Constitutional Litigation and Its Jurisdictional Implications in the Court of International Trade

Todd M. Hughes*
Claudia Burke†

I. INTRODUCTION

Since the creation of the United States Court of International Trade, constitutional litigation has played a small but vital role in the court's jurisprudence.[1] These cases have raised important challenges to presidential authority, acts of Congress, and various types of agency action. The bases for these constitutional challenges have included the First Amendment, Due Process and Equal Protection, the Export Clause, and also have implicated separation of powers principles. And, almost

* Deputy Branch Director, Commercial Litigation Branch, United States Department of Justice. M.A./J.D. 1992, Duke University; B.A. 1989, Harvard College.

† Senior Trial Counsel, Commercial Litigation Branch, United States Department of Justice. J.D. 1999, Temple University; B.A. 1995, Haverford College. The views expressed in this Article are those of the authors and not necessarily those of the United States or any of its agencies. The authors would like to thank Laura Mitchell and Joseph Gallina for their assistance with legal research.

1. A Westlaw search conducted on November 14, 2008, using the terms "constitution" or "constitutional" in the Court of International Trade database yielded approximately 579 cases out of over 61,000, less than one percent, and a search adding some of the more common constitutional provisions ("due process," "equal protection," "export clause," and "first amendment") yielded approximately 120 more cases—698, as of January 14, 2009.

hand-in-hand, these cases have raised substantial questions about the court's jurisdiction—whether the court possessed jurisdiction at all, or which of the several provisions of the court's statutory grant of jurisdiction (28 U.S.C. § 1581) applied. This Article will briefly discuss past and present jurisprudence of the court's constitutional litigation and the implications of that litigation for the court's jurisdiction. Part II summarizes the court's jurisdictional statute, with a focus on section 1581(i) jurisdiction. Part III examines a few of the more significant historical cases, while Part IV focuses more extensively on two matters currently in litigation.

II. OVERVIEW OF SECTION 1581

Section 1581 of title 28 prescribes the court's jurisdiction. Sections (a) through (h) of that statute confer jurisdiction to review specifically enumerated decisions from the United States Department of Commerce (Commerce), the United States International Trade Commission (ITC), the United States Department of the Treasury, the United States Department of Labor, and the United States Customs and Border Protection (Customs).[2] Subsection (i) provides what many courts have called a residual grant of jurisdiction to consider certain other enumerated challenges not covered by the preceding provisions of section 1581.[3] Although section 1581 was intended to clarify the court's jurisdiction, it has engendered substantial litigation.[4] Judge Carman, of the court, has observed that "[i]f Congress had set out to create a jurisdictional gauntlet for litigants, it could not have designed a better system than that which has resulted since the enactment of the Customs Court Act of 1980."[5] And, as discussed further below, much of this jurisdictional confusion and litigation arises from disputes about the scope of the "residual" jurisdictional provision in section 1581(i).

Section 1581(i) allows parties an avenue into court for actions

> aris[ing] out of any law of the United States providing for—
> (1) revenue from imports or tonnage;
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

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2. 28 U.S.C. § 1581(a)-(h) (2006).

3. *See, e.g.*, Hartford Fire Ins. Co. v. United States, 544 F.3d 1289, 1291 (Fed. Cir. 2008); Corus Staal BV v. United States, 515 F. Supp. 2d 1337, 1343 (Ct. Int'l Trade 2007).

4. *See, e.g.*, Honorable Gregory W. Carman, *The Jurisdiction of the United States Court Of International Trade: A Dilemma for Potential Litigants*, 22 STETSON L. REV. 157, 164-65 (1992); *see also Report of the United States Court of International Trade Advisory Committee on Jurisdiction—Part I*, 18 ST. JOHN'S J. LEGAL COMMENT. 1, 6-7 (2003).

5. Carman, *supra* note 4, at 161.

(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.[6]

The court reviews claims under section 1581(i) using the scope and standard articulated in the Administrative Procedure Act (APA).[7] The court also refers to the APA when determining whether parties have met constitutional standing requirements.[8] Because section 1581(i) cases are brought pursuant to the APA,[9] the court reviews section 1581(i) claims on the administrative record.[10] Additionally, cases brought under section 1581(i) have different exhaustion requirements from cases brought under, for example, section 1581(a). Exhaustion under section 1581(i) is applied "where appropriate," whereas exhaustion under section 1581(a) is required.[11]

Additionally, although both the Court of International Trade and the United States Court of Appeals for the Federal Circuit have characterized subsection (i) as "residual," both courts have been careful to explain that even this "residual" provision contains strict limits and cannot be invoked when another provision of section 1581 is or could have been available and is not manifestly inadequate.[12] This limitation—and in particular the

6. 28 U.S.C. § 1581(i).

