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The Court of International Trade's Jurisdiction Over Potentially Protestable Customs Service Rulings: Lowa, Ltd. V. United States

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COMMENTS

THE COURT OF INTERNATIONAL TRADE'S JURISDICTION OVER POTENTIALLY PROTESTABLE CUSTOMS SERVICE RULINGS: *LOWA, LTD. v. UNITED STATES*

The decision in *Lowa, Ltd. v. United States*[1] is one of the

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[1] 561 F. Supp. 441 (Ct. Int'l Trade 1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984). The plaintiff in Lowa, Ltd. v. United States had an airplane extensively refurbished while abroad, and, in August 1979, brought it back to the United States. 561 F. Supp. at 442. The plaintiff sought to file a consumption entry under item 694.40 of the Tarriff Schedules of the United States (TSUS), which would have imposed a 5% *ad valorem* duty on the value added to the aircraft by the refurbishing. *Id.* The Customs Service, operating under the erroneous belief that the aircraft had been of American registry at the time the repairs were made, refused to release the aircraft until a vessel repair entry was filed pursuant to 19 U.S.C. § 1466. *Id.* Section 1466, if applicable, would have imposed a 50% duty on the expense of the repairs. *Id.*; *see also* Suwannee Steamship Co. v. United States, 435 F. Supp. 389, 390-91 & n.1 (Cust. Ct. 1977) (shipowner required to pay an *ad valorem* duty of 50% of the cost of foreign repairs).

After posting a bond to secure the release of the aircraft, "the plaintiff filed [a petition] with the district director of Customs . . . seeking relief from the 50% vessel repair duty." 561 F. Supp. at 443. The plaintiff supplied additional information that showed that the aircraft was not registered under the laws of the United States at the time the repairs were made, and Customs concluded that the 50% duty did not apply. *Id.* In February, 1981, however, Customs notified the plaintiff that it would be required to file an entry summary for the aircraft. *Id.* The plaintiff subsequently filed an entry summary under item 694.41, TSUS, which provided for entry free of duty. *Id.*

Commencing January 1, 1980, however, item 694.41 had superseded item 694.40, TSUS, which provided for a 5% duty. *Id.* Customs notified plaintiff that the entry should be made under item 694.40, the provision that applied during 1979 when the plaintiff's aircraft had been released into United States commerce. *Id.* "[T]he plaintiff filed . . . a protest objecting to the refusal by Customs to accept the entry under item 694.41," and Customs responded with a letter stating that the protest was premature. *Id.* The plaintiff then commenced its action before the Court of International Trade, and the Court granted the defendant's motion to dismiss for lack of jurisdiction. *Id.*

For a more detailed discussion of the *Lowa* decision, see Cohen, *Recent Decisions of the Court of International Trade Relating to Jurisdiction—A Primer and a Critique*, 58 ST. JOHN'S L. REV. 700, 708-09 & nn.47-52 (1984); Vance, *The Unrealized Jurisdiction of 28 U.S.C. § 1581(i): A View From the Plaintiff's Bar*, 58 ST. JOHN'S L. REV. 793, 810-13 & nn. 80-88 (1984).

most recent pronouncements by the Court of International Trade on its jurisdiction over potentially protestable Customs Service rulings.[2] As this Symposium demonstrates, a number of specialists in international trade litigation believe that the "manifestly inadequate" standard applied by the Court mischaracterizes the relationship between section 1581(a) and section 1581(i).[3] Critics of *Lowa* generally adopt one of two diametrically opposed positions. One view, advocated by David M. Cohen, Director of the Commercial Litigation Branch of the Department of Justice, interprets section 1581(i)(4) as inapplicable to potentially protestable decisions, placing them outside the Court's residual jurisdiction.[4] The opposing school of thought, promulgated by Andrew P. Vance, President

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[2] *See, e.g.*, Luggage and Leather Goods Mfrs. of Am., Inc. v. United States, 18 CUST. B. & DEC. No. 24, at 114-17 (Ct. Int'l Trade 1984) (when special administrative remedies are exhausted under the Generalized System of Preference established in the Trade Act of 1974, plaintiffs are not required to file an essentially futile protest with the Customs Service to gain § 1581(b) jurisdiction, and may properly maintain an action in the Court of International Trade under § 1581(i)); American Ass'n of Exporters and Importers v. United States, 583 F. Supp. 591, 596-97 (Ct. Int'l Trade 1984) (dictum) (denied protests are not "absolute precondition[s] to the Court of International Trade's exercise of subject matter jurisdiction").

[3] *See* Cohen, *supra* note 1, at 760-74 nn. 350-435; Vance, *supra* note 1, at 810-12 nn. 80-89. It is important to note that, despite the disparate opinions on the efficacy of either a broad or narrow grant of jurisdiction to the Court under § 1581(i), all commentators generally welcomed the Customs Courts Act of 1980 as a necessary overhaul in customs-related adjudication. *See, e.g.*, Cohen, *The New United States Court of International Trade*, 20 COLUM. J. TRANSNAT'L L. 278, 293 (1981) (the Act represents "the first step in the development of a true international trade court for the United States"); Note, *The Customs Courts Act of 1980—Pub. L. No. 96-417, 94 Stat. 1785 (to be Codified in Scattered Sections of 19 and 28 U.S.C.)*, 7 N.C.J. INT'L L. & COM. REG. 85, 104 (1982) (the "result [of the Act] will be a fairer and more public administration of U.S. trade law").

[4] *See* Cohen, *supra* note 1, at ___ nn. 481-82. Cohen foresaw the possibility that a legislative reorganization of the Customs Court system might expand the Court's jurisdiction beyond what some considered appropriate if the "natural inclination . . . to permit judicial review in order to insure adherence to [established] rules" was not balanced against the problems inherent in foreign affairs and against criteria established in previously developed areas of judicial review. The Sixth Annual Judicial Conference of the United States Court of Customs and Patent Appeals, 84 F.R.D. 429, 528 (1979) (panel discussion on the Customs Courts Act of 1979). However, Cohen acknowledged the overall desirability of judicial review of administrative action. *Id.*

The general difficulty in permitting an administrative agency to render absolute, unreviewable decisions stems primarily from the dual role of the agency as prosecutor and adjudicator. *See* J. CHAMBERLAIN, N. DOWLING & P. HAYS, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES 209-10 (1969). Objectivity often suffers when the arbiter in a dispute has a vested interest in the outcome. *See id.* Indeed, it is submitted that any diligent administrator will be interested in strenuously upholding the rules he or she is charged with enforcing. Even a well-structured internal administrative organization cannot fully solve the problem; however, it is more likely that an independent judicial review will. *See id.* at 212.

of the Association of the Customs Bar, contends that potentially protestable rulings may be heard by the Court so long as they involve an actual case or controversy and practical exhaustion of remedies has occurred.[5]

This Comment will suggest that the standard explicated in *Lowa* is truer to the legislative intent of the Customs Courts Act of 1980 (Customs Courts Act or the Act) than either of the above alternatives. This Comment will substantiate this claim by analyzing the three approaches in light of the language of the Court's jurisdictional statute, the relevant principles of administrative law, the legislative history of the Customs Courts Act, and the case law defining the boundaries of the Court's jurisdiction. The Comment will conclude that *Lowa* strikes the most reasonable balance between the policies underlying the exhaustion of remedies require-

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[5] *See* Vance, *supra* note 1, at 814. The case or controversy requirement is a well known element of the United States Constitution. U.S. CONST., art. 3, § 2, cl. 1. One author posits that the following factors are necessary to comprise a valid case or controversy:

> (1) [T]he presence before the court of two or more adverse parties, (2) a contest as to their respective rights or duties or both, (3) an adjudication by the application of relatively firm principles characteristically presumed to exclude the exercise of broad discretion, and (4) a decision not subject to subsequent revision by executive or legislature.

L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTIONS 99 (1965).

