

The Interplay of Jurisdiction Under 28 U.S.C. § 1581(a) Versus § 1581(i)*

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The subject matter jurisdiction of the U.S. Court of International Trade (“CIT”) is provided for by 28 U.S.C § 1581. An issue of frequent litigation is whether the proper basis of jurisdiction has been alleged, and, in the context of customs litigation, the two subparagraphs of § 1581 most frequently invoked by litigants are subparagraphs (a) and (i). This article discusses the parameters of § 1581 jurisdiction under these two provisions, the clear demarcation of jurisdiction between them, and the advantages of judicial review under subparagraph (a) as compared to (i).

To begin, 28 U.S.C § 1581(a) and (i) provide as follows:

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

* * *

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for--

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

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This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

A. Judicial Review Under Subparagraph § 1581(a)

There are several actions taken by U.S Customs and Border Protection (“Customs”) as part of the importing process that are routinely challenged by the importer. Congress created an express scheme, embodied by 28 U.S.C. § 1581(a) and 19 U.S.C. § 1514, for the importer to challenge these actions. *See Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1291 (Fed. Cir. 2008) (“*Hartford*”) (“In subsection 1581(a), Congress set out an express scheme for administrative and judicial review of Customs’ actions.”) (citations omitted). Pursuant to this scheme, the importer is required to protest the administrative decision and present all challenged issues related to the decision to the agency. Should the agency deny the protest in whole or in part, or should the protest become deemed denied (for example, by operation of 19 U.S.C. § 1515(b)), the importer may commence a civil action under 28 U.S.C. § 1581(a) to have the CIT review the import transaction. 28 U.S.C. § 1581(a).

The various administrative decisions that are protestable are enumerated in 19 U.S.C. § 1514(a), and 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 [19 U.S.C. § 1337];
- (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof,

including the liquidation of an entry, pursuant to either [19 U.S.C. § 1500] or [19 U.S.C. § 1504];
(6) the refusal to pay a claim for drawback; or
(7) the refusal to reliquidate an entry under subsection (d) of [19 U.S.C. § 1520].

19 U.S.C. § 1514(a).

While these seven decisions are the only protestable decisions enumerated by statute, Congress intended for the review of these protestable decisions to be all encompassing. Section 1514(a) provides, in relevant part, that Customs' decisions, "including the legality of all orders and findings entering into the same, as to [the decisions enumerated in § 1514(a)(1)-(7)] shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced" in the CIT in a timely manner. 19 U.S.C. § 1514(a).

By expressing that all "decisions," including the legality of all orders and findings entering into the same, "as to" the enumerated categories of § 1514(a) are covered by the statute, Congress did not limit the CIT's review solely to the enumerated decisions. Rather, section 1514(a) is broader, and covers all decisions made by Customs "as to"— or, in other words, "relating to" the protestable action. Accordingly, as part of the judicial review of the protestable decision, the Court is permitted to review all orders and findings entering into the same. *See, e.g., Ford Motor Co. v. United States*, 286 F.3d 1335 (Fed. Cir. 2002) (reviewing a challenge to the agency's extension of liquidation in the context of § 1581(a) after the liquidation has occurred and the importer has exhausted the administrative protest remedies).

While judicial review under § 1581(a) is all encompassing, "[s]ection 1581(a) provides no jurisdiction for protests outside [the] exclusive categories" of § 1514(a). *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994) (citations omitted). Thus, the

“orders and findings” related to the protestable decision are not, in and of themselves, protestable determinations. Rather, these orders and findings become subsumed into the protestable decision, and to the extent a party seeks review of such an order or finding, the appropriate course of action is to protest the decision specified by § 1514(a)(1)-(7), and then raise the ancillary challenge to the subsumed event as part of the protest.

Liquidation of an entry is a useful example to illustrate this point. “Liquidation is ‘long honored in customs procedure as the final reckoning of an importer’s liability on an entry.’” *Travenol Lab., Inc. v. United States*, 118 F.3d 749, 753 (Fed. Cir. 1997) (citation omitted); *see also* 19 C.F.R. § 159.1 (defining liquidation). In the context of § 1581(a) litigation, liquidation is the quintessential protestable decision.

