiff challenged Commerce's liquidation instructions as unlawful and initially sought a writ of mandamus requiring Commerce to issue new instructions to Customs to liquidate without duties, which the Court and parties subsequently agreed to treat as motion for declaratory relief.

The CIT first held that it had jurisdiction over the action under § 1581(i),⁵⁹ citing *Shinyei*.⁶⁰ The CIT then addressed the government's argument that absent an injunction against liquidation, §§ 1516a(c)(1) and 1516a(e) required entries remaining unliquidated at the time of the "Timken" notice to be liquidated at the cash-deposit rate, rather than in accordance with the Court's decision. Relying on its earlier decision in *Laclede Steel Co. v. United States*,⁶¹ the CIT rejected this reading of the statutory provisions but also went on to "evaluate the situation anew," in light of the Federal Circuit decision in *Shinyei*.⁶² That case, the CIT concluded, held that Commerce instructions must pass muster under the APA, and, under

⁵⁸ *Jilin Henghe Pharm. Co. v. United States*, 342 F. Supp. 2d 1301, 1309-10 (Ct. Int'l Trade 2004) (holding that once Commerce's final antidumping determination has been invalidated, it cannot serve as a legal basis for the imposition of antidumping duties on Plaintiffs' entries), *vacated*, 123 Fed. Appx. 402 (Fed. Cir. 2005).

⁵⁹ *Id.* at 1304.

⁶⁰ *Shinyei*, 355 F.3d at 1312.

⁶¹ *Laclede Steel Co. v. United States*, 928 F. Supp. 1182 (Ct. Int'l Trade 1996), *aff'd mem.*, 92 F.3d 1206 (Fed. Cir. 1996).

⁶² *Jilin*, 342 F. Supp. 2d at 1309.

the APA standard of review, “an agency action must be ‘in accordance with law,’” and “law” for this purpose includes not only statutes but “a binding court decision.”⁶³ The CIT found that the liquidation instructions at issue in *Jilin* were not in accordance with law because they did not reflect the Court’s prior determination invalidating the underlying antidumping duty order. The Court also held that 19 U.S.C. §§ 1516a(c)(1) and 1516a(e) “cannot be read to legitimate the liquidation of *Jilin*’s entries under Commerce’s now discredited determination. To read the statutory provisions in that way fails to give force and effect to this Court’s decisions, in that it allows liquidations to continue under a legally invalid determination.”⁶⁴ Finally, the Court held that “because this action is predicated upon the APA, the Court need not look to 19 U.S.C. § 1516a(c)(2) alone in search of a remedy,”⁶⁵ and granted declaratory relief in favor of *Jilin*.⁶⁶

If *Jilin* is perceived as embracing unqualifiedly the Federal Circuit’s reasoning in *Shinyei*, the CIT’s subsequent decision in *Mukand International, Ltd. v. United States*⁶⁷ arguably reflects a narrow application of that case.⁶⁸ In *Mukand*, the plaintiff’s entries were subject to an antidumping duty order on Stainless Steel Bar from India (“SSB Order”). *Mukand* did not participate in the first administrative review of the order, but filed an untimely questionnaire response in the second administrative review, leading to an adverse facts available rate. While the administrative reviews were ongoing, *Mukand* began importing SSB produced in the United Arab Emirates (“UAE”) using Stainless Steel Wire Rod (“SSWR”) from India, and submitted a scope ruling request to Commerce seeking clarification as to whether its entries of SSB produced in UAE using SSWR from India were subject to the SSB Order. Although Commerce ultimately concluded that they were not, it failed to initiate the scope inquiry or issue a ruling until two years

⁶³ *Id.* (quoting 5 U.S.C. § 706(2)(A)).

⁶⁴ *Id.*

⁶⁵ *Id.* at 1310.