The exhaustion of administrative remedies prerequisite to judicial review of an agency decision in the federal system has been characterized as "too rigid" and, has at times been required "almost mechanically." *Id.* at 424. Basically, the motivation behind the rule is similar to that requiring a final decision in a lower court before appeal to a higher court can be taken. *Id.* Preventing piecemeal resolution of diverse issues in several courts saves time, money, and leads to more credible results. *Id.* at 424-25. Vance's requirement of only practical exhaustion, rather than actual exhaustion, softens the burden of total administrative exhaustion, which is often required without regard to the futility of the effort, while retaining the framework of the exhaustion doctrine. *Id.; see* Vance, *supra* note 1, at 814.

Vance is not completely alone in his position on § 1581(i) jurisdiction. *See* The First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 100 F.R.D. 499, 580-83 (1983) (Statement of Peter Gerhart). Although his ideas were more general than those expressed by Vance in this Symposium, *see* Vance, *supra* note 1, 814, Professor Gerhart did state that all § 1581 issues must be ripe: "the issue[s] must be concrete, [they] must be controverted, and [they] must be one[s] for which all the relevant facts are before the decision maker." This view parallels Vance's case or controversy requirement very closely. *Id.* at 582. Similarly, and perhaps more importantly, Gerhart agreed with the basic requirement of an exhaustion of remedies, but, like Vance, believed that "the exhaustion doctrine may be ignored if there is no administrative remedy to exhaust, and it may be overridden if the need for a judicial remedy overrides the importance of allowing the administrator to first look at the question." *Id.* at 582-83. In fact, by concentrating on relative importance rather than practical exhaustion as a guideline to when potentially protestable issues may be brought before the Court, Gerhart advocated a position even more extreme than that of Vance. *See id.*

ment and the need to provide importers with meaningful access to the Court in cases in which the protest remedy proves inadequate.

THE STATUTORY PROBLEM

The propriety of extending the Court's jurisdiction to potentially protestable matters in which no protest has been filed remains open to question, in part, because the language of section 1581 does not expressly address the issue. Section 1581(a), which provides that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest"[6] is, by its terms, irrelevant to cases in which no protest has been filed. Since the other subsections of section 1581 deal with particular types of cases that do not include potentially protestable rulings,[7] section 1581(i)(4) is the only statute that the Court conceivably could use as a basis for jurisdiction over such rulings.

Section 1581(i)(4) states, in pertinent part:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section . . . the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for—

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[6] 28 U.S.C. § 1581(a) (1982).

[7] *See id.* § 1581(b), 1581(i)(1)-(3). All of the above-cited subsections contain this statement:"[t]he Court of International Trade shall have exclusive jurisdiction of any civil action." *Id.* Subsection (b) grants jurisdiction to the Court for actions commenced under § 516 of the Tariff Act of 1930, which deals with disputes over "the classification and the rate of duty imposed upon designated imported merchandise." *Id.* § 1581(b); *see* 19 U.S.C. § 1516 (1982). Subsection (c) relates to § 516A of the Tariff Act of 1930, which discusses countervailing and antidumping duties. 28 U.S.C. § 1581(c) (1982); *see* U.S.C. § 1516(a) (1982). Subsection (d)(1)-(3) confers jurisdiction to review final decisions by the Secretary of Labor relating to the eligibility of workers, firms, and communities for adjustment assistance under the Trade Act of 1974. 28 U.S.C. § 1581 (d)(1)-(3) (1982); *see* 19 U.S.C. §§ 2273, 2341, 2371 (1982). Subsection (e) grants the Court the power to review final decisions authorized to be made by the Secretary of the Treasury under the Trade Agreements Act of 1979. 28 U.S.C. § 1581(e) (1982); *see* 19 U.S.C. § 2515(b)(1) (1982). Subsection (f) allows the Court to direct the International Trade Commission, or other agencies, on applications to those agencies requesting that confidential information be made available under the Tariff Act of 1930. 28 U.S.C. § 1581(f) (1982); *see* 19 U.S.C. § 1677f(c)(2) (1982). Subsection (g)(1)-(2) permits the Court to review application denials and suspensions or revocations of customhouse broker's licenses under the Tariff Act of 1930. 28 U.S.C. § 1581(g)(1)-(2) (1982); *see* 19 U.S.C. § 1641 (1982). Subsection (h) provides the Court with jurisdiction to review certain rulings of the Secretary of the Treasury involving goods yet to be imported if the party initiating the suit shows that "irreparable" harm will occur unless the ruling is changed. 28 U.S.C. § 1581(h) (1982).

(4) administration and enforcement with respect to matters referred to in . . . subsections (a)-(h) of this section.[8]

Standing alone, this language appears to grant the Court jurisdiction over potentially protestable matters. However, before reaching this conclusion, 28 U.S.C. § 2637 (section 2637), which defines the extent to which exhaustion of administrative remedies is required before the Court can take jurisdiction of a case, must be consulted.[9]

Section 2637(a) states, in pertinent part:

A civil action contesting the denial of a protest . . . may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced . . . .[10]

This section, which uses the same language as section 1581(a),[11] plainly refers to cases brought under that section. Section 2637(a) is particularly relevant to the present analysis because it does not require a protest to be filed in a case involving a potentially protestable ruling for the Court to have jurisdiction.[12] The section

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[8] 28 U.S.C. § 1581(i)(4) (1982).

[9] *Id.* § 2637; *see* L. JAFFE, *supra* note 5, at 424-25. In addition to the Court's inadequacy exception to the exhaustion of administrative remedies required under § 1581(i), one commentator has enumerated five other exceptions to the exhaustion rule. *See* Comment, *Limiting Judicial Intervention in Ongoing Administrative Proceedings*, 129 U. PA. L. REV. 452, 458-67 (1980). These exceptions include cases involving questions of the jurisdiction of the agency, attacks on the constitutionality of the action of the agency, examinations of potential international questions, resolutions of essentially legal questions, and cases of discretionary waivers of the exhaustion requirement. *Id.* This commentator notes that "judicial intervention reduces the stature and legitimacy of the administrative process" and might eventually "encourag[e] litigants to by-pass or evade agency decisionmaking." *Id.* at 457.

Section 2637(b) states "[a] civil action contesting the denial of a petition under § 516 of the Tariff Act of 1930 may be commenced . . . by a person who has first exhausted the procedures set forth in such section." 28 U.S.C. § 2637(b) (1982). Clearly, this section and § 2637(c), which refers only to § 1581(h) and its provision granting the Court jurisdiction when a ruling by the Secretary of the Treasury causes irrevocable harm to a future importation of goods, are both inapplicable to a discussion of whether any potentially protestable but unprotested matters may ever be properly brought before the Court. *Id.* §§ 1581(h), 2637(c). Therefore, only subsections 2637(a) and 2637(d) need be considered here.

[10] 28 U.S.C. § 2637(a) (1982).

[11] *See id.* Section 2637(a) is very similar to § 1581(a), which states that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest . . . under § 515 of the Tariff Act of 1930." *Id.* § 1581(a). More important than the structural similarity between the two statutes is the fact that both refer specifically to § 515 of the Tariff Act of 1930, clearly evincing their common origin. *Id.* §§ 1581(a), 2637(a); *see* 19 U.S.C. § 1515 (1982) (standards for review of a protested claim).

[12] *See* 28 U.S.C. § 2637(a) (1982).

simply provides that in those cases in which a protest is filed and denied, any amounts assessed by Customs against the importer must be paid before the Court can take jurisdiction.[13] Therefore, it is submitted that section 2637(a) presents no jurisdictional impediment to the Court hearing those potentially protestable matters in which no protest is filed because the relief available through the administrative process is alleged to be inadequate.

