

**THE ADMINISTRATIVE PROCEDURE ACT AND  
JUDICIAL REVIEW IN CUSTOMS CASES AT THE  
COURT OF INTERNATIONAL TRADE**

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## **The Administrative Procedure Act and Judicial Review in Customs Cases at the Court of International Trade**

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The U.S. Court of International Trade has exclusive jurisdiction to review many decisions and actions taken by the U.S. Bureau of Customs and Border Protection. The bulk of these cases fall into two categories. The first involves the review of denied administrative protests under 28 U.S.C. § 1581(a).<sup>3</sup> The second category involves the review of other actions challenging Customs' enforcement of laws relating to, among other things, tariffs, duties, fees and other taxes on imported merchandise; revenue from imports; and the administration and enforcement of the related laws and regulations. This is the Court's so-called residual jurisdiction under 28 U.S.C. § 1581(i). A third category of cases involves Customs' regulation of licensed customhouse brokers.<sup>4</sup>

When any court is asked to review the determination of an administrative agency, the court must address a number of related questions. These questions include:

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<sup>3</sup>Administrative protests against the liquidation of a customs entry are filed pursuant to 19 U.S.C. § 1514. Absent a timely protest, the liquidation of an entry and all of Customs' decisions included therein becomes final.

<sup>4</sup>These cases are before the Court pursuant to 28 U.S.C. § 1581(g).

- What is the applicable standard of review?
- What is the scope of the court's review?
- What level of deference is applicable to the determination under review?

This article looks at these questions in the context of Customs cases at the CIT. In particular, this article seeks to examine the impact of the Administrative Procedure Act on the Court's customs jurisprudence. In brief, the paper concludes that although the APA is often invoked in customs cases, the APA provides little in the way of substantive content to influence decision making at the Court. As a practical matter, that means litigants basing arguments in the APA may have little to gain other than the appearance of substantive thoroughness.

## **I. The Administrative Procedure Act**

There is a strong presumption that administrative decisions are subject to judicial review.<sup>5</sup> Typically, the scope and standard of that review is set by reference to the Administrative Procedure Act.<sup>6</sup> In general, the APA establishes a right to judicial review. Section 702 provides 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. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal shall not be dismissed nor relief therein be denied on the ground that it is against the United states or that the United States is an indispensable party.

5 U.S.C. § 702 (emphasis added).

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<sup>5</sup>Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986).

<sup>6</sup>The relevant parts of the APA are now codified at 5 U.S.C. §§ 701-706.

Thus, the APA provides a waiver of sovereign immunity to suits challenging federal agency actions. That waiver, however, is limited to actions seeking relief other than monetary damages.<sup>7</sup> Historically, actions to recover customs duties improperly collected were brought under equity as actions in assumpsit for money had and received.<sup>8</sup> Thus, these actions arguably sought equitable relief, rather than money damages. Today, regardless of their nature, actions to recover customs duties improperly collected or other actions challenging a denied protest are specifically authorized not in the APA but in 19 U.S.C. § 1514 which provides that Customs' liquidations are final and conclusive unless a timely protest is filed or unless a civil action contesting the denial of the protest is commenced.

The APA also provides, in relevant part, that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review.” 5 U.S.C. § 704. Thus, where an agency’s organic statute provides a mechanism for judicial review, the APA does not provide a separate jurisdictional basis.<sup>9</sup> For cases before the U.S. Court of International Trade, a court of limited and special jurisdiction, subject-matter jurisdiction must be found in one of the subsections of 28 U.S.C. § 1581. Consequently, before the CIT, while the APA may create a cause of action in § 702, it can never provide a sound basis

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<sup>7</sup>See, e.g., Infante v. Drug Enforcement Admin., 938 F. Supp. 1149, 1154 (E.D.N.Y. 1996).

<sup>8</sup>See., e.g., Elliott v. Startwout, 109 U.S. 238 (1883).

<sup>9</sup>Defenders of Wildlife v. Administrator, E.P.A., 882 F.2d 1294, 1302 (8<sup>th</sup> Cir. 1989)(APA does not provide means of review where Federal Insecticide, Fungicide, and Rodenticide Act applies).

for establishing the Court's jurisdiction.<sup>10</sup>

The real substance of the APA is embodied in section 706, which states in full:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706. Where the APA applies and sets the scope of review, this is the applicable language. As is discussed more fully below, most CIT decisions invoking the APA focus on whether the agency decision was arbitrary, capricious, or an abuse of discretion to the exclusion of the other bases on which an agency action may be overturned.

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<sup>10</sup>See the discussion of AutoAlliance below in the discussion of cases involving customhouse brokers. See also Butler v. United States, No. 00-100, slip op. (Ct. Int'l Trade June 30, 2006).