⁶⁶ *Id.*

⁶⁷ *Mukand Int’l, Ltd. v. United States*, 412 F. Supp. 2d 1312 (Ct. Int’l Trade 2005) *aff’d*, No. 2006-1259, 2007 U.S. App. LEXIS 2520 (Fed. Cir. Feb. 6, 2007).

⁶⁸ *Id.* at 1318-19 (holding narrowly that “that importer’s failure to obtain preliminary injunction, preventing liquidation of its entries pending completion of its requested scope ruling, deprived court of subject matter jurisdiction to grant any post-liquidation relief”).

after Mukand's initial request.⁶⁹

Prior to issuing the scope ruling, Commerce instructed Customs to liquidate Mukand's entries following the completion of the second administrative review, including its entries of SSB produced in UAE using SSWR from India, pursuant to the rate established based on adverse facts available. After Customs liquidated Mukand's entries, Mukand filed a protest with Customs, which was denied. Mukand then filed a complaint against Commerce with the CIT under § 1581(i), seeking a writ of mandamus to compel Commerce to issue a scope determination, suspend any further liquidation and refund duties paid on imports of SSB from UAE.⁷⁰

The CIT first examined whether it had jurisdiction to hear Mukand's claim under § 1581(i). Resurrecting positions that had been rejected in *Shinyei*, the government argued that the Court lacked jurisdiction under § 1581(i) because Mukand could have brought its action under § 1581(a), and because liquidation was final under § 1514(a).⁷¹ The CIT easily rejected these arguments, noting that "Mukand's challenge to Commerce's compliance with its regulatory procedures for reviewing scope determinations is not an action available to Mukand under § 1581(a),"⁷² and that "Customs' implementing decision was not a protestable decision within the meaning of § 1514"⁷³

The CIT nonetheless concluded that it was precluded from reviewing Mukand's claim for reliquidation.⁷⁴ Somewhat surprisingly, the CIT began its analysis by citing the Federal Circuit's decision in *Zenith*⁷⁵ and the CIT's decision in *Mitsubishi Electronics Am., Inc. v. United States* for the proposition that once liquidation occurs, the cause of action is moot because the entries are outside the court's jurisdiction.⁷⁶ These, of course, were the very two deci-

⁶⁹ See *id.* at 1313-14 (explaining the factual background of the case).

⁷⁰ See *id.* (describing the facts as set forth in the case).

⁷¹ See *id.* at 1315-16 (summarizing generally the court's position and the holding in the case).

⁷² *Id.* at 1316.

⁷³ *Id.* at 1317.

⁷⁴ *Id.*

⁷⁵ *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983).

⁷⁶ See *Mitsubishi Electronics Am., Inc. v. United States*, 848 F. Supp 193 (Ct. Int'l Trade 1994), *aff'd on other grounds*, 44 F.3d 973, 977 (Fed. Cir. 1994) (holding that failure to seek an injunction before liquidation resulted in the court having no jurisdiction over the complaint).

sions the Federal Circuit found inapplicable in *Shinyei* to a challenge to Commerce's liquidation instructions under § 1581(i). Based on the reasoning in those two decisions, however, the CIT held that Mukand's failure to "seek injunctive relief prior to the liquidation of its entries of SSB from UAE preclude[d] the Court from exercising . . . jurisdiction to consider its refund request."⁷⁷

The CIT distinguished *Shinyei* on the grounds that the plaintiff in that case had not slept on his rights, while "Mukand filed an application for a scope ruling request, but failed to seek an injunction pending a Commerce scope ruling, even after it become [sic] clear that its entries would be liquidated before Commerce responded."⁷⁸ The CIT's concern regarding the potential for claims such as that of Mukand's to undermine the efficiency of the administrative and judicial processes is legitimate, and it reflects a robust body of jurisprudence in the CIT and Federal Circuit.⁷⁹ In the Authors' view, however, the CIT's focus on the diligence of plaintiffs in pursuing their rights and administrative efficiency was irrelevant to its holding that it lacked jurisdiction over Mukand's action and disregarded the Federal Circuit's reasoning in *Shinyei*, questioning whether *Zenith* applied to questions of jurisdiction *at all*, let alone its conclusion that "[n]either section 516A nor *Zenith* can be read to preclude reliquidation in actions brought under the APA seeking corrected [liquidation] instructions," in circumstances where the allegation is that Commerce failed to comply with its organic statute.⁸⁰