Section 2637(d), which applies to cases arising under subsections 1581(d)-(i), grants the Court broad discretion to determine when a party must exhaust its administrative remedies before seeking judicial review. It provides that:

> In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.[14]

The implication of this language is that the Court may take jurisdiction of a potentially protestable but unprotested matter under the proper circumstances, because unprotested matters do not fall into the group of cases referred to in section 1581(a) or section 2637(a), both of which address only "civil action[s] commenced to contest the denial of a protest."[15] Moreover, nothing in the language of either section suggests that potentially protestable matters are automatically excluded from the purview of section 1581(i). Even if the "in addition to" language of section 1581(i) is construed to exclude cases from the Court's residual jurisdiction that are provided for in the other subsections of section 1581,[16] potentially protestable matters are not excluded because they are not provided for in any other subsection. It is submitted that to argue otherwise is to ignore the time-honored principle of statutory construction that the words of a statute bear their ordinary meaning unless a contrary interpretation is indicated.[17]

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[13] *Id.; see infra* note 17 (discussion of "plain meaning" rule).

[14] 28 U.S.C. § 2637(d) (1982).

[15] *See id.* §§ 1581(a), 2637(a).

[16] *See* Cohen, *supra* note 1, at 783-85; *infra* notes 75 & 77.

[17] *See generally* Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509, 509-16 (1940) (broad background rationale supporting plain meaning rule). The "plain meaning" rule provides that when "[an] act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." Hamilton v. Rathbone, 175 U.S. 414, 419 (1899); *see also* Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122, 202-03 (1819) (the "plain meaning" of a provision in a statute should only be discarded if the result of enforcing that meaning is "so monstrous, that all mankind would, without hesitation, unite in rejecting the application").

One of the major arguments raised in opposition to this construction of section 1581(i) assumes that it provides no effective check upon the Court's capacity to use this section to enlarge its jurisdiction. It is submitted that such an assumption is unwarranted. The exhaustion of remedies doctrine has been used by both the Court and its predecessor tribunal, the Customs Court,[18] to prevent an improper expansion of jurisdiction.

The Exhaustion of Remedies Doctrine

As Chief Judge Re observed in *Lowa,* it is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[19] In cases involving assessments of duties on imported merchandise, the administrative remedy is to file a protest with the Customs Service.[20] What remains open to debate is the extent to which the Court may accept such cases if no protest has been filed, or if a protest has been filed but has not been formally denied.

Four exceptions to the exhaustion doctrine have been recognized and applied by the federal courts.[21] Judicial review is permitted without exhaustion of administrative appeals when: (1) the administrative remedy would be inadequate to provide relief,[22] (2) pursuit of the administrative remedy would be futile,[23] (3) the ag-

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[18] *See generally* Cohen, *supra* note 3, at 278-82 (history and background of the pre-1980 customs court system).

[19] Lowa, Ltd. v. United States, 561 F. Supp. 441, 448 (Ct. Int'l Trade 1983) (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938)), *aff'd,* 724 F.2d 121 (Fed. Cir. 1984).

[20] *See* 19 U.S.C. §§ 1514, 1515 (1982).

[21] *See* 5 B. MEZINES, ADMINISTRATIVE LAW §§ 43.02[3], at 43-24 to 43-25, 49.02, at 49-7 to 49-29 (1984).

[22] *Id.* § 49.02[1], at 49-7; *see, e.g.,* Walker v. Southern Ry., 385 U.S. 196, 198-99 (1966) (action by employee for money damages against railroad for wrongful discharge in violation of collective bargaining agreement not barred by employee's failure to pursue administrative remedies available under the Railway Labor Act), *modified,* 386 U.S. 988 (1967); Camenisch v. University of Tex., 616 F.2d 127, 134 (5th Cir. 1980) (en banc) (it is well-settled that the exhaustion doctrine does not apply where there is no adequate administrative procedure available), *vacated on other grounds,* 451 U.S. 390 (1981). *See generally* 5 B. MEZINES, *supra* note 21, § 49.02[1].

[23] 5 B. MEZINES, *supra* note 21, § 49.02[4], at 49-26; *see, e.g.,* McKart v. United States, 395 U.S. 195 (1969) ("[i]n Selective Service cases, the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created"); New Jersey v. Department of Health & Human Servs., 670 F.2d 1262, 1277 (3d Cir. 1981) (court recognized that exhaustion of remedies doctrine "has traditionally been waived in those situa-

grieved party would incur irreparable injury if required to await administrative relief,[24] and (4) the agency has exceeded its authority.[25] Since the exhaustion doctrine exists to prevent the courts from improperly interfering with the creation of administrative agency policy,[26] it is not applied to cases in which there is little danger of intrusion upon agency prerogatives.[27]

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tions where exhaustion would be futile") (quoting Susquehana Valley Alliance v. Three Mile Island Nuclear Reactor, 614 F.2d 231, 245 (3d Cir. 1980), *cert. denied,* 449 U.S. 1069 (1981)); Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 825 (2d Cir. 1967) (courts will disregard doctrine of exhaustion of administrative remedies when there is nothing to be gained from exhaustion). *See generally* 5 B. MEZINES, *supra* note 21, § 49.02[4].

[24] 5 B. MEZINES, *supra* note 21, § 49.02[2], at 49-20 to 49-23. *See, e.g.,* Cerro Metal Prods. v. Marshall, 620 F.2d 964, 971 n.17 (3d Cir. 1980) (if case were normally subject to exhaustion of remedies doctrine, court would find "that it comes within the long-established exception when the prescribed administrative procedure is clearly shown to be inadequate to prevent irreparable injury"); Babcock and Wilcox Co. v. Marshall, 610 F.2d 1128, 1138 (3d Cir. 1979) (as a judicially-created doctrine, exhaustion of remedies is subject to an exception when the prescribed administrative procedure is clearly inadequate to prevent irreparable injury); American Fed'n of Gov't Employees v. Resor, 442 F.2d 993, 994-95 (3d Cir. 1971) ("if the prescribed administrative procedure is clearly . . . inadequate to prevent irreparable injury, . . . a court need not defer decision until the conclusion of the administrative inquiry"). *See generally* 5 B. MEZINES, *supra* note 21, § 49.02[2].

[25] 5 B. MEZINES, *supra* note 21, § 49.02[3], at 49-24; *see, e.g.,* Leedom v. Kyne, 358 U.S. 184, 190-91 (1958) (federal district court had jurisdiction of an original suit to set aside NLRB's decision because Board exceeded its authority); Coca-Cola Co. v. FTC, 475 F.2d 299, 303 (5th Cir.) ("most widely recognized exception to the general rule against judicial consideration of . . . agency rulings is the class of cases where an agency has exercised authority in excess of its jurisdiction") *cert. denied,* 414 U.S. 877 (1973). *See generally* 5 B. MEZINES, *supra* note 21, § 49.02[3].

[26] *E.g.,* McKart v. United States, 395 U.S. 185, 193-94 (1969) (primary purpose of exhaustion doctrine is to avoid premature interruption of administrative process); Von Hoffburg v. Alexander, 615 F.2d 633, 637 (5th Cir. 1980) ("the major purpose of the exhaustion doctrine is to prevent the courts from interfering with the administrative process until it has reached a conclusion"); Craycroft v. Ferrall, 408 F.2d 587, 594 (9th Cir. 1969) (one of the purposes of the exhaustion rule is "to avoid interference with the orderly functioning of the administrative process"), *vacated on other grounds,* 397 U.S. 335 (1970).