## II. Review of Denied Protests

In a provision entitled “Scope and standard of review,” Congress determined that protest review cases under 28 U.S.C. § 1581(a) are to be reviewed “upon the basis of the record made before the court . . . .”<sup>11</sup> This is, therefore, a “rare circumstance”<sup>12</sup> in which agency findings of fact are specifically made subject to de novo review. Therefore, the scope of the review is the record made before the Court.

The more complicated question is the standard of review. In other words, given the record developed before the Court, under what circumstances will the Court properly reverse Customs’ decision? The statute is silent on that question.

On questions of fact, it is clear that the CIT exercises de novo review, which is not review at all. Rather, the issue is one of proof. Statutorily, the decision Customs rendered is presumed to be correct and the plaintiff has the burden of proving otherwise.<sup>13</sup> This presumption, however, applies only to questions of fact.<sup>14</sup> To overcome the presumption, the Court must find that the preponderance of the evidence favors plaintiff’s position.<sup>15</sup>

The traditional formulation of the standard of review in a 1581(a) cases was that the

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<sup>11</sup>28 U.S.C. § 2640(a)(1).

<sup>12</sup>Pierce, Administrative Law Treatise, § 11.2, 768 (2002, 4<sup>th</sup> Ed. Aspen Law & Business)

<sup>13</sup>28 U.S.C. § 2639(a)(1).

<sup>14</sup>Universal Electronics, Inc. v. United States, 112 F.3d 488, 493 (Fed. Cir. 1997).

<sup>15</sup>Fabil Mfg. Co. v. United States, 237 F.3d 1335, 1340-41 (Fed. Cir. 2001).

presumption carries no force with respect to questions of law.<sup>16</sup> Questions of law have generally been the province of the court. As the Supreme Court said in Marbury v. Madison, “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>17</sup>

Consistent with Marbury, in the pre-Mead decision Universal Electronics, the Federal Circuit clearly articulated that the presumption of correctness does not apply to questions of law. If it did, according to Universal Electronics, the presumption would be a rule of deference allocating the roles of two adjudicatory bodies.<sup>18</sup> Deference, according to the Federal Circuit, is “governed by standards of review”<sup>19</sup> and, when viewed in that context, Customs was deemed entitled to no deference on questions of law and only a presumption of correctness on questions of fact.

Marbury, however, is not without its provisos and limitations. Chief among those is Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.<sup>20</sup> Chevron stands for the now familiar proposition that courts reviewing an agency interpretation of a statute the agency administers must perform a two-part analysis. First, the court must determine whether the statute is ambiguous. If not, then the clearly expressed intent of Congress controls. Where there is

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<sup>16</sup>Universal Electronics, 112 F.2d at 491, citing Goodman Manufacturing, L.P. v. United States, 69 F.3d 505, 508 (Fed. Cir. 1995).

<sup>17</sup> 5 U.S. 137, 177 (1803)

<sup>18</sup>Universal Electronics, 112 F.2d at 492-3.

<sup>19</sup>Id.

<sup>20</sup>467 U.S. 837 (1984).

ambiguity, the court is to defer to the permissible interpretation of the agency.<sup>21</sup> Given the holding in Marbury that the courts determine the meaning of law, some have characterized Chevron as the “counter-Marbury.”<sup>22</sup> Moreover, consistent with the Federal Circuit’s instructions in Universal, it is appropriate to treat Chevron deference, when applicable, as the standard of administrative review for § 1581(a) cases. Thus, when facts are not in dispute, as in the case of properly made motions for summary judgment, the “standard of review” for Customs’ interpretation of formally made rules—such as regulations—is that they will be affirmed unless the agency’s interpretation is “impermissible.”

Chevron and Haggar, however, applied to interpretations of the regulations passed through a formal notice and comment process; leaving open the question of the standard of review in less formal decision making including rulings and protests.<sup>23</sup> In United States v.

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<sup>21</sup>Id. at 842-43. See also, Haggar Apparel v. United States, 526 U.S. 380, 392 (1999)(Chevron is applicable to Customs’ regulatory interpretations of the Harmonized Tariff Schedule).

<sup>22</sup>See, e.g., Murphy, A “New” Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom, 56 Admin. L. Rev.1 (2004).

<sup>23</sup>In the context of the Chevron two-step analysis, commentators have characterized the question of whether Chevron deference attaches to something less than formal rule making as “step zero.” Murphy, supra note 22 at 18. An example of the practical application of this question occurred in Park B. Smith v. United States, in which Customs relied, in part, on one of its Informed Compliance Publication. The Court dismissed this as “an inexcusably irresponsible attempt by Customs to present to the public its . . . theory as the current state of the law.” 25 C.I.T. 506, 508, n1 (2001). The Court further noted that “it is the purview of the courts, not executive branch agencies, to interpret the law.” Id. Post-Mead, the Court held that even if an Informed Compliance Publication demonstrated Customs’ consistent practice, it “lack[ed] the valid reasoning necessary for it to have the ‘power to persuade.’” Intercontinental Marble Corp. v. United States, 264 F. Supp. 2d 1306, 1315-15 (Ct. Int’l Trade 2003)(finding that an Informed Compliance Publication relied upon by Customs to define a term by a meaning other than the “common and commercial” meaning, which had been identified in the TSUS, but not the HTSUS, was not due Skidmore deference.)