The Federal Circuit affirmed the CIT's decision on appeal, although effectively on other grounds.⁸¹ The Federal Circuit began its analysis by noting that "the parties interpret the trial court's decision as dismissing the action for lack of jurisdiction based on Customs' liquidation of the subject entries."⁸² Surprisingly, the

⁷⁷ *Mukand*, 412 F. Supp. 2d at 1317.

⁷⁸ *Id.* at 1319.

⁷⁹ The CIT relied heavily on the Federal Circuit's decision in *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998) in support of its conclusion that allowing Mukand to proceed with its claim would impair "the twin purposes" of administrative exhaustion, i.e., protecting administrative agency authority and promoting judicial efficiency. *Mukand*, 412 F. Supp. 2d at 1319.

⁸⁰ *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004).

⁸¹ *Mukand Int'l, Ltd. v. United States*, No. 2006-1259, 2007 U.S. App. LEXIS 2520 (Fed. Cir. Feb. 6, 2007).

⁸² *Id.* at *7.

Federal Circuit disagreed with the parties' shared understanding of the CIT's holding and instead interpreted it as "a ruling on the merits of the mandamus petition."⁸³ Significantly, however, the Federal Circuit went on to clarify that even if it were mistaken, its recent decision in *Shinyei* "makes clear that the effect of liquidation under the injunction and liquidation provisions of section 516A does not divest the Court of International Trade of section 1581(i)(4) jurisdiction over an otherwise proper action for reliquidation. The trial court therefore had jurisdiction to consider the merits of this mandamus action."⁸⁴ On the merits, the Federal Circuit held that *Mukand* was not entitled to the "drastic and extraordinary remedy" of mandamus because it had failed to pursue alternative remedies, including filing a § 1581(i) action seeking injunctive relief against Commerce prior to liquidation.⁸⁵ While confirming that *Shinyei* stood for the proposition that failure to seek injunctive relief prior to liquidation did not divest the CIT of jurisdiction, the Federal Circuit distinguished *Shinyei* as an instance where the plaintiff had availed itself of alternative remedies prior to liquidation, including by filing a mandamus action.⁸⁶

The Federal Circuit's decision in *Mukand* is important in two respects. First, it unqualifiedly confirms the holding in *Shinyei* that notwithstanding the seminal decision in *Zenith* that liquidation divests the CIT of jurisdiction in §§ 1581(a) and (c) cases, it does not do so in reliquidation actions brought under § 1581(i)(4). After *Mukand*, there no longer can be any question whether the CIT possesses jurisdiction to hear properly pled reliquidation claims. Second, it may reflect a warning to plaintiffs not to interpret the Federal Circuit's willingness to interpret § 1581(i)'s jurisdictional reach broadly to encompass reliquidation claims as an indication that it has a similarly expansive attitude towards the merits of such claims. Indeed, *Mukand* suggests that a plaintiff assumes considerable risk that a reliquidation claim will be rejected on the merits if it was in a position to seek injunctive or other relief prior to liquidation, but failed to do so.

⁸³ *Id.*

⁸⁴ *Id.* at *7-*8.

⁸⁵ *Id.* at *8.

⁸⁶ *Id.* at *9-*11.