[27] *See* 5 B. MEZINES, *supra* note 21, § 43.02[3], at 43-24. As the Ninth Circuit indicated in Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969), *vacated on other grounds,* 397 U.S. 335 (1970),

> [a] major premise supporting the requirement of exhaustion is that recourse to the full administrative process might satisfactorily have resolved the debated issues. Accordingly, it is unlikely that a court would require exhaustion if an administrative body's actions constituted a readily discernible error of a type unlikely to be corrected by further recourse to the administrative process and resulting in great injury to a party or to the public. It is also reasonable that a court should relax the requirement of exhaustion in a case that can be decided only by the determination of an issue not addressed to an area of administrative judgment. Furthermore, the Supreme Court has not required exhaustion when faced with a record clearly revealing infringements on the first amendment right of free expression that could not be fully and satisfactorily protected by requiring re-

The Court has adopted most of these common-law exceptions to the exhaustion requirement under the general label "manifestly inadequate." In *Lowa,* for example, the Court expressly recognized the inadequacy and irreparability of harm exceptions,[28] and in *United States Cane Sugar Refiners' Association v. Block,*[29] the court squarely embraced the futility exception.[30] Moreover, the need for rigid adherence to the exhaustion requirement is lessened in the area of international trade,[31] in part, because the Court itself is a tribunal that specializes in international trade. In addition, the policy of ensuring the uniformity of regulations governing international trade no longer necessitates judicial restraint on the part of the Court, since the Court now has exclusive jurisdiction to review Customs Service rulings and, therefore, for all practical purposes uniformity has been achieved.[32]

The Legislative History of the Customs Courts Act of 1980

The brief legislative history of the Customs Courts Act declares the main purpose of the Act to be "to provide for a comprehensive system of judicial review of matters directly affecting imports, utilizing, wherever possible, the specialized expertise of the United States Customs Court [now the Court of International Trade] and the Court of Customs and Patent Appeals [now the Court of Appeals for the Federal Circuit]."[33] To this end, section

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course to the administrative process.

Id. at 594-95.

[28] *Lowa,* 561 F. Supp. at 448.

[29] 683 F.2d 399 (C.C.P.A. 1982).

[30] *Id.* at 402 n.5.

[31] In League of United Latin Am. Citizens v. Hampton, 501 F.2d 843 (D.C. Cir. 1974), the court listed, *inter alia,* two reasons for requiring the application of the exhaustion doctrine in most cases:

> [A] plaintiff should be required to exhaust his administrative remedies so long as resort to the agency is not obviously futile: . . . 5. when the case presents complicated and technical facts, the court should defer to the expertise and special knowledge of the agency, 6. when the resolution of the issues depends on the interpretation and application of the agency's regulations and the interest of uniformity the agency should be allowed to construe their own regulations.

Id. at 847, *see also* Sohm v. Fowler, 365 F.2d 915, 917-19 (D.C. Cir. 1966); *infra* notes 80-81 and accompanying text (main problem with uniformity of treatment of Customs Service rulings was previous construction of the exhaustion doctrine by both Customs Court and district courts).

[32] *See* Customs Court Act of 1980, Pub. L. No. 96-417, § 201, 94 Stat. 1727, 1728-29; *see also* 28 U.S.C. § 1581 (1982).

[33] *Hearings on S. 2857 Before the Subcomm. on Improvements in Judicial Machinery*

1581(i) was drafted to "eliminate the confusion which [then] exist[ed] as to the demarcation between the jurisdiction of the district courts and the Court of International Trade [and to] make it clear that all suits of the type specified [in section 1581(i)] would be properly instituted only in the Court of International Trade."[34] This sweeping grant of jurisdiction was qualified by the House Report on the Act, which stated that subsection (i) created no new causes of action.[35]

The insistence in the House Report that the Act created no new causes of action does not, it is submitted, represent a fear that the Court would attempt to overstep the statutory bounds of its jurisdiction as much as it signals the purpose behind the grant of residual jurisdiction. Before the Act was passed, a class of Customs Service rulings existed that could properly be reviewed by the district courts, but which lay outside the Customs Court's statutory grant of jurisdiction.[36] Section 1581(i) was meant to bring these cases within the purview of the Court of International Trade, not to establish a new basis for importers to secure judicial review of previously unreviewable rulings.[37]

The fact that the Act was not meant to increase the number of

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of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 3 (1978) [hereinafter cited as *Senate Hearings on S. 2857*].

[34] S. REP. No. 466, 96th Cong., 1st Sess. 3 (1979) [hereinafter cited as S. REP. No. 466].

[35] H.R. REP. No. 1235, 96th Cong., 2d Sess. 33 (1980) [hereinafter cited as H. R. REP. No. 1235].

[36] *See, e.g.*, Cohen, *The "Residual Jurisdiction" of the Court of International Trade Under the Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 471, 473-77 (1981). *Compare* 28 U.S.C. § 1340 (1976) (statute conferring jurisdiction on district court) *with id.* § 1582 (statute in force before 1980 conferring jurisdiction on Customs Court). Prior to the enactment of the 1980 Act, it was often difficult to determine which court had jurisdiction to hear a claim. *See* Proceedings of the Fourth Annual Judicial Conference of the United States Court of Customs and Patent Appeals, 77 F.R.D. 63, 182-90 (1977). This difficulty arose because the statutes conferring jurisdiction upon the Customs Court provided a narrow definition of the circumstances in which suit could be instituted. Cohen, *supra*, at 474.

[37] The Senate Report, echoing the Senate Hearings, states the purpose of § 1581(i) as follows:

> [T]he purpose of this broad jurisdictional grant is to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade. This residual jurisdictional provision should make it clear that all suits of the type specified are properly instituted only in the Court of International Trade . . . .

S. REP. No. 466, *supra* note 34, at 3; *see also Proposed Amendments to the Customs Court Act: Hearings on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 1 (1980) (remarks of Sen. DeConcini) [hereinafter cited as *House Hearings on H.R. 6394*].

administrative rulings eligible for judicial review suggests a simple test of the correctness of the *Lowa* doctrine: If the type of international trade cases formerly heard only by the district courts is the same type of cases over which the Court of International Trade has asserted jurisdiction pursuant to section 1581(i)(4) and the *Lowa* doctrine, that doctrine comports with the intent of the Act. Therefore, pre-Act case law can be used to help ascertain the boundaries of the Court's residual jurisdiction.

Pre-Act Case Law

In her testimony during the Senate hearings on the Customs Courts Act, former Assistant Attorney General Babcock cited *Sneaker Circus, Inc. v. Carter*[38] as an example of the type of case that would come within the proposed grant of residual jurisdiction.[39] In *Sneaker Circus,* the Second Circuit held that an importer's challenge to executive agreements made by the President concerning footwear imports from China and Korea was within the jurisdiction of the district court, although it was not within the jurisdiction of the Customs Court.[40] The Second Circuit justified the need for the district court to exercise its original jurisdiction by emphasizing the inadequacy of the Customs Service's protest remedy under the circumstances:

> Violation of these export limits subjects the foreign exporter to heavy civil and criminal sanctions in the country of export. There is accordingly every likelihood that the agreements will be effectively enforced abroad, with the result that no occasion for protest . . . will ever present itself, and no Customs Court jurisdiction . . . will arise.[41]

Shortly after the decision in *Sneaker Circus,* the United States District Court for the District of Columbia stated this inadequacy exception more explicitly in *Davis Walker Corp. v. Blumenthal.*[42] Relying heavily upon *Sneaker Circus,* the *Davis Walker* court declared that "[j]urisdiction lies in the federal court over Customs-related matters where no adequate remedy exists in

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[38] 566 F.2d 396 (2d Cir. 1977).
[39] *Senate Hearings on S. 2857, supra* note 33, at 50, 60.
[40] 566 F.2d at 399.
[41] *Id.*
[42] 460 F. Supp. 283 (D.D.C. 1978).

the Customs Court."[43] The district court therefore accepted jurisdiction to review the trigger price mechanism used by the Treasury Department to enforce the Antidumping Act.[44] Since "[m]ost foreign suppliers refused to sell . . . at prices below the trigger prices,"[45] the court explained, instigation of an antidumping investigation or the imposition of duties, one of which was a necessary precondition to Customs Court jurisdiction over such a question, was unlikely.