Mead,<sup>24</sup> the Supreme Court answered that question by holding that less formal decisions of federal agencies are entitled to judicial deference under Skidmore v. Swift & Co.<sup>25</sup>

In California Industrial Products, Inc. v. United States,<sup>26</sup> the Court discussed the application of Skidmore in the context of a challenge to denied drawback claims. In that case, the Court noted that whether an agency decision is entitled to deference under Skidmore varies depending on the decision's thoroughness, logic, expertness, consistency with prior decisions, and any other sources of weight.<sup>27</sup> Given that Customs was unable to show a consistent pattern of rulings on drawback claims, the Court found the decision entitled to no deference.<sup>28</sup>

The standard of review for Customs' informal determinations is harder to formulate. Stated generally and consistent with Skidmore, the Court must adopt the administrative determination if, given consideration of all the relevant factors, it is "persuasive." In reaching this conclusion, it does not appear that the Court must ignore its own reading of the statute. The issue is whether the Court is persuaded to forgo its independent interpretation by the logic,

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<sup>24</sup>533 U.S. 218 (2001).

<sup>25</sup>323 U.S. 134 (1944).

<sup>26</sup>350 F. Supp. 2d 1135 (Ct. Int'l Trade 2004), aff'd by California Industrial Products, Inc. v. United States, 436 F.3d 1341 (Fed. Cir. 2006).

<sup>27</sup>Id. at 1140.

<sup>28</sup>Arguably, this is an incorrect conclusion to the extent that the Court found the decision not entitled to deference. A better formulation of the conclusion might be that simply by virtue of it being an agency decision, the ruling was entitled to deference but that the weight given this particular decision was zero. There is little, if any, practical significance to this distinction other than that it assures that the administrative determination is given proper consideration. If it were truly not entitled to Skidmore deference, it would not be necessary to review it under the Skidmore factors.

thoroughness, and expertness of Customs' decision.

Thus, the scope of review in § 1581(a) cases is statutorily set as the record made before the Court. The burden is on the plaintiff to overcome the presumption of correctness attaching to Customs' determination by a preponderance of the evidence. Finally, on questions of law, the Court of International trade will overturn Customs' interpretation of a statute only where it is impermissible, in the case of formal adjudications, or unpersuasive, for other determinations. The Administrative Procedure Act, therefore, is simply not implicated in § 1581(a) cases.

### **III. Application of the APA in the Court of International Trade § 1581(i) Cases**

Statutorily, there are certain cases in which the CIT is required to apply the scope and standard of review provided for in section 706 of the APA. This Section discusses that legal framework and its application in specific cases law examples.

#### **A. The standard of review for §1581(i) cases must be taken from the APA.**

Section 1581(i) of Title 28 of the United States Code provides the CIT with exclusive, residual jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of a cause of action based on a U.S. law that provides 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.<sup>29</sup>

Such cases fall outside the scope of of cases enumerated in 28 U.S.C. § 2640(a) - (d). Therefore,

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<sup>29</sup>28 U.S.C. § 1581(i)(2006).

the appropriate scope and standard of review for § 1581(i) cases falls to § 2640(e), which refers the CIT to the APA for guidance.<sup>30</sup>

Section 706 of the APA instructs a court reviewing an administrative agency action or finding to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” The APA guides the court to apply one of six standards of review to agency actions, findings, and conclusions.

The court should set aside such actions, findings, or conclusions found to be:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.<sup>31</sup>

In addition, the APA provides that the reviewing court “shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”

Consequently, a motion for summary relief in a § 1581(i) case is generally brought under USCIT R. 56.1 as a motion for judgment on the agency record. The “rule of prejudicial error” requires to courts to apply conventional principles of harmless error when reviewing an agency action.<sup>32</sup>

As is illustrated in the opinions discussed below, the facts and circumstances involved in

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<sup>30</sup>28 U.S.C. § 2640(e)

<sup>31</sup>5 U.S.C. §706(2)(2006).

<sup>32</sup>Intercargo Ins. Co. v. United States, 83 F.3d 391, 394 (Fed. Cir. 1996).

the case at hand define which of the six APA standards of review should apply. In addition, the APA standards do not discuss the role of deference. Therefore, practitioners may experience confusion as the court attempts to give the agency the appropriate level of Chevron or Skidmore deference while simultaneously applying the APA standard or standards of review.