7. *Id.* § 2640(e) ("In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5.").

8. *Id.* § 2631(i) ("Any civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)-(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5.").

9. *See* Motions Sys. Corp. v. Bush, 437 F.3d 1356 (Fed. Cir. 2006) (en banc); *see also* Mark A. Moran & Wentong Zheng, *Claims Under the Administrative Procedure Act Before the Court of International Trade—A General Overview and Analysis of Significant Recent Jurisprudence*, 28 U. PA. J. INT'L ECON. L. 21, 21 (2007) ("[T]here is a compelling statutory argument . . . that the overwhelming number of claims filed under the CIT's jurisdictional statute . . . are necessarily predicated on the APA.").

10. *See* Ammex, Inc. v. United States, 341 F. Supp. 2d 1308, 1308 (Ct. Int'l Trade 2004), *aff'd*, 419 F.3d 1342 (Fed. Cir. 2005); Defenders of Wildlife v. Hogarth, 177 F. Supp. 2d 1336, 1343 (Ct. Int'l Trade 2001) (quoting 5 U.S.C. § 706(2)(A) (1994)) (noting that cases arising under 28 U.S.C. § 1581(i) are reviewed on the administrative record).

11. *Compare* 28 U.S.C. § 2637(d) *with id.* § 2637(a).

12. *See* Hartford Fire Ins. Co. v. United States, 544 F.3d 1289, 1293 ("While this court has described subsection 1581(i) as a 'broad residual jurisdictional provision,' we have in the same breath said that 'the unambiguous precedents of this court make clear that its scope is strictly limited, and that the protest procedure cannot be easily circumvented.'" (citing Int'l Custom Prods., Inc. v. United States, 467 F.3d 1324, 1327 (Fed. Cir. 2006))); Corus Staal BV v. United States, 515 F. Supp. 2d 1337, 1343 (Ct. Int'l Trade 2007).

intersection between the various avenues of relief afforded by section 1581—continues to generate new and complex jurisdictional questions for the court.

III. PAST CONSTITUTIONAL LITIGATION AND SECTION 1581(I)

A. Presidential Authority and Separation of Powers

Some of the earliest constitutional cases have involved challenges to presidential authority. For instance, in *United States Cane Sugar Refiners' Ass'n v. Block*, the Court of International Trade was asked to enjoin certain quotas imposed by the President on sugar importation.[13] The Government raised an initial jurisdictional challenge, contending that plaintiffs could not rely upon section 1581(i), but should have attempted to first import sugar over the quota and then file a protest and exhaust administrative remedies after the sugar was excluded.[14] The court rejected that argument and concluded that section 1581(i) was available because it would "be totally unreasonable—indeed, shocking—to require plaintiff's members to attempt to import over-quota sugar simply in order to obtain a protestable exclusion of the merchandise from entry."[15] On the merits, the court proceeded to find that the quotas imposed by the President were authorized.[16] Once recognizing that the President's actions were authorized by statute, the court found that its authority to review the decision was at an end.[17] "Fundamentally, however, if the President's action is authorized by the statutes relied upon, the judiciary may not properly inquire or probe into the President's reasoning . . . ."[18]

More recently, in *Motions Systems Corp. v. Bush*, the Court of International Trade was once again asked to consider whether the President had acted within the scope of his authority in international trade matters. The court first rejected a jurisdictional challenge by the Government and concluded that it possessed jurisdiction to review the President's decision not to provide certain import relief to U.S. industry, but then concluded that the President's decision was consistent with statutory authority.[19] On appeal, the Federal Circuit, sitting en banc,