At the moment of liquidation, “all decisions of the collector involved in the ascertaining and fixing the rate and amount of duties chargeable against imported merchandise entered for consumption are merged in and become a part of a legal liquidation, and it is a legal liquidation only . . . against which a protest will lie.” *Dow Chem. Co. v. United States*, 10 CIT 550, 557, 647 F. Supp. 1574, 1581 (1986) (quoting *Dart Export Corp. v. United States*, 43 CCPA 64, 73 (CCPA 1956)); *see also United States v. Utex Int’l, Inc.*, 857 F.2d 1408, 1410 (Fed. Cir. 1988) (“All findings involved in a district director’s decision merge in the liquidation. It is the liquidation which is final and subject to protest, not the preliminary findings or decisions of customs officers.”) (citation omitted).

Protestable decisions, like liquidation, become final and conclusive unless the claimant files an administrative protest or, if necessary, commences a civil action pursuant to 28 U.S.C. § 1581(a) in a timely fashion. 19 U.S.C. § 1514(a). The CIT’s standard of review for civil actions brought pursuant to § 1581(a) is *de novo* based upon the record developed before the Court. *See*

28 U.S.C. § 2640(a)(1). Accordingly, the Federal Rules of Evidence and the traditional tools of discovery govern the disposition of an action under § 1581(a).

B. Judicial Review Under Subparagraph § 1581(i)

Turning to 28 U.S.C. § 1581(i), this subparagraph embodies the CIT’s residual grant of jurisdiction. Pursuant to this subsection, the CIT has “exclusive, residual jurisdiction to hear civil actions against the United States concerning importation revenues, tariffs and duties, embargoes, and administration and enforcement of matters involving section 515 of the Tariff Act[.]” *i.e.*, the matters referred to in §§ 1581(a) – (h) and (i)(1) – (3). *Hartford*, 544 F.3d at 1291.

The scope of the CIT’s review for actions brought pursuant to § 1581(i) is limited to the administrative record developed before the agency. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973); 5 U.S.C. § 706 (In making a determination under section 706, “the court shall review the whole record or those parts of it cited by a party . . .”). This type of record comprises the items enumerated in subsections (1) through (4) of USCIT R. 73.3(a), if they exist, and ““all documents and materials directly or indirectly considered by agency decisionmakers and includes evidence contrary to the agency’s position.”” *See Ammex, Inc. v. United States*, 23 CIT 549, 555, 62 F. Supp. 2d 1148, 1156 (1999) (citations omitted).

The standard of review for actions commenced pursuant to § 1581(i) is governed by the Administrative Procedures Act (“APA”). *See* 28 U.S.C. § 2640(e), which directs the Court to 5 U.S.C. § 706. Pursuant to these standards, the Court will “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *Consolidated Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005).

“[T]he word formula ‘arbitrary, capricious, [or] abuse of discretion’ connotes arbitrariness review.” *Consolidated Fibers, Inc., et al. v. United States* (“*Consolidated Fibers*”), 32 CIT 24, 535 F. Supp. 2d 1345, 1353 (2008) (citations omitted). Pursuant to this standard, the Court (1) must consider whether the agency’s decision was based on a consideration of relevant factors and whether there has been a clear error of judgment, and (2) analyze whether a rational connection exists between the agency’s factfindings and its ultimate action. *See id.* at 1353-54 (discussing *Consolidated Bearings*, 412 F.3d at 1269 versus *In re Gartside*, 203 F.3d 1305, 1312-13 (Fed. Cir. 2000)); *see also* 3 Charles H. Koch, Jr., ADMINISTRATIVE LAW AND PRACTICE §§ 10.1[1], 10.3, 10.4, 10.6 (2d ed. 1997 & Supp. 2006)).

“An aspect of arbitrariness review is the hard look doctrine in which the Court looks for signs or ‘danger signals’ that the agency has failed to take a hard look at the question.” *Consolidated Fibers*, 535 F. Supp. 2d at 1354 n.4 (citing 3 Charles H. Koch, Jr., ADMINISTRATIVE LAW AND PRACTICE § 10.5 (2d ed. 1997 & Supp. 2006)). Under this approach, “an agency decision is ‘arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” *Consolidated Fibers*, 535 F. Supp. 2d at 1354 n.4 (quoting *Motor Vehicle Mfrs. Ass’n of United States Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 39 (1983), and citing *Timken United States Corp. v. United States*, 421 F.3d 1350, 1359 (Fed. Cir.2005)).