**B. The APA applied to § 1581(i) cases.**

In recent years, the CIT has considered several customs cases under § 1581(i) using the scope and standard of review directed in the APA. Below is a discussion of a sampling of those cases in which the ultimate determination involved a complicated analysis of deference and the appropriate APA standard of review. In addition, the CIT has reviewed the power of the APA to grant subject matter jurisdiction to cases that would otherwise fall outside the jurisdiction of the Court.

1. Ammex, Inc. v. United States

The issue before the CIT in Ammex, Inc. v. United States<sup>33</sup> was whether Customs properly revoked an earlier ruling by issuing a contrary Headquarters ruling without first evaluating the key facts involved.<sup>34</sup> Ultimately, the Court granted plaintiff's motion for judgment on the agency record because the record failed to establish the operative fact needed to support the government's position.<sup>35</sup>

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<sup>33</sup>341 F. Supp. 2d 1308 (Ct. Intl Trade 2004), aff'd by Ammex, Inc. v. United States, 419 F.3d 1342 (Fed. Cir. 2005).

<sup>34</sup>Id. Ammex operated a duty-free store that sold gasoline to travelers exiting the United States headed into Canada. Id. In 2000, Customs issued Ammex a ruling letter authorizing that business. Id. In 2001, Customs revoked its 2000 ruling letter. Id.

<sup>35</sup>Id. Specifically, the Court found that the record established that no federal tax had been assessed on Ammex's fuel when the revocation ruling was issued. Id.

To reach this conclusion, the CIT considered the issues in accordance with the scope and standard of review presented in the APA. The scope of the review was “confined to the record developed before the agency.”<sup>36</sup> As for the standard of review, the CIT had to determine whether Customs’ revocation was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” as stated in section 706(2)(A) of the APA.<sup>37</sup> The Court was not persuaded by Customs’ interpretation of two terms — “imposed” and “assessed” — and determined that Customs’ definitions were inconsistent with the applicable statute.<sup>38</sup> In addition, the Court found that because Customs did not investigate the facts developed in the record, Customs’ actions were not supported by the record.<sup>39</sup> This appears to be a nod toward APA section 706(2)(E) which has been held to apply only to formal rule making.<sup>40</sup>

Additionally, although the ultimate determination turned on Customs’ interpretation of statutory terms, the Court did not conduct any apparent deference analysis. The Court did, however, point out that Customs’ proffered interpretation conflicted with the applicable regulations.<sup>41</sup>

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<sup>36</sup>Id. at 1311.

<sup>37</sup>Id.

<sup>38</sup>Id. at 1312-13.

<sup>39</sup>Id. at 1314-15. The CIT found that Customs should have “acquired unambiguous information specific to Ammex’s fuel on the question of whether such fuel had in fact been assessed any taxes.” Id. at 1314.

<sup>40</sup>Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971), rev’d on other grounds by Califano v. Sanders, 430 U.S. 99 (1977).

<sup>41</sup>Id. at 1314. The applicable regulation was 19 C.F.R. §19.35(a). Id.

2. International Custom Products, Inc. v. United States

In International Custom Products, Inc. v. United States,<sup>42</sup> the CIT considered several motions brought by both plaintiff and defendant. Of interest here is the Court's discussion of plaintiff's motion for judgment on the agency record.<sup>43</sup> The Court first stated that the scope of review was limited to the agency record before it.<sup>44</sup> Next, the Court undertook a substantial discussion of the six separate standards of review set forth under section 706 of the APA.<sup>45</sup> The Court determined that each of subsections A through D, as discussed above, must be satisfied to sustain Customs' action.<sup>46</sup>

Based on its evaluation of the record, the Court found that Customs did not undertake the necessary administrative proceedings to revoke or modify a binding ruling and that the Notice of Action was a "decision' within the context of 19 U.S.C. §1625(c)."<sup>47</sup> For these reasons, the Court concluded that Customs' action failed all four of the appropriate standards of review and,

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<sup>42</sup>374 F. Supp. 2d 1311 (Ct. Int'l Trade 2005).

<sup>43</sup>The case involved a dispute over the classification of a product described as "white sauce." Id. at 1314. Customs issued a ruling to Plaintiff in 1999 and Plaintiff imported the product in accordance with that ruling until Customs issued a Notice of Action changing the classification of the product in 2005. Id. at 1314-15. The new classification required a 2400% increase in duties over what was owed under the previous classification.

<sup>44</sup>Id. at 1323. Although the Court based this determination on case law, as discussed above, section 706 of the APA states that the scope of review is the agency record.

<sup>45</sup>Id. at 1323-24. The Court found that the narrow standards found in subsections 706(2)(E) and (F) did not apply to the facts involved. However, each of subsections 706(2)(A) through (D) were implicated by the arguments before the Court. Id. at 1324.

<sup>46</sup>Id. at 1324.