In *Jerlian Watch Co. v. United States Department of Commerce*,[46] importers challenged a quota that limited the duty-free importation of watches from United States possessions.[47] They claimed that they could not challenge the quota by the protest method because payment of the duties that would be assessed against them would drive them out of business.[48] The Ninth Circuit affirmed the district court decision to dismiss the importers' petition, holding that the no "adequate remedy" exception could be invoked only if the party seeking review could demonstrate unalterable or unavoidable detriment.[49] The court concluded that financial hardship was not sufficiently detrimental to justify application of the inadequacy exception since the plaintiffs "[held] the key to their remedy by choosing whether or not to import in excess of their allocation and pursue a protest."[50] This fact distinguishes

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[43] *Id.* at 290.

[44] *Id.*

[45] *Id.*

[46] 597 F.2d 687 (9th Cir. 1979) (per curiam). *Jerlian Watch* has been cited as support for a restrictive interpretation of § 1581(i). *See* Cohen, *supra* note 1, at 770-71. *But see* Vance, *supra* note 1, at 809-10 (pre-Act cases such as *Jerlian Watch* do not compel the Court to interpret its jurisdiction under § 1581(i) restrictively). Nevertheless, it is submitted that the *Jerlian Watch* court effectively conceded the propriety of the inadequate remedy exception by attempting to limit it.

[47] 597 F.2d at 688. The quota that the importers challenged in *Jerlian Watch* "contemplate[d] a two-stage allocation process." *Id.* at 689. In the first stage, the annual quota of watches that could be imported duty-free was to be divided among all eligible producers based on the quantity of local income taxes and wages paid, and on the number of units exported in the previous year. *Id.* In the second stage, the remainder of the quota was allocated among watch assemblers who used at least 26 "discrete components" in the manufacture of their watches, and made a specified wage contribution per watch movement. *Id.*

[48] *Id.* at 691.

[49] *Id.* at 692.

[50] *Id.* The federal courts consistently have found in other administrative contexts that financial hardship is not sufficiently injurious to justify an exception to the exhaustion of remedies requirement. *See, e.g.*, Barnes v. Chatterton, 515 F.2d 916, 921 (3d Cir. 1975) (costs involved in pursuing administrative relief through Civil Service Commission do not constitute irreparable injury and plaintiff is therefore required to exhaust available adminis-

Jerlian Watch from both *Sneaker Circus* and *Davis Walker,* in which the plaintiffs lacked the ability to protest.[51]

Post-Act Case Law

From the outset, the Court of International Trade acknowledged the importance of pre-Act case law in defining its "manifestly inadequate" standard. The Court first had the opportunity to apply this standard in *United States Cane Sugar Refiners' Association v. Block.*[52] In *Cane Sugar Refiners' Association,* the plaintiff association attempted to challenge a presidential proclamation creating sugar importation quotas—without first filing a protest—on the ground that the delay and expense inherent in using the protest remedy held "the potential for immediate injury and irreparable harm" to both the sugar industry and the American economy.[53] The Court agreed that the protest remedy was manifestly inadequate under the circumstances and upheld the ex-

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trative remedies before seeking judicial review); Frito-Lay, Inc. v. FTC, 380 F.2d 8, 10 (5th Cir. 1967) (where plaintiff failed to exhaust administrative remedies through FTC, judicial intervention is not justified where injury sought to be avoided is merely normal cost of administrative litigation); Allegheny Airlines v. Fowler, 261 F. Supp. 508, 520 (S.D.N.Y. 1966) (expense involved in submitting to administrative proceedings of the New York State Commission for Human Rights is not sufficiently detrimental to justify judicial action without exhaustion of administrative remedies).

[51] *See* Sneaker Circus, Inc. v. Carter, 566 F.2d 396, 399 (2d Cir. 1977); Davis Walker Corp. v. Blumenthal, 460 F. Supp. 283, 290 (D.D.C. 1978); *see also* Timken Co. v. Simon, 539 F.2d 221, 225-26 & n.8 (D.C. Cir. 1976) (refusing to hold that district court lacked jurisdiction to hear challenge to dumping finding since importer lacked Customs Court remedy); Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136, 143 (D.C. Cir.) (district court jurisdiction existed because private enforcement of import restraints eliminated possibility of protestable Customs decision being made), *cert. denied,* 421 U.S. 1004 (1974). *But cf.* J.C. Penney Co. v. United States Treasury Dep't, 439 F.2d 63, 68 (2d Cir.) (determination that case is not ripe for review by Customs Court since no protest can yet be filed does not, of itself, vest the district court with jurisdiction), *cert. denied,* 404 U.S. 869 (1971).

[52] 544 F. Supp. 883 (Ct. Int'l Trade), *aff'd,* 683 F.2d 399 (C.C.P.A. 1982)

[53] 544 F. Supp. at 886. In order to file a protest, the plaintiff association, comprised of six major independent refiners of cane sugar in the United States, first would have had to attempt to import sugar in excess of the quota established, solely to obtain a protestable exclusion of the product from the entry under § 1514. *Id.* at 887. Under the Presidential proclamation, Customs officials were required to exclude from entry any sugar in excess of the established quotas. *Id.* The Customs officials reviewing a protest to this proclamation would be powerless because they would have no authority to override the Presidential proclamation. *Id.* Consequently, there was no relief available to plaintiffs at the administrative level. *Id.* Judge Newman, writing for the Court, declared that it would be "totally unreasonable—indeed, shocking—to require plaintiff's members" in this situation, to file a protest before seeking judicial review of the validity of the proclamation. *Id.*

ercise of jurisdiction under section 1581(a).[54] Although at first glance this decision may seem to disregard the limitation placed on the inadequacy exception in *Jerlian Watch, Cane Sugar Refiners' Association* is distinguishable because the injury alleged was not solely to the importers, but also to the American economy as a whole.[55] Furthermore, while this decision differs from the pre-Act cases because harm to third parties is alleged, it is submitted that Congress, in giving exclusive jurisdiction over international trade matters to the Court, did not intend to deny the Court jurisdiction to review an unprotested matter that posed serious danger to the national economy.

Perhaps because *Cane Sugar Refiners' Association* appeared to give an expansive interpretation to the Court's jurisdictional statute, subsequent decisions of the Court and the Federal Circuit have stressed the narrowness of the manifestly inadequate standard.[56] For example, in *American Air Parcel Forwarding Co. v. United States,*[57] the Court rejected the argument that an importer—without filing a protest—could challenge the imposition of extra duties after goods were imported pursuant to "internal advice" that was subsequently revoked by Customs.[58] The plaintiff had attempted to show inadequacy by arguing that payment of the additional duties would bankrupt it, and the Court, in keeping with *Jerlian Watch,* observed that "where a litigant has access to . . . [the] court under traditional means, such as [by filing a pro-

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[54] *Id.*

[55] *See id.*

[56] *See* Manufacture De Machines Du Haut-Rhin v. von Raab, 569 F. Supp. 877, 882-83 (Ct. Int'l Trade 1983). *But see* Special Commodity Group v. Baldridge, 575 F. Supp. 1288, 1291-92 (Ct. Int'l Trade 1983) (plaintiff permitted to assert claim arising out of law of imports).

[57] 557 F. Supp. 605 (Ct. Int'l Trade), *aff'd,* 718 F.2d 1546 (Fed. Cir. 1983), *cert. denied,* 104 S. Ct. 1909 (1984).

[58] 557 F. Supp. at 608. The plaintiffs in *American Air Parcel* were involved in the importation of clothing that was custom-made in Hong Kong for customers in the United States who ordered the merchandise through American salesmen. *American Air Parcel,* 718 F.2d at 1547-48. The plaintiffs objected to the assessment of duties based on the sales price paid by the consumer in the United States. *Id.* at 1548. They contended that the amount of duty should be based on the payment in Hong Kong by distributors to tailors. *Id.* In response to the importer's request for internal advice, the Customs Office of Regulations and Rules declared that the duty should be assessed based on the transaction in Hong Kong between the tailors and distributors. *Id.* The Customs Service, however, later revoked this decision. *Id.* at 1549.