C. Demarcation Between § 1581(a) Jurisdiction and § 1581(i) Jurisdiction

It is long settled that, “to prevent circumvention of the administrative processes crafted by Congress, jurisdiction under subsection 1581(i) may not be invoked if jurisdiction under another subsection of 1581 is or could have been available, unless the other subsection is shown to be manifestly inadequate.” *Hartford*, 544 F.3d at 1292 (citing *Int’l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)). Accordingly, “where a litigant has access to [the Court of International Trade] under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach by complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i) unless such traditional means are manifestly inadequate.” *Hartford*, 544 F.3d at 1292 (quoting *Am. Air. Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983)).

This mandate – that § 1581(a) be manifestly inadequate prior to exercising § 1581(i) jurisdiction – is both retrospective and prospective. First, it is retrospective in that if an importer could have availed itself of § 1581(a) jurisdiction in the past, but failed to do so, the Court will not permit an importer to invoke § 1581(i) jurisdiction as a means to have its import dispute resolved. An example of this retrospective application is *Juice Farms, Inc. v. United States*, 68 F.3d 1344 (Fed. Cir. 1995); *see also, e.g., Alden Leeds Inc. v. United States*, 2012 WL 1325030, *5-*7 (Fed. Cir. Mar. 8, 2012).

In *Juice Farms*, the Court held that an importer could not invoke § 1581(i) to challenge an admittedly erroneous liquidation because the importer could have filed a protest against the liquidation, and obtained judicial review under § 1581(a). *Id.*, 68 F.3d at 1346. Customs erroneously liquidated the importer’s entries while suspension orders were in effect. *Id.* at 1345. The importer, unaware of the liquidations, failed to protest the liquidations in a timely fashion.

Id. Despite this failure, the importer challenged the erroneous liquidations alleging jurisdiction under § 1581(i). The Court of Appeals rejected § 1581(i) as the proper basis for jurisdiction, holding that the importer's failure to timely protest did not render the remedy of § 1581(a) manifestly inadequate. *Id.* at 1346. Rather, because the importer could have challenged the legality of the erroneous liquidations by filing a protest, and obtaining judicial review in the context of § 1581(a), the Court held that the importer could not invoke § 1581(i) as a basis for jurisdiction. *Id.*

Second, the mandate is prospective in that if an importer can avail itself of § 1581(a) jurisdiction in the future, but cannot do so at the present time, the Court will not permit an importer to invoke § 1581(i) jurisdiction as means to prematurely resolve its import dispute. Two examples of this prospective application are *Hitachi Home Elecs. (Am.) Inc. v. United States, et al.* (“*Hitachi*”), 704 F. Supp. 2d 1315 (CIT 2010), *aff’d*, 661 F.3d 1343 (Fed. Cir. 2011), *pet. for panel rehearing and rehearing en banc denied*, 676 F.3d 1041 (Fed. Cir. 2012), *pet. for writ of cert.*, (Sup. Ct. No. 12-148, July 30, 2012); and *Norman G. Jensen, Inc. v. United States* (“*Jensen*”), 687 F.3d 1325 (Fed. Cir. 2012).

In *Hitachi* and *Jensen*, jurisdiction under subsection (a) was unavailable at the time of commencement of the court action because the claimant's protests had not been denied or deemed denied. However, because the avenue for § 1581(a) jurisdiction could arise in the future (should Customs deny the protest or the claimant file a request for accelerated disposition and obtain a deemed denial of its protest), the Court did not allow the claimant to invoke § 1581(i) jurisdiction. The Court found that § 1581(a) was not a manifestly inadequate forum to resolve the importer's claims, even though the avenue for § 1581(a) jurisdiction would not be available

until a future point in time, if at all, as Customs could allow the protests. *Hitachi*, 661 F.3d at 1350-51; *Jensen*, 687 F.3d at 1330-31.