<sup>47</sup>Id. at 1326-28.

consequently, was null and void.<sup>48</sup>

The Court did not enter into a discussion of Customs' interpretation of the statutory term "decision" and thereby avoided an analysis of the appropriate deferential treatment. In addition, the Court did not differentiate between the application of the APA standards on facts versus law. However, the CIT did properly avoid a de novo review of the underlying classification issue and focused only on the procedural correctness of Customs' actions.

### 3. SKF v. United States

In many cases, the CIT has described the "arbitrary and capricious" standard as a test of "rationality."<sup>49</sup> For example, in SKF v. United States,<sup>50</sup> the CIT reviewed a claim challenging the constitutionality of section 754 of title VII of the Tariff Act of 1930, which is commonly known as the Byrd Amendment.<sup>51</sup> The Court found jurisdiction was proper under §1581(i) and that the scope and standard of review must be in accordance with section 706 of the APA.<sup>52</sup> Specifically, the Court found that the agency's decision must be "in accordance with the law" and that the

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<sup>48</sup>Id. at 1325-26.

<sup>49</sup>See, for example, International Custom Products v. United States, 374 F. Supp. 2d 1311 (Ct. Int'l Trade 2005), also discussed above. In International Custom Products, the CIT observed that "the touchstone of the arbitrary, capricious standard is rationality." Id. at 1324, quoting Hyundai Elecs. Indus. Co., Ltd. v. U.S. Int'l Trade Comm'n, 899 F. 2d 1204, 1209 (Fed. Cir. 1990) (internal quotations omitted).

<sup>50</sup>No. 06-139, slip op. (Ct. Int'l Trade Sept. 12, 1006).

<sup>51</sup>Id. at 3.

<sup>52</sup>Id. at 2-3. The motion before the Court was a CIT Rule 56.1 Motion for Judgement upon the Agency Record.

underlying law must be in accordance with the Constitution.<sup>53</sup> The Court also noted that it reviews questions of constitutionality de novo and the agency's decision based on the facts in the record.

In its analysis, the Court first found that the Byrd Amendment violated the Equal Protection Clause of the Constitution because it discriminates between similarly situated domestic producers.<sup>54</sup> The Court reasoned that it could not find a "rational basis" for the classification and distinction of domestic producers made under the statute.<sup>55</sup> Consequently, the Court held that the Byrd amendment was unconstitutional.<sup>56</sup> Ultimately, because the underlying law was unconstitutional, the Court held that the agency's implementation thereof was arbitrary, capricious and not in accordance with the law. In all likelihood, however, the implementation was not arbitrary and capricious and was only not in accordance with the law. Moreover, § 706(2)(B) would also apply as the implementation was contrary to constitutional right.

#### 4. AutoAlliance International, Inc. v. United States

The CIT has demonstrated great care when determining whether the APA confers subject matter jurisdiction on a case before it. For example, while considering a motion to sever and dismiss one count of an action purportedly brought under § 1581(i), the CIT found that the APA

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<sup>53</sup>Id. at 3.

<sup>54</sup>Id. at 14.

<sup>55</sup>Id. at 14-15. The Court specifically held that "[t]he plain language of the [Byrd Amendment] fails to rationally indicate why entities who supported a petition are worthy of greater assistance than entities who took no position or opposed the petition when all the domestic entities are members of the injured domestic industry." Id. at 15.

<sup>56</sup>Id. at 19.

is not an independent grant of subject matter jurisdiction.<sup>57</sup> In AutoAlliance International, Inc. v. United States, the CIT considered the reach of section 702 of the APA and found that “[w]hile the APA establishes a cause of action for an aggrieved party’s claims, it does not create an independent basis of subject matter jurisdiction for this Court to hear the claims.”<sup>58</sup> In addition, the Court found that section 704 of the APA was not satisfied, because another adequate remedy was available to redress Plaintiff’s claim.<sup>59</sup> Specifically, the Court found that Plaintiff could have

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<sup>57</sup>AutoAlliance International, Inc. v. United States, 398 F. Supp. 2d 1326, 1335 (Ct. Int’l Trade 2005).

<sup>58</sup>Id. at 1335. 5 U.S.C. §702 provides:

Right of review. 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. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

<sup>59</sup>AutoAlliance International, Inc., 398 F. Supp. 2d at 1335. 5 U.S.C. §704 provides:

Actions reviewable. 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. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

pursued recourse pursuant to 1581(a).<sup>60</sup> Consequently, jurisdiction could not exist pursuant to § 1581(i) or the APA.<sup>61</sup>

#### **IV. The APA in Broker Statute Cases**

The final group of cases involving the application of the APA to be discussed in this paper include disputes brought pursuant to the broker statute.<sup>62</sup> The first example discussed below illustrates the analytical split between deciding issues of fact and issues of law and the role the APA standards of review appears to play under such circumstances. The second example below discusses the relationship between the APA standards of review and deference.