3.2. Tembec, Inc. v. United States⁸⁷

This consolidated case presented the CIT with important questions of first impression relating to the authority of USTR to give domestic law effect to ITC affirmative determinations issued in response to adverse rulings by the World Trade Organization and the effect of NAFTA binational panel decisions leading to the invalidation of antidumping and countervailing duty orders. Plaintiffs' complaints first challenged the authority of USTR to implement an affirmative ITC injury determination issued under § 129 of the Uruguay Round Agreements Act ("URAA").⁸⁸ USTR had ordered Commerce to implement the ITC § 129 determination notwithstanding the ITC's prior issuance of a negative determination following binational panel review, and Commerce relied on the implemented determination to maintain the antidumping and countervailing duty orders on softwood lumber. Plaintiffs also challenged the government's position that 19 U.S.C. § 1516a(g)(5)(B) required Commerce to liquidate all pre-*Timken* notice entries on the basis of the invalidated orders, even though all entries remained suspended by operation of law.⁸⁹

The CIT concluded that it had subject matter jurisdiction over the case under § 1581(i), as plaintiffs were challenging the administration and enforcement of the ITC § 129 determination, not the substance of the § 129 determination itself.⁹⁰ It then addressed whether Congress had authorized a private right of action to challenge USTR's interpretation of § 129, beginning with the well established principle that "[u]nder the APA, courts presume a private right of action is available absent 'any indication in the statute that the [agency] decision is committed wholly to the discretion of the agency or that review is otherwise precluded.'"⁹¹ The Court then turned to the government's claim that this presumption was

⁸⁷ *Tembec I*, 441 F. Supp. 2d 1302 and *Tembec II*, 461 F. Supp. 2d 1355 (Ct. Int'l Trade 2006).

⁸⁸ 19 U.S.C. § 3538(a) (1995). See also *Tembec I*, 441 F. Supp. 2d at 1311 ("Plaintiff Tembec filed a summons and complaint in this Court on January 19, 2005, alleging under section 702 of the Administrative Procedure Act ("APA") that the USTR's action ordering Commerce to implement the Section 129 Determination was not in accordance with law.")

⁸⁹ See *Tembec II*, 461 F. Supp. 2d 1355.

⁹⁰ *Tembec I*, 441 F. Supp. 2d at 1317-18.

⁹¹ *Id.* at 1318 (quoting *Bell v. New Jersey*, 461 U.S. 773, 778 (1983)).

overcome in the case at bar because Congress had barred private suits to enforce NAFTA (or challenge agency action taken to implement a binational panel decision) or to enforce the terms of the URAA.⁹²

The Court rejected the first argument on the grounds that plaintiffs' claims do not arise from NAFTA. Instead, pursuant to the APA, plaintiffs contest the USTR's interpretation of § 129, which was passed as part of the URAA. The Court thus held that the jurisdictional bars of 19 U.S.C. §§ 1516a(g) and 3312(c) did not apply.⁹³ The Court also rejected the government's argument that 19 U.S.C. § 3512(c)(1) precluded plaintiffs' suit, relying heavily on the exhaustive analysis of a similar issue in *Canadian Lumber Trade Alliance v. United States*.⁹⁴ The Court held that § 3512 was inapplicable because "section 129 is domestic legislation that implements, but does not approve, the Uruguay Round Agreements."⁹⁵ The Court also noted that "the structure of the URAA is designed to ensure the participation of all interested parties, including parties such as Plaintiffs" and refused to infer "that, despite Congress' clearly expressed intent to promote the participation of interested foreign parties in the section 129 process, it nevertheless intended to preclude review of whether the USTR's order to implement the results of that process is in accordance with law."⁹⁶

The Court also concluded that plaintiffs met their burden of showing that their claims fell within the "zone of interests" of § 129, an additional requirement the courts have imposed on plaintiffs bringing suit under the APA, which is derived from the requirement in § 702 that a plaintiff be "adversely affected or aggrieved" by the challenged agency action.⁹⁷ The government had argued that it alone fell within the zone of interests of § 129, because the statute "creates only procedures for the Political Branches to consult with each other in order to frame the United

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006). See *Tembec I*, 441 F. Supp. 2d at 1318-20 (discussing the government's failure to recognize the distinction between implementing legislation and approving legislation).