Such an approach makes sense as Congress did not intend for the Court to review an import transaction prior to the completion of that transaction. As part of the legislative history of the Customs Court Act of 1980, Congress noted the following:

It is not the Committee's intent to permit judicial review prior to the completion of the import transaction in such a manner as to negate the traditional method of obtaining judicial review of import transactions. Many individuals will, of course, desire to obtain judicial review without the payment of duties. Such review, however, is exceptional and is authorized only when the requirements of subsection (h) are met.

Customs Courts Act of 1980, H. R. Rep. No. 96-1235 at 47 (1980), as reprinted in 1980 U.S.C.C.A.N. 3729, 3758. While Congress made this pronouncement in the context of § 1581(h), it is nonetheless probative in the context of § 1581(i) -- the CIT's residual grant of jurisdiction.

In either context, retrospective or prospective, the critical inquiry that determines the proper basis for jurisdiction is whether the remedy provided under § 1581(a) is manifestly inadequate. The concept of manifest inadequacy as it relates to the CIT's residual jurisdiction is derived from the standards of the APA. *See Abitibi-Consolidated Inc., et al., v. United States*, 30 CIT 714, 718, 437 F. Supp. 2d 1352, 1357 (2006) (explaining how the requirement of manifest inadequacy is mirrored by 5 U.S.C. § 704). Because Congress intended for most import transactions to be reviewed in the context of § 1581(a), demonstrating manifest inadequacy is a difficult burden to overcome. For example, allegations of financial hardship, including an imminent threat of bankruptcy, as well as delays inherent in the statutory process are insufficient. *See, e.g., Int'l Custom Prods., Inc.*, 467 F.3d at 1327.

The concept of manifest inadequacy dovetails with the concept of unavailability. A litigant can demonstrate that the remedy provided under subsections 1581(a)-(h) is manifestly inadequate by demonstrating that those subsections are unavailable. In this vein, “a party asserting jurisdiction under § 1581(i) bears the burden of demonstrating that another subsection is either unavailable or manifestly inadequate.” *Alden Leeds Inc.*, 2012 WL 1325030 at *3 (citation omitted).

Just as manifest inadequacy is prospective in nature, so too is the concept of unavailability. “Under 28 U.S.C. § 1581, a jurisdictional basis is ‘available’ if a party can ultimately invoke it by complying with the procedural requirements particular to it.” *Ford Motor Co. v. United States*, 806 F. Supp. 2d 1328, 1336 n.10 (CIT 2011) (citations omitted). Accordingly, subsection 1581(i) may not be invoked unless another subsection of § 1581 “would never be available.” *Shakeproof Indus. Prods. Div. of Ill. Tool Works v. United States*, 104 F.3d 1309, 1312 (Fed. Cir. 1997); see *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1351 (Fed. Cir. 2000) (citing *Shakeproof*); *Hylsa, S.A. de C.V. v. Tuberia Nat’l, S.A. de C.V.*, Appeal No. 97-1270, 1998 WL 56389, *2 (Fed. Cir. Feb. 12, 1998) (same)).² While these cases were decided in the context of 28 U.S.C. § 1581(c) versus § 1581(i), they are nonetheless applicable and instructive to the present discussion (*i.e.*, the demarcation of § 1581(a) versus § 1581(i)) as the Court’s analysis addresses the broader, global framework of § 1581.

² *But see Ford Motor Co. v. United States*, 688 F.3d 1319 (Fed. Cir. 2012), where the Court examined the facts as they existed at the time of commencement of the court action for purposes of determining the availability of § 1581(a) jurisdiction. The Court premised its holding on an allegation that the agency failed to act. *Id.* at 1327. Accordingly, the applicability of *Ford* is limited to the unique facts of that case.

**D. Advantages Of Judicial Review Under Subparagraph 1581(a)
As Compared To Subparagraph 1581(i)**

In context of § 1581(a) versus (i), there are sound policy reasons for requiring a showing of manifest inadequacy or unavailability of § 1581(a) prior to exercising jurisdiction under § 1581(i). First, to the extent the civil action is fact intensive or seeks a resolution of a disputed fact, there are distinct advantages to having an administrative decision of Customs reviewed in the context of § 1581(a) as compared to § 1581(i). As discussed above, under § 1581(a), the parties have all the traditional tools of discovery at their disposal to identify and narrow the disputed issues, while under § 1581(i), the scope of the Court's review is limited to the administrative record developed before the agency. Thus, by proceeding under § 1581(a), the Court is presented with a full judicial record, comprised of sworn testimony, documents, and other admissible evidence, to decide a case as opposed to an administrative record, which by definition, is a limited set of documents. Further, under § 1581(a), the Court's review is *de novo*, while under § 1581(i), the Court engages in arbitrariness review. Accordingly, to the extent the civil action is fact intensive or seeks a resolution of a disputed fact, by proceeding under § 1581(a), the Court is not restricted by an administrative record or a non-*de novo* standard of review.