The *American Air Parcel* opinion followed the decision in United States v. Uniroyal, Inc., 687 F.2d 467 (C.C.P.A. 1982). For a brief discussion of that opinion, see *infra* notes 60-62 and accompanying text.

test], it must avail itself of this avenue of approach complying with all the relevant prerequisites thereto."[59] Similarly, in *United States v. Uniroyal, Inc.*,[60] the Court of Customs and Patent Appeals stressed the narrowness of the "manifestly inadequate" exception,[61] and Judge Nies' concurring opinion observed that the exception was consistent with pre-Act case law.[62] Finally, in *Lowa*, Chief Judge Re concluded from the relevant case law that the inadequacy exception applies only to protestable matters when the protest remedy is manifestly inadequate, or "when necessary . . . because of special circumstances."[63]

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[59] 557 F. Supp. at 607. The Federal Circuit affirmed the Court's dismissal of the importer's action for lack of jurisdiction. *American Air Parcel*, 718 F.2d at 1552-53. On appeal, the importer raised two arguments: first, that payment of the additional duties assessed would drive the importer into bankruptcy, and thus it could not use the protest remedy; and, second, that the § 1581(a) remedy did not comport with due process under the circumstances. *Id.* at 1549-50. The Federal Circuit dismissed the first argument in terms similar to those used by the Court of International Trade. *Compare* 557 F. Supp. at 607-08 *with* 718 F.2d at 550-52. With respect to the importer's constitutional arguments, the court held that the mere allegation of a constitutional violation did not suffice to render the protest remedy "manifestly inadequate," since if this were the case, § 1581(a) could be circumvented merely by casting challenges in constitutional language. *Id.* at 1550. Moreover, the court held that the delays implicated in the protest procedure did not violate the importer's due process rights, particularly since the importer had increased the time necessary for disposition of protests by seeking additional administrative review. *Id.* at 1551.

[60] 687 F.2d 467 (C.C.P.A. 1982).

[61] *See id.* at 471-72. The *Uniroyal* court noted: "The jurisdiction of the Court of International Trade under § 1581(i) is expressly 'in addition to the jurisdiction conferred . . . by subsections (a)-(h),' and the legislative history of § 1581 further evidences Congress' intention that subsection (i) not be used generally to bypass administrative review by meaningful protest." *Id.* at 472. In *Uniroyal*, Customs issued notices of redelivery to an importer because it had not marked its goods with the country of origin. *Id.* at 468 & n.2. The importer responded with a request for an internal advice concerning whether an exception to the marking requirement applied. *Id.* at 468. The reply was in the negative, and the importer based its action upon it. *Id.* at 469. The Court, however, denied the Government's motion to dismiss on the ground that, by answering the request for internal advice, Customs had made a final decision concerning the applicability of the marking statute. *Id.* at 469. Since Customs would thus have to deny any protest subsequently filed, the filing of a protest would be a meaningless gesture, and jurisdiction existed under § 1581(i). *Id.* at 469-70. The issue was certified for interlocutory appeal and the Court of Customs and Patent Appeals reversed on the ground that an "internal advice" ruling could not be reviewed pursuant to § 1581(i). *Id.* at 472.

[62] *See id.* at 475 & n.9 (Nies, J., concurring), Judge Nies believed that the legislative history of the Act foreclosed any judicial review of an internal advice. *See id.* at 475 (Nies, J., concurring). Although the notices of delivery might have been reviewable under § 1581(i) if the protest remedy were shown to be "manifestly inadequate," no such inadequacy was shown. *Id.* (Nies, J., concurring). For that reason, Judge Nies concurred in the court's decision. *See id.* (Nies, J., concurring).

[63] 561 F. Supp. at 447. Chief Judge Re emphasized the judicial deference due the administrative process: "Whether the question to be decided is factual or 'strictly legal,' the

A DEFENSE OF THE LOWA STANDARD

The language in the foregoing opinions suggests, it is submitted, an effort by the Court both to accept cases that previously would have been heard by the district courts under the "no adequate remedy" exception and to stay within the limits mandated by section 1581. Moreover, by adopting the stance it has taken in interpreting section 1581, it is suggested that the Court has acted consistently with the legislative history of the Customs Courts Act.

Nevertheless, the articles in this Symposium by Messrs. Cohen and Vance indicate that the *Lowa* standard has influential critics. Cohen's position is that the "in addition to" language of section 1581(i) makes that section a grant of jurisdiction entirely separate from the grants of jurisdiction contained in sections 1581(a)-(h).[64] This view necessarily assumes that the Court has acted beyond its powers in applying the "manifestly inadequate" standard, since it assumes that potentially protestable matters must come within the jurisdictional grant of section 1581(a) if they are to come before the Court at all.[65] Vance, by contrast, maintains that the Court's power to excuse the filing of a protest is at least as great as was the power of the district courts to do so before passage of the Act.[66] He contends, however, that the grant of jurisdiction embodied in section 1581(i)(4) authorizes the Court to hear potentially protestable matters in which the protest remedy would cause hardship to the aggrieved party, so long as a case or controversy is shown to exist.[67] This view asserts that *Lowa* takes too constrained a view of the

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judicial respect due the administrative process requires that the decision should be made in the first instance by the administrative agency to whom Congress has delegated the responsibility of administering the statutory plan." *Id.* Citing *Uniroyal* with approval, Chief Judge Re observed that the Court of Customs and Patent Appeals' refusal to use § 1581(i) to circumvent the normal administrative review process comported with established precedent. *See id.* at 446.

[64] *See* Cohen, *supra* note 1, at 772-73.

[65] *See id.* at 70, 771-72. Cohen admits that his interpretation assumes that "jurisdiction exists under § 1581(i) only if it does not or could not exist under some other subsection of § 1581," *id.* at 772, but cites direct support for this position, *see infra* note 75 and accompanying text.

[66] *See* Vance, *supra* note 1, at 798.

[67] *See id.* at 798-99. Vance's proposed standard focuses on whether the matter is ripe for decision, and de-emphasizes the need to prevent improper circumvention of the protest remedy. *See id.* Vance contends that focusing on whether a case is ripe for decision rather than on the applicability of § 1581(a) is more in harmony with the legislative intent and "would not lead to the judicialization of the administration of customs laws." *Id.*

Court's jurisdiction.[68]

It is suggested that both Cohen's and Vance's interpretations of section 1581(i) are unjustifiably extreme: Cohen's view depends on an interpretation of section 1581(a) that contradicts the plain meaning of that statute and of section 2637(d), while Vance's view ignores the express intent of the legislature not to create new causes of action in passing the Customs Courts Act.

Based on the "in addition to" language of section 1581(i), Cohen characterizes section 1581 as embodying nine discrete grants of jurisdiction to the Court.[69] A case that is embraced by the terms of a particular section, he contends, may not be heard by the Court unless the jurisdictional prerequisites of that section are met.[70]

This construction of section 1581 causes no problems except in regard to potentially protestable matters. Section 1581(a), as was previously noted, applies only to actions brought to contest the denial of a protest.[71] Cohen, however, argues that section 1581(a) includes both protestable and protested matters, even though protestable matters may not actually be heard by the Court until a protest is filed and denied.[72] According to Cohen, the fact that these claims could be protested excludes them from the purview of section 1581(i).[73]

The simple response to this argument is that it ignores the language of sections 1581(a) and 2627(d). Section 1581(a) says nothing about compelling protestable matters that are not protested to be protested, and section 2637(d) gives the Court discretion to determine when exhaustion of remedies is appropriate ex-

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[68] *See id.* at 811.

[69] *See* Cohen, *supra* note 1, at 701.

[70] *Id.* Cohen notes that civil actions brought pursuant to § 1581(a) cannot be heard unless the jurisdictional requirements have been fulfilled and a protest has been filed by the plaintiff. *See id.* at 702.

[71] *See supra* notes 6-7 and accompanying text.