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13. 544 F. Supp. 883, 883 (1982).
14. *Id.* at 886.
15. *Id.* at 887.
16. *Id.* at 893.
17. *Id.* at 895.
18. *Id.* (citing United States v. George S. Bush & Co., 310 U.S. 371 (1939)).
19. 342 F. Supp. 2d 1247, 1256-57, 1262 (Ct. Int'l Trade 2004), *aff'd en banc*, 437 F.3d 1356 (Fed. Cir. 2006).

affirmed the judgment of the Court of International Trade based upon an alternative holding. The Federal Circuit concluded that "[n]o right of judicial review exists to challenge the acts of either the President or the Trade Representative in this case."[20] The court held that the statute at issue afforded the President substantial discretion and that, absent a claim that the President had violated an explicit statutory mandate, no judicial review was available.[21]

B. The Export Clause

Article I, Section 9, Clause 5 of the Constitution of the United States (the Export Clause) provides that "[n]o Tax or Duty shall be laid on Articles exported from any State."[22] Although generally an obscure provision of the Constitution, the Export Clause has engendered some of the most significant constitutional litigation in the Court of International Trade, primarily in the massive Harbor Maintenance Tax litigation, but also in more recent cases.

The Harbor Maintenance Tax (HMT), first enacted in 1986 as an *ad valorem* tax upon port use, was intended to provide funds for the maintenance and repair of harbors and ports.[23] Although unchallenged for several years after its enactment, in the early 1990s, exporters began filing challenges in the Court of International Trade, claiming that the HMT constituted a tax imposed upon exports in violation of the Export Clause. *United States Shoe Corp. v. United States* was selected as a test case.[24]

United States Shoe, like many of the constitutional cases discussed in this Article, presented both jurisdictional and merit-based issues. Although the parties agreed that the Court of International Trade possessed jurisdiction to consider the case, the parties sharply disagreed about whether the case should proceed under section 1581(a) or 1581(i).[25] The Government contended that because the tax was collected by Customs, a protest should be filed against the decision to collect the tax and, after administrative remedies were exhausted, suit should be brought under section 1581(a).[26] The court rejected that argument, holding that the "[a]cceptance of payment of duties owed does not

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20. Motion Sys. Corp. v. Bush, 437 F.3d 1356, 1359 (Fed. Cir. 2006) (en banc).
21. *Id.* at 1361-62.
22. U.S. CONST. art. I, § 9, cl. 5.
23. S. REP. NO. 99-126, at 113-16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6685-88.
24. 907 F. Supp. 408 (Ct. Int'l Trade 1995), *aff'd*, 114 F.3d 1564 (Fed. Cir. 1997), *aff'd*, 118 S. Ct. 1290 (1998).
25. *Id.* at 410, 418.
26. *Id.* at 419.

constitute a protestable decision."[27] The court instead concluded that section 1581(i) provided the basis for its jurisdiction. That conclusion was ultimately affirmed by the Federal Circuit and the Supreme Court of the United States.[28]

On the merits, the Court of International Trade held that the HMT violated the Export Clause.[29] Rejecting the Government's arguments that the HMT was a user fee designed to regulate commerce, the court held that the HMT was, in fact, a tax to raise revenue and was "intended . . . to pay the costs of developing, operating, and maintaining port projects."[30] This conclusion, likewise, was ultimately affirmed by the Federal Circuit and the Supreme Court.[31]

The HMT litigation was notable in many aspects. It partially struck down an act of Congress and ultimately resulted in refunds of more than $750 million. The sheer volume of the litigation was itself significant for the court as, over the years, it has involved thousands of plaintiffs in approximately 10,000 separate cases. Moreover, the original test case of *United States Shoe* spawned a number of other significant test cases that raised important issues of first impression, such as the severability of a portion of an unconstitutional statute,[32] litigation under the Port Preference and Uniformity Clauses,[33] and the availability of interest on refunds of an unconstitutional tax.[34]

Although the HMT litigation remains the most significant Export Clause litigation in the Court of International Trade, more recently, the court also considered a challenge to a duty deferral program.[35] In that case, Customs permitted certain dutiable goods to be entered temporarily

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27. *Id.*

28. In a separate but related proceeding, the Federal Circuit concluded that in certain circumstances section 1581(a) jurisdiction could apply to obtain refunds of the HMT paid upon export shipments. Swisher Int'l, Inc. v. United States, 205 F.3d 1358 (Fed. Cir.), *cert. denied*, 121 S. Ct. 264 (2000). Although the finding of dual bases of jurisdiction to make the same legal challenge would seem to be in conflict with long-standing precedent of the Court of International Trade and the Federal Circuit, *see, e.g.*, Nat'l Corn Growers Ass'n v. Baker, 840 F.2d 1547, 1556-57 (Fed. Cir. 1988), the unique nature of the HMT litigation likely played a role in those decisions.