Second, as a pragmatic consideration, in § 1581(i) cases the Court's review often gets mired by challenges over the sufficiency of the administrative record. Because judicial review is limited to the administrative record, discovery is generally not permitted in actions brought under § 1581(i). There are, however, exceptions to this rule. The Court has allowed discovery in limited circumstances, including where there is a reasonable basis to believe that materials considered by agency decisionmakers are not in the record, where an agency's failure to adequately explain its actions frustrates effective judicial review, where a party makes a strong

showing of bad faith or improper behavior by agency decisionmakers, or to permit an explanation or clarification of technical terms in the record. *Ammex*, 23 CIT at 556-57, 62 F. Supp. 2d at 1156-58.

This framework has the potential to incentivize improper challenges to the sufficiency of the administrative record. For example, a party may challenge the sufficiency of the administrative record solely as an artifice to obtain discovery. As explained above, the Court's review in § 1581(i) actions turns, in part, on whether the agency's decision was based on a consideration of relevant factors, whether there has been a clear error of judgment, and whether a rational connection exists between the agency's factfindings and its ultimate action. If a party is permitted to conduct discovery in the context of § 1581(i), the party may use the discovery process as a means to influence the Court's review of the administrative record and discredit the agency's decision making process. The Court should be wary of such attempts.

“There is a strong presumption against general discovery into administrative proceedings born out of the objective of preserving the integrity and independence of the administrative process.” *NVE v. Dep't of Health and Human Servs.*, 436 F.3d 182, 195 (3d Cir. 2006). To demonstrate that discovery is warranted in an APA case, the claimant must overcome the presumption of regularity that attaches to the agency's compilation of the record.

To obtain discovery from an agency in an APA case, a party must overcome the standard presumption that the “agency properly designated the Administrative Record.” *Bar MK Ranches*, 994 F.2d at 740. That is, **a party must provide good reason to believe that discovery will uncover evidence relevant to the Court's decision to look beyond the record. Thus, a party must make a significant showing**-variously described as a “strong”, “substantial”, or “prima facie” showing-that it will find material in the agency's possession indicative of bad faith or an incomplete record. See *Overton Park*, 401 U.S. at 420, 91 S.Ct. 814 (requiring a “strong showing” before extra-record inquiry will be permitted); *San Luis Obispo*, 751 F.2d at 1327 (requiring a party to make a

“prima facie showing”); *Train*, 519 F.2d at 291 (finding discovery merited by a “substantial showing”).

Amfac Resorts, L.L.C., v. U.S. Dep’t of Interior, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (emphasis supplied); see also *Tafas v. Dudas*, 530 F. Supp. 2d 786, 795 (E.D.Va. 2008) (discussing the “presumption of regularity” in the context of judicial review of an agency action). Given this standard, challenges over the sufficiency of the administrative record can be extensive and require a great deal of time to resolve.

By reviewing an administrative decision in the context of 28 U.S.C. § 1581(a) as opposed to § 1581(i), the possibility of being bogged down by disputes over the sufficiency of the administrative record is eliminated, and the parties have the panoply of discovery tools at their disposal. In sum, there are sound policy reasons for requiring a showing of manifest inadequacy or unavailability of § 1581(a) prior to exercising jurisdiction under § 1581(i).

Conclusion

Because a showing of manifest inadequacy and unavailability of § 1581(a) must be made prior to exercising § 1581(i) jurisdiction, Congress intended for most import transactions to be reviewed in the context of § 1581(a). This legislative scheme is beneficial because, within the context of § 1581(a), the parties may engage in discovery and present a fully developed judicial record – as compared to § 1581(i) wherein the Court’s review is limited. Accordingly, for future adjudication of jurisdictional challenges, the Court and the parties should be mindful of this important legislative scheme.

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