⁹⁵ *Tembec I*, 441 F. Supp. 2d at 1319.

⁹⁶ *Id.* at 1320.

⁹⁷ See *id.* at 1323 (providing a detailed analysis of the "zone of interests" requirement).

States' response to adverse WTO reports."⁹⁸ The Court observed that "Defendants' argument focuses on the procedural rights created by section 129, but misses the proper object of inquiry—the substantive interests to be protected by those procedural rights."⁹⁹ In the Court's view, the substantive interest was "ensuring that new section 129 determinations are implemented in accordance with U.S. law," and plaintiffs "have a protected interest in the proper administration of section 129" by virtue of their status as "interested parties" in trade proceedings who were subject to anti-dumping and countervailing duty orders.¹⁰⁰ The Court also rejected the government's argument that plaintiffs' claims raised a political question: "The court is neither called upon to make trade policy, nor to direct the USTR as to whether any section 129 determination should be implemented. Rather, the court is merely asked to determine the bounds of USTR's authority to order implementation."¹⁰¹

On the merits, the Court held that the language and structure of § 129, its legislative history and its purpose all supported the conclusion that Congress had not expressly or impliedly authorized the USTR to implement an affirmative ITC determination under § 129.¹⁰² In a subsequent opinion, the Court entered final judgment in favor of plaintiffs, and ordered the defendants, among other things, to revoke all of the orders on softwood lumber, to liquidate all unliquidated entries covered by the orders in accordance with the ITC negative remand determination, to refund all cash deposits with accrued interest, and to terminate all ongoing administrative proceedings related to the orders.¹⁰³

3.3. *Abitibi-Consolidated Inc. v. United States*¹⁰⁴ and *Tokyo Kikai Seisakusho, Ltd. v. United States*¹⁰⁵

In *Abitibi*, plaintiffs challenged Commerce's use of sampling to select respondents in an administrative review of the antidumping

⁹⁸ *Id.* (citation omitted).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1324–25.

¹⁰¹ *Id.* at 1327.

¹⁰² *Id.* at 1331–42.

¹⁰³ *Tembec II*, 461 F. Supp. 2d 1355.

¹⁰⁴ 437 F. Supp. 2d 1352 (Ct. Int'l Trade 2006).

¹⁰⁵ 403 F. Supp. 2d 1287 (Ct. Int'l Trade 2005).

duty order on imports of softwood lumber products from Canada.¹⁰⁶ Due to the large number of companies in the review, Commerce decided to limit the number of respondents using a “probability proportional to size” sampling method pursuant to 19 U.S.C. § 1677f-1(c)(2)(A).¹⁰⁷ Plaintiffs were not selected, and their voluntary responses to Commerce’s questionnaires were not examined. Rather than await the final results of the review, plaintiffs commenced a challenge to Commerce’s respondent selection, seeking to direct Commerce to accept plaintiffs as voluntary respondents or, alternatively, preliminarily enjoin the third review pending selection of a statistically valid sample or selection of the largest exporters and producers.¹⁰⁸

Plaintiffs asserted that their action arose under the APA and that the CIT had jurisdiction over their action under § 1581(i). However, the CIT denied § 1581(i) jurisdiction and dismissed the action on ripeness grounds.¹⁰⁹ As for plaintiffs’ voluntary respondent claim, the CIT held that to obtain certain information necessary for applying the standard of review properly, it “would have to remand the matter to Commerce and disrupt the administrative proceeding.”¹¹⁰ As for the plaintiffs’ sampling claim, the CIT held that “immediate judicial intervention in the [administrative] review is inappropriate because further development of the administrative record will enable more efficient judicial review of Commerce’s sampling methodology than at present.”¹¹¹ Finally, the CIT rejected plaintiffs’ argument that their remedy under § 1581(c) was manifestly inadequate and concluded that § 1581(c) was the exclusive means of judicial review for plaintiffs’ claim.¹¹²

In another recent case, *Tokyo Kikai Seisakusho*, the CIT reached the same conclusion as in *Abitibi*, although the CIT in *Tokyo Kikai Seisakusho* grounded its rationale for denying § 1581(i) jurisdiction more explicitly in the APA jurisprudence.¹¹³ In *Tokyo Kikai Seisaku-*

¹⁰⁶ *Abitibi*, 437 F. Supp. 2d at 1354.