29. *U.S. Shoe Corp.*, 907 F. Supp. at 413.

30. *Id.* at 414.

31. U.S. Shoe Corp. v. United States, 114 F.3d 1564, 1566 (Fed. Cir. 1997); United States v. U.S. Shoe Corp., 118 S. Ct. 1290, 1296 (1998).

32. Princess Cruises, Inc. v. United States, 201 F.3d 1352, 1357-58 (Fed. Cir. 2000).

33. Thomson Multimedia Inc. v. United States, 340 F.3d 1355, 1357 (Fed. Cir. 2003), *cert. denied*, 124 S. Ct. 2158 (2004).

34. Sony Elecs., Inc. v. United States, 382 F.3d 1337, 1338 (Fed. Cir. 2004); Int'l Bus. Machs. Corp. v. United States, 201 F.3d 1367, 1370 (Fed. Cir. 2000).

35. Nufarm America's Inc. v. United States (*Nufarm II*), 477 F. Supp. 2d 1290, 1291 (Ct. Int'l Trade 2007), *aff'd*, 521 F.3d 1366 (Fed. Cir.), *cert. denied*, 129 S. Ct. 569 (2008).

free of duty for repair, alteration, or processing in the United States, prior to subsequent exportation.[36] The importer brought an Export Clause challenge, contending that the subsequent collection of duties at the time of exportation violated the Export Clause.[37] The court rejected this challenge, concluding that the timing of the collection of the duties did not alter the nature of the duty, which was assessed upon the goods in their character as imports.[38] The Federal Circuit, likewise, rejected the Export Clause challenge and affirmed the court's conclusion.[39]

On appeal, *Nufarm America's Inc. v. United States*, like many constitutional cases, also raised a jurisdictional issue of whether section 1581(a) or section 1581(i) should apply.[40] Although Nufarm had properly exhausted its administrative remedies and sought review under section 1581(a), it also sought to invoke jurisdiction pursuant to section 1581(i).[41] Nufarm contended that because its claim was a constitutional one, Customs could grant no effective relief and therefore exhaustion was not required.[42] Nufarm's argument relied heavily upon precedent generated by the HMT litigation, which permitted an importer to bypass administrative procedures and which also appeared to permit challenges under both section 1581(a) and section 1581(i).[43] The court rejected Nufarm's argument, concluding that exhaustion was not necessarily futile and that a party could not simultaneously maintain an action under both jurisdictional provisions.[44]

IV. RECENT CONSTITUTIONAL CLAIMS RAISED UNDER SECTION 1581(I)

The Subparts below discuss some of the more interesting and recent developments in the court's constitutional jurisprudence, first from a jurisdictional perspective (again, focusing on the unique provisions of section 1581), and second, from a substantive perspective.

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36. *Id.*
37. *Id.* at 1292.
38. *Id.* at 1297.
39. Nufarm America's, Inc. v. United States (*Nufarm III*), 521 F.3d 1366, 1367 (Fed. Cir. 2008).
40. Nufarm America's, Inc. v. United States (*Nufarm I*), 398 F. Supp. 2d 1338, 1341 (Ct. Int'l Trade 2005).
41. *Id.* at 1343.
42. *Id.*
43. *Id.* (citing Thomson Consumer Elecs., Inc. v. United States, 247 F.3d 1210 (Fed. Cir. 2001)); *see also* Swisher Int'l, Inc. v. United States, 205 F.3d 1358, 1364-65 (Fed. Cir. 2000).
44. *Nufarm I*, 398 F. Supp. 2d at 1348-52.