##### **A. Harak v. United States**

In Harak v. United States,<sup>63</sup> the CIT reviewed Customs' denial of Plaintiff's application for a customhouse broker license, which was based on his failure to pass the necessary exam. The claim came before the CIT pursuant to 28 U.S.C. §1581(g)(1) and 19 U.S.C. §1641(b)(2).<sup>64</sup>

The Court's discussion regarding the standard of review involved two parts, which

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<sup>60</sup>AutoAlliance International, Inc., 398 F. Supp. 2d at 1335-36. The Court found that had Plaintiff timely filed a summons and complaint in response to the denial of its initial protest, then subject matter jurisdiction would be available under § 1581(a). Id. at 1336.

<sup>61</sup>Id. at 1335.

<sup>62</sup>Although the underlying dispute in UPS, discussed below, involves the penalty provisions of the broker statute, the broker statute does not provide a cause of action for the type of dispute involved and the cause was brought before the Court to enforce a penalty pursuant to 28 U.S.C. § 1582.

<sup>63</sup>No. 06-106, slip op. at 1 (Ct. Int'l Trade July 18, 2006).

<sup>64</sup>Id. at 5.

separately evaluated the proper standard for reviewing questions of fact and questions of law.<sup>65</sup> As the Court noted, 19 U.S.C. §1641(e)(3) provides that Customs' findings as to facts "shall be conclusive," if supported by substantial evidence.<sup>66</sup> However, § 1641 is silent regarding conclusions of law. Therefore, the Court turned to the standards of review provided in section 706 of the APA.<sup>67</sup>

In particular, the Court applied the arbitrary and capricious standard of review found in subsection 706(2)(A) and determined that Customs' legal determination should be upheld if "reasonable."<sup>68</sup> In its discussion, the Court individually reviewed the specific examination questions Plaintiff challenged and found that Customs' denial was reasonable in each instance.<sup>69</sup> In addition, the Court determined that the actual decision to deny Plaintiff's broker's license was proper because none of the questions required remand for further determination.<sup>70</sup>

Finally, the Court considered the adequacy of the Assistant Secretary's explanation to

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<sup>65</sup>Id. at 6.

<sup>66</sup>Id.

<sup>67</sup>Id. The Court reasoned: "Because the relevant statutes are silent regarding the proper standard of review in considering the legal questions in customs' broker's license denial cases, the court is guided by the [APA]." Id.

<sup>68</sup>Id. at 6-7. The Court did not discuss the other possible standards of review available under the APA.

<sup>69</sup>Id. at 8-31. In one instance the Court specifically determined that Customs' decision was not arbitrary and capricious. Id. at 24.

<sup>70</sup>Id. at 31. The Court noted that it has limited review over Customs' allowance of credit for answers other than the official answer, and, therefore, the allowance or denial of credit for a contested question is "not dispositive to the court's review of the denial of a customs broker's license." Id.

Plaintiff regarding his initial appeal of the license denial.<sup>71</sup> After challenging Plaintiff's reliance on a case whose basis for denial was different than that involved in Plaintiff's case, the Court found that the explanation provided in support of the denial was adequate and entered judgment in favor of Customs.<sup>72</sup>

Throughout the opinion, the Court did not clearly state which standard of review was being applied to each issue. However, the initial standard of review analysis provides guidance for practitioners presented with claims involving both questions of law and questions of fact.

## **B. UPS Customhouse Brokerage v. United States**

In the recently decided UPS Customhouse Brokerage v. United States,<sup>73</sup> the CIT considered the scope and standards of review from APA section 706 during its resolution of a broker penalty case brought under 28 U.S.C. §1582(1). Below is a discussion of the case, the Court's application of the APA, and the role that considerations of deference ultimately played in the Court's decision.

### 1. Procedural and Factual Posture of the Case

In 2000, Customs issued several penalty notices to UPS Customhouse Brokerage. Customs alleged violations of the requirement for responsible supervision and control resulting in the erroneous classification of merchandise entered in 2000.<sup>74</sup> UPS remitted funds totaling \$15,000 in satisfaction of three of the penalty notices, but failed to remit \$75,000 imposed by

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<sup>71</sup>Id.

<sup>72</sup>Id. at 32-33.

<sup>73</sup>No. 06-98, slip op. (Ct. Int'l Trade June 28, 2006).

<sup>74</sup>Id. at 2-3.

five remaining notices.<sup>75</sup> In 2004, Customs brought an action seeking to enforce the monetary penalties.<sup>76</sup> Consequently, the CIT had jurisdiction over the matter pursuant to 28 U.S.C. §1582(1), which covers claims arising out of an import transaction brought by the United States to recover a civil penalty.<sup>77</sup>

At issue were plaintiff's motion to strike defendant's refund claim and defendant's motion for summary judgment; it is the Court's discussion of the Motion for Summary Judgment that is of interest here.<sup>78</sup> Ultimately, the parties' arguments centered on whether 19 U.S.C. §1641(d)(2)(A) and the corresponding regulation, 19 C.F.R. §111.91, limit the broker's liability to a maximum penalty of \$30,000.<sup>79</sup>

## 2. The CIT's Application of Section 706 of the APA

As observed by the Court, the broker statute does not specify the standard of review to be applied when the court is resolving disputes arising under 19 U.S.C. §1641(d)(2)(A).<sup>80</sup> The Court

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<sup>75</sup>Id. at 3.