[72] *See* Cohen, *supra* note 1, at 756-57. Cohen's argument relies upon cases in which the plaintiffs made a good faith effort to comply with the statutory requirements. *See id.* In these cases, each court found sufficient compliance because the legislative intent behind the prerequisites had been fulfilled. *See, e.g.*, Dynasty Footwear v. United States, 551 F. Supp. 1138, 1141 (Ct. Int'l Trade 1982) (Court determined that jurisdiction was proper where Government had possession of funds belonging to plaintiff prior to institution of suit because, while there was no actual compliance with statutory requirements, purpose of those requirements had been satisfied); Eddietron, Inc. v. United States, 493 F. Supp. 585, 590 (Cust. Ct. 1980) (partial payment of a promissory note tendered to cover the amount due on six assessed entries satisfied legislative intent of duty payment prerequisite as to one entry for jurisdictional purposes).

[73] Cohen, *supra* note 1, at 761 and text accompanying note 360.

cept in cases covered by sections 1581(a), (b), or (h).[74] This is not to say, however, that Cohen's argument that the statute contains nine discrete jurisdictional grants is necessarily incorrect.[75] Section 1581(i), even if it is construed to include potentially protestable matters, remains a jurisdictional basis "in addition to" section 1581(a) because potentially protestable matters do not come within the terms of section 1581(a) or of any other subsection of section 1581.

More importantly, Cohen's construction of section 1581 conflicts with the primary legislative purpose, which was to bring international trade cases previously heard by the district courts within the jurisdiction of the Court of International Trade. It is clear that Congress intended cases such as *Sneaker Circus* and *Davis Walker* to remain reviewable after passage of the Customs Courts Act.[76] Since the Act precludes the district courts from hearing international trade cases, however, Cohen's view effectively deprives such cases of a forum.

It is submitted that Cohen does not satisfactorily respond to this objection. Instead, he asserts that construing section 1581(i) to embrace potentially protestable matters infringes the integrity of section 1581(a) and accords section 1581(i) an importance Congress did not intend.[77] This argument, however, assumes that potentially

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[74] *See* 28 U.S.C. §§ 1581(a), 2637(d) (1982); *see also supra* notes 6-17 and accompanying text (Court permitted to exercise jurisdiction in unprotested matters).

[75] *See infra* note 77. Cohen cites several cases in support of the proposition that a ruling that can be protested must be protested to come within the jurisdiction of the Court. *See, e.g.*, Consumers Union of United States v. Committee for the Implementation of Textile Agreements, 561 F.2d 872 (D.C. Cir.) (per curiam), *cert. denied*, 435 U.S. 933 (1977). *Consumers Union*, a case decided before the passage of the Act, reversed a district court ruling that granted summary judgment on Consumers Union's challenge of a textile quota program. 561 F.2d at 873. Although it was questionable whether Consumers Union, a nonprofit organization that purchased only $15,000 worth of textiles for testing purposes annually, would have standing, *see id.* at 874, the court did not base its decision on that ground, *see id.* Instead, it reversed on the ground that

> if anyone wishes to challenge the Committee's action, he can do so as other challenges of that nature are made . . . [Customs decisions] are final unless the person aggrieved files a protest with the Collector. Upon its denial, he may bring an action contesting the refusal. . . . This exclusiveness is buttressed by 28 U.S.C. § 1340 which gives "original jurisdiction of any civil action . . ." to the District Court, "*except matters within the jurisdiction of the Customs Court.*"

Id. (emphasis in original); *see* American Air Parcel Forwarding Co. v. United States, 718 F.2d 1546, 1549 (Fed. Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 1909 (1984).

[76] *See supra* notes 33-37 and accompanying text.

[77] Cohen, *supra* note 1, at 770-72. As substantiation for the proposition that subsection (i) was intended to represent a grant of jurisdiction independent of the other subsections of

protestable matters come within section 1581(a), an interpretation that is refuted by the legislative history and the plain language of the statute. The weakness of this argument is further demonstrated by the lack of any support for it from the legislative history or any other source.[78]

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§ 1581, Cohen cites the following remarks of Rep. McClory during the House debate on the Act:

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

Cohen, *supra* note 1, at 791 n.502 (quoting 126 CONG. REC. 26,554 (1980)). This statement comports with others that occur throughout the legislative history. *See supra* notes 33-37 and accompanying text.

[78] Although this is not made explicit, Cohen's main support for his interpretation of the Act as applied to potentially protestable matters lies in Consumers Union of United States v. Committee for the Implementation of Textile Agreements, 561 F.2d 872 (D.C. Cir.) (per curiam), *cert. denied*, 435 U.S. 933 (1977) and the *American Air Parcel* cases. *See supra* note 75. It is submitted, however, that these cases are easily distinguishable from *Sneaker Circus* and *Cane Sugar Refiners' Ass'n. See supra* notes 38-41 & 52-54 and accompanying text. *Consumers Union*, for example, was not a case in which the protest remedy was inadequate. This conclusion is supported by the manner in which the opinion distinguished Consumers Union of United States v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975):

> [I]n that case, the "voluntary import restraint undertakings" were not legally binding and could not be implemented by the Customs Service. There could, as a result, never have been a decision by a Customs official upholding the restraint and opening up the protest procedure which affords access to the Customs Court.

Consumers Union, 561 F.2d at 874 (citations omitted). The *American Air Parcel* cases are even more inapposite, since the importer in those cases filed protests before approaching the Court. *See supra* note 75.

In addition, it is submitted that a second legislative purpose further refutes Cohen's position. The Customs Courts Act was also meant to eliminate discrepancies between the administrative review procedure followed by the Customs Service and the procedures followed by other agencies subject to the Administrative Procedure Act. *See House Hearings on H.R. 6394, supra* note 37, at 9 (Statement of Chief Judge Re). Chief Judge Re summarized two purposes of the Act as follows:

> [T]he bill . . . will establish as matters of legislative policy two significant jurisprudential concepts pertaining to disputes arising out of agency actions affecting importations: . . . [that Customs will be] made subject to the same policy of judicial review as Congress has provided for other administrative agencies; and [that] persons adversely affected or aggrieved by agency actions arising out of import transactions are entitled to the same access to judicial review and judicial remedies as Congress has made available for persons aggrieved by actions of other agencies.

Id. By declaring a group of previously reviewable cases unreviewable, and, by implication, restricting the Court's power to excuse the exhaustion requirement in an appropriate case, it is submitted that Cohen introduces an unjustifiable discrepancy into the process of appealing a Customs Service ruling.

Cohen's second argument against the *Lowa* standard is that it is too vague to be workable.[79] Although it is suggested that this argument is more meritorious than the statutory language argument, it too overlooks relevant considerations of legislative purpose. The inadequacy exception was criticized for creating undue confusion before the Act was passed.[80] However, much of this confusion stemmed from the fact that the standard was being applied by both the Customs Court and the various district courts.[81] With the elimination of district court jurisdiction over international trade cases, this source of potential confusion has vanished. Moreover, though broad, the standard is certainly workable, since it was used for years by the district courts before the Act became law.[82] Cases handed down both before and after passage of the Act have uniformly declared the inadequate remedy exception to be a narrow one and have applied it accordingly.[83] It is submitted that there is little reason to fear that this exception will swallow the exhaustion rule.

In contradistinction to Cohen, Vance's position is, in large measure, in harmony with the *Lowa* standard. His primary criticism of *Lowa* is that by applying the manifestly inadequate stan-

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[79] *See* Cohen, *supra* note 1, at 709.

[80] *See* Cohen, *supra* note 36, at 473-76. Under the Customs Courts Act of 1970, district courts could hear only cases outside the jurisdiction of the Customs Court. The district courts interpreted their jurisdiction to require an inquiry into the possibilities of bringing the action in the Customs Court. This inquiry required the district court to determine whether "the administrative action challenged in the suit could conceivably form the basis for an administrative protest," which then, if denied, would satisfy the statutory jurisdictional requirements of the Customs Court. Cohen, *supra* note 36, at 474. In many instances, there being no administrative decision on point, it was difficult to determine whether the action could have been protested and therefore brought in the Customs Court. *Id.; see* H. REP. No. 1235, *supra* note 35, at 33.