¹⁰⁷ *Id.* at 1355.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1357-58.

¹¹⁰ *Id.* at 1359.

¹¹¹ *Id.* at 1360.

¹¹² *Id.* at 1360-62.

¹¹³ See *Tokyo Kikai Seisakusho*, 403 F. Supp. 2d at 1292-93 (Ct. Int’l Trade 2005) (discussing the court’s decision to “construe the complaint to bring an action un-

sho, the CIT denied § 1581(i) jurisdiction over a challenge to the self-initiation and continuation by Commerce of an antidumping changed circumstance review. In that case, following the receipt of information developed at a civil trial in a U.S. district court indicating that certain Japanese producers of large newspaper printing presses were engaged in fraudulent pricing behaviors, Commerce initiated the antidumping changed circumstance review despite the fact that there was no antidumping duty order in place with respect to those Japanese producers.¹¹⁴ The Japanese producers brought suit against Commerce, challenging Commerce's authority to self-initiate the changed circumstance review and seeking to enjoin Commerce from continuing the review.¹¹⁵

The plaintiffs invoked § 1581(i) jurisdiction. In addressing the jurisdiction issue, the CIT first determined that, "[a]lthough its wording is less than clear in specifying its cause of action, plaintiffs' complaint can be construed to bring a civil action against the United States under the Administrative Procedure Act."¹¹⁶ However, noting that the APA only authorizes suits against final agency actions, the CIT concluded that the "plaintiffs' challenge to the agency action [was] not yet fit for judicial decision because Commerce's initiation of the changed circumstances review [was] a preliminary agency action."¹¹⁷ Furthermore, the CIT held that withholding court consideration would not cause a hardship to plaintiffs because participation in the changed circumstances review only required that plaintiffs file a brief as an interested party in the proceeding, which was "not a significant burden."¹¹⁸ Therefore, the CIT denied § 1581(i) jurisdiction and dismissed the action.

The outcomes in *Abitibi* and *Tokyo Kikai Seisakusho* illustrate the heavy burden plaintiffs face when trying to use § 1581(i) jurisdiction to challenge Commerce action in an antidumping or countervailing duty proceeding prior to the issuance of the final determination. As reflected in the CIT's opinions in these two cases, the CIT's willingness to entertain such claims under its § 1581(i) jurisdiction hinges on its assessment of the ripeness of the claims and

der the APA").

¹¹⁴ *Id.* at 1288.

¹¹⁵ *Id.* at 1288–89.

¹¹⁶ *Id.* at 1292.

¹¹⁷ *Id.* at 1293.

¹¹⁸ *Id.*

whether relief available under other subsections of § 1581 after the completion of the proceeding would be manifestly inadequate, two hurdles that plaintiffs rarely are able to overcome.

3.4. *The Byrd Amendment Cases*

In 2006, the CIT issued several decisions in cases raising claims implicating the Continued Dumping and Subsidy Offset Act ("Byrd Amendment"). Representative cases are *Canadian Lumber Trade Alliance v. United States*,¹¹⁹ *PS Chez Sidney, LLC v. United States Int'l Trade Comm'n*,¹²⁰ and *SKF USA Inc. v. United States*.¹²¹