<sup>76</sup>Id. at 3-4.

<sup>77</sup>Id. at 19.

<sup>78</sup>Id. at 1.

<sup>79</sup>Id. at 11-19.

<sup>80</sup>The relevant statutory provision states:  
Monetary penalty. Unless action has been taken under subparagraph (B), the appropriate customs officer shall serve notice in writing upon any customs broker to show cause why the broker should not be subject to a monetary penalty not to exceed \$ 30,000 in total for a violation or violations of this section. The notice shall advise the customs broker of the allegations or complaints against him and shall explain that the broker has a right to respond to the allegations or complaints in writing within 30 days of the date of the notice. Before imposing a monetary penalty, the customs officer shall consider the allegations or complaints and any

also noted that § 1641(e) provides that upon judicial review, Customs' findings as to the facts "if supported by substantial evidence, shall be conclusive."<sup>81</sup> However, § 1641(e) does not specify this type of action as one that is judicially reviewable. Rather, this action came before the Court as a penalty enforcement case pursuant to § 1582.

The Court next found that § 2640 of Title 28 of the United States Code, which provides that the CIT should base its review of claims brought pursuant to § 1582 on the record before it, does not provide a standard of review.<sup>82</sup> Consequently, the Court turned to section 706 of the APA for guidance.<sup>83</sup>

The Court reviewed each of the six available standards in turn to identify the applicable standard or standards.<sup>84</sup> First, the Court dismissed subsections 706(2)(E) and (F) because the question did not arise out of a rulemaking provision of the APA or a public adjudicatory hearing nor out of a case where the agency factfinding procedures were challenged as inadequate or

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timely response made by the customs broker and issue a written decision. A customs broker against whom a monetary penalty has been issued under this section shall have a reasonable opportunity under section 618 [19 USCS §§ 1618] to make representations seeking remission or mitigation of the monetary penalty. Following the conclusion of any proceeding under section 618 [19 USCS § 1618], the appropriate customs officer shall provide to the customs broker a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

<sup>81</sup>UPS Customhouse Brokerage, No. 06-98, slip op. at 23.

<sup>82</sup>Id. at 24.

<sup>83</sup>Id. The Court reasoned that while § 2640 expressly provided a scope of review for an action brought pursuant to § 1582, it does not "specify a standard of review. As a result, the Court must look to the [APA] for the applicable standard of review." Id. (emphasis in original).

<sup>84</sup>Id. at 25.

involve issues raised in a proceeding to enforce nonadjudicatory agency action.<sup>85</sup>

The Court reviewed the remaining four standards and determined that subsections 706(2)(C) and (A) were relevant to the review of the issues before it.<sup>86</sup> Subsection C applies to actions, findings, or conclusions “in excess of statutory jurisdiction, authority, or limitation;” subsection A applies to those that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” The Court also observed, as is discussed above, that the arbitrary and capricious standard is the most deferential and is often tied to the concept of “rationality.”<sup>87</sup>

### 3. Observations Regarding the Role of Deference

There were no facts in dispute in UPS. The issue centered on a question of statutory construction. Ultimately, the Court found that the issue “boil[ed] down to a question of deference.”<sup>88</sup> The Court, however, did not clearly articulate the relationship between deference and the APA standards of review it was applying. Rather, the Court first turned to Customs’ regulations regarding the imposition of a monetary penalty against a broker pursuant to § 1641(d)(2)(A) and determined that Chevron analysis should apply.<sup>89</sup> Based on the two-step

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<sup>85</sup>Id.

<sup>86</sup>Id. at 26.

<sup>87</sup>Id.

<sup>88</sup>Id. at 29. The Court stated that the parties and the amicus have “exhaustively briefed this Court” on their respective interpretations of the language in the broker penalty statute before determining that the issue hangs on deference. Id.

<sup>89</sup>Id. The Court reasoned that it was “reviewing an agency’s construction of a statute that it administers,” and, consequently, Chevron applies. Id. The relevant regulation is found in 19 C.F.R. §111.91.