A. Threshold Issues

The unique jurisdictional limitations on the court's review, as well as the threshold issue of standing, are of particular interest in constitutional cases. The court's recent decisions in *Totes-Isotoner Corp. v. United States* addressed important and developing jurisdictional questions regarding section 1581(i).[45] In *Totes*, a U.S. importer of men's gloves challenged the constitutionality of the tariff rate imposed on its imports, alleging that the tariff schedule violated its right to equal protection under the law because it discriminates on the basis of gender and/or age by assessing a higher charge for men's gloves than for other gloves.[46]

The Government raised two independent jurisdictional challenges. In its motion for reconsideration, the Government contended that Totes *could have* filed a protest with the Customs. If it had, the court would have lacked jurisdiction under section 1581(i) because other relief could have been available pursuant to section 1581(a). The court's decision, however, framed the question in terms of exhaustion, holding that Customs never made a decision that Totes could have challenged; therefore, exhaustion was not required.[47] That is, the court determined that, because Customs possessed "no authority or discretion" to apply the tariff schedule, Customs "does not make a 'decision.'"[48] When there is no protestable decision, the court held, section 1581(a) does not pose a jurisdictional obstacle to relief under section 1581(i).[49]

The court went on to reject the Government's reliance on the recent Supreme Court decision, *United States v. Clintwood Elkhorn Mining Co.*, which, in the Government's view, confirmed that a mandatory exhaustion requirement (like the one in section 1581(a)) is still mandatory regardless of whether a constitutional issue is protested.[50] The

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45. 580 F. Supp. 2d 1371 (Ct. Int'l Trade), *reh'g granted*, 569 F. Supp. 2d 1315 (Ct. Int'l Trade 2008).

46. *Id.* at 1373.

47. *Id.* at 1377 (implying that such a decision would not be protestable, apparently because it involved a constitutional question).

48. *Id.* at 1375.

49. *Id.* at 1377.

50. *Id.* at 1374. In *Clintwood Elkhorn*, the Supreme Court held that the tax code's jurisdictional provision required plaintiffs to file a refund claim with the Internal Revenue Service, even though the cause of action alleged a constitutional violation. 128 S. Ct. 1511, 1516 (2008). This court held that the mandatory exhaustion requirement in *Clintwood Elkhorn* was different from the exhaustion requirement that the court applies to section 1581(i) cases. *Totes*, 580 F. Supp. 2d at 1377 (discussing the discretionary exhaustion provision for (i) cases set forth in 28 U.S.C. § 2637(d)). The court did not address the similarities between the exhaustion requirement for section 1581(a) (*see* 28 U.S.C. § 2637(a) (2000) (discussing mandatory

court ultimately held that to the extent Totes could have protested Customs' tariff assessment, it was not required to do so in this instance given the constitutional question at issue.[51]

Second, the Government contended that the tariff schedule involved a "political question," and was therefore immune from judicial review.[52] The court acknowledged that the subject matter is "not appropriate for judicial resolution where it is exclusively assigned to the political branches or where such branches are better-suited than the judicial branch to determine the matter."[53] Although the challenged tariff provisions originated in international negotiations which, on their own, may have been immune from suit pursuant to the political question doctrine, the court noted in a separate case that the provisions "have since been enacted into law," and were, therefore, appropriate for review using traditional constitutional interpretive tools.[54]

The *Totes* court also addressed significant questions of standing. For example, the Government contended that Totes lacked Article III standing because the challenged tariff rates tax products, not people, and therefore do not discriminate against any importer.[55] The court held that the Supreme Court's decision in *Craig v. Boren* controlled the standing question.[56] In *Craig*, the Supreme Court allowed a beer vendor to pursue an equal protection claim challenging a statute that permitted females but

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exhaustion for denial of protests to Customs)) except to say that exhaustion was not required because it would have been futile for Totes to protest the tariff assessment. *Totes*, 580 F. Supp. 2d at 1377 (applying the principles of discretionary exhaustion, not mandatory exhaustion).

51. *Totes*, 580 F. Supp. 2d at 1377 (stating that Customs "has no authority to make any decision regarding [the tariff classifications'] constitutionality").

52. 569 F. Supp. 2d 1315, 1321-22 (Ct. Int'l Trade 2008).