In *Canadian Lumber Trade Alliance*, Canadian exporters and the Government of Canada brought an APA claim challenging Customs' distribution under the Byrd Amendment of antidumping and countervailing duties imposed on imports from Canada as violating § 408 of the NAFTA Implementation Act.¹²² That provision provides that "[a]ny amendment . . . [to] title VII of the Tariff Act of 1930 [19 U.S.C. §§ 1671 et seq.], or any successor statute . . . shall apply to goods from a NAFTA country only to the extent specified in the amendment."¹²³ Canadian exporters contended that, since the Byrd Amendment amended Title VII of the Tariff Act of 1930 but failed to specify its applicability to Canada or Mexico, it should not be applicable to goods from Canada and Mexico.¹²⁴

The CIT first held it had jurisdiction under § 1581(i) to hear the Canadian parties' claim, and Canadian exporters, but not the Government of Canada, had standing to state a cause of action under the APA.¹²⁵ As for the merits, the CIT found that the application of the Byrd Amendment to Canadian and Mexican goods conflicted with the express language of 19 U.S.C. § 3438.¹²⁶ The CIT held that the Byrd Amendment, when read in light of § 3438, authorizes distribution to be made from duties collected pursuant to antidumping and countervailing duty orders, except for duty orders on

¹¹⁹ 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006).

¹²⁰ 442 F. Supp. 2d 1329 (Ct. Int'l Trade 2006).

¹²¹ 451 F. Supp. 2d 1355 (Ct. Int'l Trade 2006).

¹²² *Canadian Lumber Trade Alliance*, 425 F. Supp. 2d at 1321.

¹²³ 19 U.S.C. § 3438 (2000).

¹²⁴ *Canadian Lumber Trade Alliance*, 425 F. Supp. 2d at 1330.

¹²⁵ *Id.* at 1335-52.

¹²⁶ *Id.* at 1363, 1366.

goods from Canada and Mexico.¹²⁷ Accordingly, it entered a declaratory judgment that the Byrd Amendment did not apply to goods from Canada and Mexico and permanently enjoined Customs from distributing any further duties derived from the orders on softwood lumber, hard red spring wheat, and magnesium from Canada.¹²⁸

In *PS Chez Sidney*, the plaintiff—a domestic crawfish producer—indicated in a preliminary questionnaire that it supported a petition for an antidumping investigation of crawfish imports but indicated in a final questionnaire that it took no position on the investigation.¹²⁹ The ITC and Customs determined that the producer was not an affected domestic producer entitled to distribution under the Byrd Amendment because it did not indicate its support for the antidumping investigation. The plaintiff brought suit before the CIT challenging the agencies' determinations.

After its non-constitutional arguments were rejected by the CIT, the plaintiff challenged the Byrd Amendment as violating the First Amendment of the Constitution, as it was denied the government subsidy based on its opinion expressed in the questionnaire. The CIT first held that it had § 1581(i) jurisdiction to hear the plaintiff's constitutional arguments.¹³⁰ After going through an exhaustive First Amendment analysis, the Court held that, under strict scrutiny, the requirement for an expression of support for antidumping investigations as a condition for receipt of government benefits was facially unconstitutional.¹³¹

In *SKF USA*, another case challenging the Byrd Amendment on constitutional grounds, the ITC and Customs determined that plaintiff, a domestic producer, was not an "affected domestic producer" within the meaning of the Byrd Amendment because it had opposed the petition in its questionnaire response in the original antidumping duty investigation.¹³² Plaintiff challenged the determination on the grounds that the Byrd Amendment violated the plaintiff's rights under the First Amendment and the Due Process and Equal Protection clauses of the Constitution.

¹²⁷ *Id.* at 1373.

¹²⁸ *Id.*

¹²⁹ *PS Chez Sidney*, 442 F. Supp. 2d at 1331.

¹³⁰ *Id.* at 1333.

¹³¹ *Id.* at 1340–59.

¹³² *SKF USA*, 451 F. Supp. 2d at 1356.