Chevron analysis, the Court found that “the language [of § 1641(d)(2)(A)] is ambiguous and does not speak to the precise question before the Court.” Moving on to Chevron step two, the Court found that Customs’ interpretation of the language in the corresponding regulation, 19 C.F.R. §111.91, was reasonable.<sup>90</sup> Consequently, the Court determined that Customs’ reading of the broker penalty statute was “owed deference by this Court.”<sup>91</sup> The Court, therefore, quickly dismissed UPS’ final arguments and found that the penalties had been properly imposed.<sup>92</sup>

The curiosity of the Court’s holding is its application of the APA standards of review. There are two reasons for this. First, although the Court devoted significant discussion to the appropriate APA standards to apply, it appears that the APA standards had no discernable affect on the Court’s decision. Rather, the Court relied entirely on the deference owed to Customs’ interpretation of the broker penalty statute under the law. A possible way to conform the Court’s decision to the APA is to assume that because the Court held that Customs’ interpretation of the broker penalty statute was permissible under Chevron, it was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Second, a reasonable reading of § 2640 indicates that the APA is not applicable to penalty cases. The APA standards of review apply in specific circumstances, as directed by 28 U.S.C.

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<sup>90</sup>Id. at 31-32. The Court found that “[i]n promulgating the broker penalty regulations, which were subject to notice and comment . . . Customs clearly adopted the position that it was entitled to impose more than one monetary penalty for violations of the broker statute.” Id. at 32. In addition, “[a]lthough the regulation might be read to limit any penalties imposed to an aggregate of \$30,000, Customs clarified its position in the mitigation guidelines,” which are found at 19 C.F.R. Pt. 171, App. C., XX(A). Id. at 32.

<sup>91</sup>Id. at 33.

<sup>92</sup>Id. at 34-36.

§2640. As the Court observed in UPS, § 2640 clearly provides an applicable scope of review to apply in § 1582 penalty actions. The statute, however, does not express a corresponding standard of review. However, practitioners might note that the language of § 2640(e), which implicates the scope and standards of review from the APA, refers to “any civil action not specified in this section.” This would appear to exclude civil actions brought pursuant to § 1582, as they are specifically named in subsection (a)(6). Thus, penalty actions are, for purposes of the APA, the equivalent of § 1581(a) cases in which questions of law are decided de novo by the Court with appropriate application of Chevron or Skidmore deference. This greater delegation of authority to the Court is consistent with a possible congressional intent to provide defendants in civil penalty cases greater protection from agency action through undiluted review by the Court of International Trade.

## **V. Conclusion**

In Customs litigation under 28 U.S.C. § 1581(a), broker penalty cases under 19 U.S.C. § 1641,<sup>93</sup> and penalty cases under 19 U.S.C. § 1592, the Court of International Trade reviews cases on the record made before it. That is the scope of review. Plaintiffs have the burden of proof and, in protest denial cases, Customs has the presumption of correctness as to its factual determinations.<sup>94</sup> That presumption may be overcome by a preponderance of the evidence or, in

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<sup>93</sup>Cases involving the revocation or suspension of a license are reviewed on the administrative record pursuant to 28 U.S.C. § 2640(a)(5).

<sup>94</sup>Under 28 U.S.C. § 2639, the presumption of correctness does not attach in an action commenced by the United States under 28 U.S.C. § 1582 to enforce a civil penalty.

fraud penalty cases, clear and convincing evidence.<sup>95</sup>

There is, however, no clear statutory mandate in these cases regarding the standard of review the Court is to apply. In UPS and other cases, the Court has adopted the APA standard of review by default. Arguably, this is premised on the language of 28 U.S.C. § 1640(e). That language, however, specifically excludes from the purview of the APA standard of review, protest denial cases and penalty cases, which are covered by 28 U.S.C. § 1640(a). Thus, a more consistent reading of the statute may be that the APA standard of review does not apply in those cases. The Court, therefore, is left without a statutory standard of review.

Not having a statutory standard of review does not leave the CIT without an analytical framework in which to decide these cases. As the Federal Circuit stated in Universal Electronics, the standard of review is the allocation of decision making autonomy between adjudicators. In cases where the question involves an Executive Branch agency's legal interpretation, Chevron and Mead govern the relationship between the agency and the Court. Thus, on questions of law, the standard of review is—separate and apart from the APA—the proper application of either Chevron or Skidmore deference.

The APA is a square peg that the Court may be in the process of trying to insert into a hole that has been well rounded by decades of practice in which the Court gave little or no deference to the underlying agency determination. In doing so, the Court fit nicely into its role as an Article III court with uniquely specialized expertise in the area of customs law. Mead and its predecessor Haggar require that the Court give appropriate deference to the expertise of the relevant agencies. While those decisions by the Supreme Court may have somewhat eroded the

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<sup>95</sup>19 U.S.C. § 1592(e)(2).

Court's role in determining the meaning of the customs laws, the Court should not further that process by seeking to superimpose on its decision making the strictures of the APA. Nor should the Court simply set out the APA standard of review and not let it inform the Court's decisions.

Rather, where there is no statutory mandate to apply the APA, the Court should recognize that deference under Chevron or Skidmore is the appropriate standard of review on questions of law.