53. *Id.* at 1320-21 (citing Baker v. Carr, 369 U.S. 186, 211 (1962)). A similar jurisdictional issue has recently arisen in *Almond Bros. Lumber Co. v. United States*, No. 08-00036 (Ct. Int'l Trade Dec. 19, 2008). In *Almond Bros.*, certain parties challenge distributions of money made pursuant to the 2006 Softwood Lumber Agreement—a trade agreement between the United States and Canada. In October 2008, the United States moved to dismiss the complaint because it does not arise under any of the categories listed in section 1581(i). Rather, it concerns the substance of a trade agreement between two sovereigns (as opposed to a U.S. statute), or certain actions taken by Canada, neither of which the court possesses jurisdiction to entertain. Since then, the parties have continued to brief the issues in the Government's motion to dismiss. In particular, in its opposition, Almond Brothers argued that, in signing the Softwood Lumber Agreement, the United States Trade Representative (USTR) was bound by provisions of the statute governing USTR's power to initiate investigation, rather than by the statutory provisions outlining USTR's authority to enter into trade agreements. Plaintiff's Opposition to Defendant's Motion To Dismiss at 6, Almond Bros. Lumber Co. v. United States, No. 08-00036 (Ct. Int'l Trade Dec. 19, 2008).

54. *Totes*, 569 F. Supp. 2d at 1322.

55. *Id.* at 1324.

56. *Id.* at 1324-25.

not males between eighteen and twenty-one to purchase alcohol.[57] In *Totes*, the court determined that "[i]f anything, Totes' role as payor of the allegedly discriminatory tax makes its standing here more directly connected to that scheme than the interest of the beer vendor found sufficient in *Craig*."[58]

Ultimately, the court dismissed Totes' complaint for failure to state a claim upon which relief could be granted.[59] Particularly noteworthy is the court's application of the necessary pleading requirements, in light of the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*.[60] In *Bell Atlantic*, the Supreme Court arguably strengthened the threshold pleading requirement articulated in *Conley v. Gibson*.[61] After *Bell Atlantic*, parties' factual allegations "must be enough to raise a right to relief above the speculative level."[62]

Applying this standard to the claims raised by Totes, the court determined that Totes needed to show "*some* purpose or intent to disfavor individuals because of their sex, though such purpose or intent need not be malicious."[63] The court went on to note that the tariff provisions at issue do not require that the goods be actually sold to or used by people of one sex or the other.[64] As such, the complaint, which did not allege that the tariff classifications distribute the burdens in a way that disadvantages one sex, or has a disproportionate effect based on sex, did not sufficiently allege gender-based discrimination. On reconsideration, the court rejected Totes' argument that the statute was facially discriminatory.[65]

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57. 429 U.S. 190, 194-97 (1976).

58. *Totes*, 569 F. Supp. 2d at 1324. The court also rejected the Government's contention that Totes lacked standing because there is no constitutional right to import. *See id.* at 1325.

59. *Id.* at 1328.

60. 127 S. Ct. 1955, 1964-70 (2007).

61. 355 U.S. 41, 45-46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."); *see also* Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1123 (2009) (stating that the Court in *Twombly* "rejected as too lenient" the "no set of facts" standard from *Conley*, 355 U.S. 41).

62. *Bell Atlantic*, 127 S. Ct. at 1965.

63. *Totes*, 569 F. Supp. 2d at 1326.

64. Totes-Isotoner Corp. v. United States, 580 F. Supp. 2d 1371, 1379 (Ct. Int'l Trade 2008) (discussing "actual use" provisions, which would require the good to be used by a certain category, versus "chief" or "principal" use provisions, which need not be used by any particular category).

65. *Id.*

B. Equal Protection and First Amendment Claims

The other significant area of constitutional litigation under the court's section 1581(i) jurisdiction concerns the Continued Dumping & Subsidies Offset Act (CDSOA, also known as the "Byrd Amendment"). Two recent decisions have explored the CDSOA through both the First Amendment and Equal Protection lenses.[66]

Congress enacted the CDSOA (now repealed) to strengthen the remedial purposes of the unfair trade laws by providing monetary relief to members of injured domestic industries, which it terms "affected domestic producers."[67] Affected domestic producers are only those producers who were "in support of the petition" underlying an antidumping or countervailing duty order.[68]

In *PS Chez Sidney LLC v. United States*, the court pronounced the petition support requirement unconstitutional, holding that the requirement was subject to, and failed to meet, the strict scrutiny standard of review.[69] The support requirement was not, according to the court, drawn narrowly enough to achieve what might otherwise be a legitimate or even a compelling state interest.[70] The underlying motive articulated by Congress, "assistance to members of domestic industry injured by foreign dumping and subsidies," could, in the court's view, "be achieved by a narrower inquiry"[71]—for example, asking whether the party was harmed by the order at issue.[72] That is, the operative question should be whether a domestic producer has been harmed, not whether it supported the petition. The support requirement was, thus, "simultaneously over and underinclusive,"[73] because it was not connected to any demonstration of harm to the producer.