The CIT first held that it had jurisdiction over the case under § 1581(i), and that the standard of review of the APA was applicable.¹³³ The CIT went on to hold that the requirement in the Byrd Amendment that an entity such as SKF USA had to support an antidumping petition to be included as an “affected domestic producer” violates the Equal Protection guarantee of the Constitution, as the classification “treats similarly situated domestic producers differently and is not rationally related to a legitimate government objective.”¹³⁴ After striking down the provision defining “affected domestic producer” as violating the Equal Protection Clause of the Constitution, the Court found it unnecessary to address plaintiff’s other constitutional arguments and proceeded to remedies.¹³⁵ With respect to the question of remedy, the Court found the unconstitutional provision severable from the Byrd Amendment and remanded the matter back to the ITC and Customs for review of their decisions in accordance with its opinion.¹³⁶

4. THE FUTURE OF APA CLAIMS BEFORE THE CIT

As the above analysis has shown, there is a compelling argument that virtually all claims heard by the CIT under its § 1581(i) jurisdiction are APA claims, despite the fact that plaintiffs in their complaints and the CIT in its decisions rarely acknowledge it so explicitly. Thus, although the number of § 1581(i) cases explicitly raising APA claims has increased lately, it is difficult to read too much into that trend. Similarly, although the number of § 1581(i) cases filed at the CIT in recent years seems to have increased a substantial amount, it is difficult to attribute too much significance to this apparent trend given the relatively large number of § 1581(i) cases triggered by just two events: 1) the imposition of the anti-dumping and countervailing duty orders on softwood lumber from Canada; and 2) the enactment of the Byrd Amendment. When these cases are excluded from the calculus, there does not appear to be a statistically significant increase in the number of § 1581(i) cases on the Court’s docket in recent years.

In the authors’ view, however, the Federal Circuit’s decision in

¹³³ *Id.*

¹³⁴ *Id.* at 1366.

¹³⁵ *Id.* at 1362.

¹³⁶ *Id.* at 1364.

Shinyei is a seminal case that could significantly change the landscape of litigation under the Court's residual jurisdiction in the future for two reasons. First, the Court unambiguously reaffirmed its decision in *Consolidated Bearings* that challenges to Customs' liquidation instructions are distinct from challenges to the underlying antidumping or countervailing duty determinations. Furthermore, the Court reaffirmed that plaintiffs can bring APA claims seeking reliquidation under § 1581(i). Given the relative frequency with which erroneous or unlawful liquidation instructions are issued, the Federal Circuit's holding that liquidation does not make moot a plaintiff's cause of action should lead to court challenges in circumstances that most practitioners previously would have concluded lacked any foundation. The Federal Circuit's recent decision in *Mukand* unambiguously reaffirmed the holding in *Shinyei* that a plaintiff's failure to seek injunctive relief prior to liquidation did not divest the CIT of jurisdiction over reliquidation claims, while at the same time arguably narrowing the instances in which such reliquidation claims are likely to prevail on the merits. Second, and more generally, the Federal Circuit's emphasis in *Shinyei* that under the APA agency action must be "in accordance with law," and that "law" includes the binding decisions of this Court and the Federal Circuit—a reminder one would not have considered necessary—may give potential litigants added confidence that legitimate claims of unlawful agency conduct will not be dismissed quite as quickly by the CIT as they may have been in the past. The CIT's decision in *Jilin* is perhaps the best illustration of a subsequent decision embracing that aspect of the Federal Circuit's decision in *Shinyei*.

In the future, the CIT also is likely to see more APA claims under its § 1581(i) jurisdiction as questions arise regarding the administration and enforcement of both existing and new trade legislation that does not specifically provide for judicial review by the CIT. One would expect, for example, that given the proliferation of WTO challenges to determinations of the ITC and Commerce Department, that *Tembec* will not be the only instance in which the CIT is called upon to address the scope of the USTR's authority under § 129, and that it will confront in particular questions regarding the implementation of § 129 determinations issued by Commerce.