[81] *See* Jerlian Watch Co. v. Department of Commerce, 597 F.2d 687, 690-91 (9th Cir. 1979) (per curiam); SCM Corp. v. United States Int'l Trade Comm'n, 549 F.2d 812, 821 (D.C. Cir. 1977); Cohen, *supra* note 36, at 475-77.

[82] *See* Cornet Stores v. Morton, 632 F.2d 96, 99 (9th Cir. 1980) (available remedies are not inadequate merely because more desirable remedies are available in another court), *cert. denied*, 451 U.S. 937 (1981); Jerlian Watch Co. v. Department of Commerce, 597 F.2d 687, 692 (9th Cir. 1979) (per curiam) (financial impossibility does not render available remedy inadequate); Barclay Indus. v. Carter, 494 F. Supp. 912, 913-14 (D.D.C. 1980) (available remedies are not inadequate because more desirable remedies or procedures are available in a district court). *See generally supra* notes 38-51 and accompanying text.

[83] *See, e.g.*, Jerlian Watch Co. v. Department of Commerce, 597 F.2d 687, 691 (9th Cir. 1979) (per curiam) (pre-Act case law); United States Cane Sugar Refiners' Ass'n v. Block, 544 F. Supp. 883, 887 (Ct. Int'l Trade), *aff'd*, 683 F.2d 399 (C.C.P.A. 1982) (post-Act case law).

dard, the Court failed to exercise all the jurisdiction granted to it by section 1581(i).[84] He contends that since application of the exceptions to the exhaustion requirement no longer invokes questions about the Court's subject matter jurisdiction, pre-Act cases do not bind the Court to interpret those exceptions restrictively.[85] Suggesting that language in the legislative history requires section 1581(i) to be read broadly to expand the Court's jurisdiction and to further the objectives of the Act,[86] Vance proposes a new standard for determining reviewability of protestable matters. Namely, any case in which a final decision has been made by the Customs Service and which is ripe for decision—in the sense that a controversy demonstrably exists—would be reviewable by the Court pursuant to section 1581(i).[87] In other words, Vance would extend the jurisdiction of the Court to cases the district courts previously rejected as unreviewable under the exhaustion of remedies requirement.

There are, it is suggested, several problems with Vance's position. First, like Cohen's view, Vance's interpretation ignores the legislative intention to conform review standards for Customs Service rulings to those applied to rulings of other agencies.[88] More importantly, Vance's interpretation allows previously unreviewable rulings to be heard by the Court, and thus conflicts with the expressed intent in the legislative history that no new causes of action were to be created. Vance's response to this charge is that since the protestability of a ruling no longer defines the Court's jurisdiction over it, pre-Act case law applying the exhaustion requirement no longer applies to the Court.[89] Aside from the fact that it remains questionable whether the Act's passage makes protestability irrelevant to the issue of the Court's subject matter jurisdiction,[90] the primary purpose of the Act was to remove trade

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[84] *See* Vance, *supra* note 1, at 812.

[85] *See id.* at 806 nn.60-62 and accompanying text.

[86] *See id.* at 810. Vance cites Sacilor, Acieries et Laminoirs de Lorraine v. United States, 542 F. Supp. 1020 (Ct. Int'l Trade 1982), as an example of a broad interpretation of the Court's jurisdiction. Vance, *supra* note 1, at 811 nn.84-87 and accompanying text.

[87] *See* Vance, *supra* note 1, at 810.

[88] *See* H. REP. No. 1235, *supra* note 35, at 45. The Act was designed to provide aggrieved parties in import transactions the same judicial review and judicial remedies available to parties aggrieved by other agencies. *Id.*

[89] *See* Vance, *supra* note 1, at 802.

[90] *See* 28 U.S.C. § 2637(d) (1982). The language of § 2637(d) makes plain that its permission to the Court in regard to the exhaustion requirement does not apply to cases in which § 1581(a) is applicable. *See id.* Moreover, the legislative history appears to substanti-

cases from the district courts' jurisdiction.[91] It was to permit this to be done without excluding previously reviewable matters from judicial review that the Act expanded the Court's jurisdiction.[92] To argue that the Court's jurisdiction should be expanded even further is, in effect, to create new causes of action, which Congress expressly refused to do.

As a matter of policy, it is suggested that Vance's standard is vague and unworkable. Under existing case law, there are no clear constitutional principles for deciding when a case or controversy exists in situations in which no protest has been filed.[93] More importantly, Vance's standard permits cases that would ordinarily be handled under section 1581(a) to be handled under section 1581(i). These sections have different statutes of limitation, standing requirements, and burdens of proof.[94] To allow the Court to ignore the exhaustion requirement and interchange cases between these two sections is to build inequity into the jurisdictional scheme of section 1581. It would be more equitable, it is suggested, to permit the Customs Service to resolve impasses concerning the protestability of particular cases by formulating new administrative guidelines than to permit the Court to countenance forum shopping by abrogating the *Lowa* standard.

CONCLUSION

The *Lowa* standard comports with traditional principles of reviewability of administrative rulings, as well as with the legislative purposes behind the Customs Courts Act. Moreover, it strikes a

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ate Cohen's assertion that § 1581(i) was not meant to apply if § 1581(a) did. *See, e.g.*, 126 CONG. REC. 26,553 (1980) (remarks of Rep. McClory). Therefore, it is submitted that a potentially protestable matter must either come within subsection (i) or be protested to fall within the Court's jurisdiction.

[91] *See supra* note 80.

[92] *See supra* notes 33-37 and accompanying text.

[93] *Cf.* Old Republic Ins. Co. v. Pitman, 520 F. Supp. 1225, 1227 (Ct. Int'l Trade 1981) (Court determined jurisdiction was proper under 28 U.S.C. § 1581(i) without looking into existence of a controversy); Zenith Radio Corp. v. United States, 505 F. Supp. 216, 218 (Ct. Int'l Trade 1980) (jurisdictional discussion is contained in two sentences in which Court simply states that jurisdiction exists under 28 U.S.C. 1581(i)); Sanho Collections, Ltd. v. Chasen, 505 F. Supp 204, 208 (Ct. Int'l Trade 1980) (Court determined, without inquiry into constitutional principles, that jurisdiction was proper under 28 U.S.C. § 1581(i) where no protest could be filed).

[94] *Compare* 28 U.S.C. § 2631(a) (1982) (standing) *and id.* § 2636(a) (time for commencing an action) *and id.* § 2639(a) (burden of proof) *with* 28 U.S.C. § 2631(i) (standing) *and id.* § 2636(i) (time for commencing an action) *and id.* § 2639(i) (burden of proof generally).

reasonable balance between the need to maintain the integrity of the protest mechanism and the need to afford aggrieved importers an appropriate forum for dispute resolution. It is hoped that the Court and the Federal Circuit will continue to develop and apply the prudent standard they have established.[95]

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[95] Recent decisions continue to follow the *Lowa* standard. *See, e.g.*, Luggage & Leather Goods Mfrs. of Am., Inc. v. United States, No. 84-53, slip op. at 115-17 (Ct. Int'l Trade May 11, 1984) (jurisdiction under § 1581(i) is proper where exhaustion of remedies would be manifestly inadequate); Vivitar Corp. v. United States, No. 84-37, slip op. at 70 (Ct. Int'l Trade Apr. 4, 1984) (1581(i) jurisdiction is proper where protest could be filed but the protest remedy would be manifestly inadequate); *see also* American Ass'n of Exporters & Importers v. United States, No. 84-21, slip op. at 36-38 (Ct. Int'l Trade Mar. 14, 1984) (noting that filing a protest is not an essential precondition to subsection (i) jurisdiction and distinguishing *Uniroyal*).