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66. *See* SKF USA Inc. v. United States, 451 F. Supp. 2d 1355 (Ct. Int'l Trade 2006); PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n, 442 F. Supp. 2d 1329 (Ct. Int'l Trade 2006).

67. Pub. L. No. 106-387, § 1002, 114 Stat. 1549, 1549A-72-75 (2000); 19 U.S.C. § 1675c(a) (2000) (repealed 2006). Although the CDSOA has been repealed, duties on entries of goods made before October 1, 2007 still will be distributed. *See* Pub. L. No. 109-171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006). Given the retrospective nature of the administrative process, these claims will likely exist for some time. *See* Jeanne E. Davidson & Zachary D. Hale, *Developments During 2006 Concerning 28 U.S.C. § 1581(i)*, 39 GEO. J. INT'L L. 127, 147-48 (2007).

68. 19 U.S.C. § 1675c(b)(1)(A).

69. *Chez Sidney*, 442 F. Supp. 2d at 1355-57.

70. *Id.* at 1356-59. The court stated that the requirement might have satisfied a rational basis standard of review, but a higher standard applied here, "to the expression of a particular point of view, because the distribution of funds is based upon the answer to what is inherently a political question." *Id.* at 1357.

71. *Id.* at 1356.

72. *Id.* at 1357 n.58.

73. *Id.* at 1358 n.59.

In *SKF USA Inc. v. United States*, the court reviewed the same support requirement, this time holding the provision unconstitutional for an equal protection violation.[74] The court could not find a rational basis or any other basis for distinguishing between those producers who supported the petition and those who did not, nor could the court identify a connection between the requirement and the purpose of the CDSOA.[75] The court further concluded that the words "support of" could be stricken from the CDSOA without violating the will of Congress.[76] Pursuant to this change, "[t]he CDSOA would then include *all* domestic producers as eligible entities to receive CDSOA funds so long as they participated in an antidumping investigation resulting in an order."[77]

In February 2009, the Federal Circuit reversed, holding that the CDSOA furthers the Government's substantial interest in enforcing the trade laws, is not overly broad, and is, therefore, constitutional.[78] In its effort to construe the statute to avoid a finding of unconstitutionality, the court assumed that the purpose of the CDSOA was to reward injured parties who assisted Government enforcement of the antidumping laws by initiating or supporting antidumping proceedings.[79] The court also assumed that SKF's opposition to the antidumping petition in this case was protected First Amendment activity but concluded that the First Amendment does not necessarily bar rewarding parties who help the Government with its enforcement obligations, as long as that reward satisfies the standards governing commercial speech.[80] Applying those standards, the court held that preventing dumping is a substantial government interest, that the CDSOA advances that interest by rewarding parties who assist in enforcement, and that the CDSOA's support requirement is not overly broad because the reward system is only triggered when the petition is successful.[81]

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74. 451 F. Supp. 2d 1355, 1366 (Ct. Int'l Trade 2006).

75. *Id.* at 1361-63 ("The Court . . . cannot find a rational basis nor . . . any conceivable basis for the classification—distinguishing between those entities who supported a petition and those who either took no position or opposed the petition—and the purpose of the CDSOA. The antidumping statute is designed to ensure that domestic *industries*, not any individual *company* can compete in the marketplace.").

76. *Id.* at 1365.

77. *Id.*

78. SKF USA, Inc. v. United States, 2009 WL 398263, at *16 (Fed. Cir. Feb. 19, 2009).

79. *Id.* at *10.

80. *Id.* at *11.

81. *Id.* at *12-15.

V. CONCLUSION

As this brief summary demonstrates, the Court of International Trade has a rich and varied history of constitutional litigation, raising significant issues of law and complex jurisdictional problems, particularly concerning the scope and meaning of section 1581(i). We fully expect that these exciting issues will retain their vital role in the court's jurisprudence.