FOREIGN SOVEREIGN STANDING TO SUE THE UNITED STATES IN ITS OWN COURTS UNDER THE ADMINISTRATIVE PROCEDURE ACT

STEPHEN C. TOSINI*

The vast majority of the Court of International Trade’s cases involve challenges to federal government actions involving international trade. These cases are generally initiated by importers, foreign exporters, or members of a domestic manufacturing industry affected by foreign competition. These trade disputes are often important to foreign governments as well as to foreign industries, and foreign governments sometimes seek relief on behalf of their own industries, or to redress their own perceived injury. In certain limited cases, there are statutes that provide the Court of International Trade with jurisdiction to entertain foreign governments’ complaints concerning actions taken by the Executive Branch. However, this occurs pursuant to the constitutional backdrop that the President “shall receive Ambassadors and other public Ministers”\(^1\) and, thus, he alone conducts the foreign affairs of the United States. Nevertheless, in a case of first impression before any court, the Court of International Trade held that a foreign government may sue the United States in the United States’ own courts pursuant to the Administrative Procedure Act (“APA”),\(^2\) even though no statute explicitly allows such a lawsuit to proceed.\(^3\)

In this Article, I will discuss the principles of sovereign immunity that underpin all courts’ jurisdiction to hear claims against the government and the Court of International Trade’s jurisdiction to hear APA cases. I will then apply these basic principles to the au-

---

* Attorney, United States Department of Justice, Civil Division. The opinions expressed in this paper are the author’s own and do not necessarily reflect the position of the Department of Justice or any other United States agency. The author would like to thank Jeanne E. Davidson of the Department of Justice for her guidance in developing this paper.

1 U.S. CONST. art. II, § 3.


3 See Tembec, Inc. v. United States, 441 F. Supp. 2d 1302, 1321-23 (Ct. Int’l Trade 2006) (holding that the provincial governments of Canada were entitled to sue the United States in the Court of International Trade).
authority of U.S. courts to entertain claims brought by foreign governments against the United States, addressing, in particular, the Court of International Trade’s recent decision in *Tembec*.

In a long line of cases, the Supreme Court and the Federal Circuit have made clear that the courts may only entertain claims against the government in cases where there is an explicit, statutory waiver of sovereign immunity. Likewise, Congress intended that the Court of International Trade possess jurisdiction to entertain a discrete subset of APA claims. Specifically, Congress provided the Court of International Trade with exclusive subject matter jurisdiction to entertain actions against the government arising from any law of the United States that provides for: (1) revenue upon imports and tonnage; (2) duties and fees; (3) embargoes or other quantitative restrictions; or (4) administration and enforcement of certain matters for which the court possesses jurisdiction. In these actions, the APA provides the cause of action against the government.

Pursuant to this constitutional and statutory backdrop, I will discuss how the absence of a specific waiver of sovereign immunity for foreign governments to sue the United States under the APA precludes the courts from “receiving ambassadors” by accepting foreign sovereigns’ complaints. As a result, if a foreign government disagrees with the actions of the Executive Branch, that sovereign should complain to the President, not to the courts.

1. BACKGROUND

1.1. Sovereign Immunity Principles

The ancient doctrine of sovereign immunity holds the government immune from all lawsuits unless the government explicitly waives its immunity. Waivers of sovereign immunity must be “expressed in statutory text.” Such waivers must be “unequivocally expressed” in statutory text and “not enlarge[d] . . . beyond what the language requires.”

---

7 Id. at 35 (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983)).
supply a waiver that does not appear clearly in any statutory text." In addition, any "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." Even if there has been some waiver of immunity, the Government is not subject to monetary liability unless the waiver unequivocally expresses consent to the specific claims at issue.

As stated in Lane:

"[S]overeign immunity places the Federal Government on an entirely different footing than private parties," and if there exists a "plausible" reading of a statutory waiver that excludes such liability, the waiver is equivocal and does not waive immunity from this form of relief. In sum, the "scope" of a "waiver of the Government's sovereign immunity will be strictly construed... in favor of the sovereign." Lastly, only Congress may waive sovereign immunity. Neither the Executive Branch nor the Judicial Branch may effect a waiver through the exercise of their respective powers. The Executive

8 Lane, 518 U.S. at 192.


10 See Lane, 518 U.S. at 192 ("To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims."); FDIC v. Meyer, 510 U.S. 471, 486 (1994) (declining to extend actions against officers to federal agencies); see also Yancheng Baolong Biochemical Products Co. v. United States, 406 F.3d 1377 (Fed. Cir. 2005) (holding that the court lacked jurisdiction to order the government to pay attorney fees as a contempt sanction because there was no waiver of sovereign immunity for such an award); Novacor Chemicals, Inc. v. United States, 171 F.3d 1376, 1382 (Fed. Cir. 1999) ("We must strictly construe the statute, for we may not imply a waiver."); RHI Holdings, Inc. v. United States, 142 F.3d 1459, 1461 (Fed. Cir. 1998) ("Waivers of sovereign immunity must be explicit, and cannot be implied."); NEC Corp. v. United States, 806 F.2d 247, 249 (Fed. Cir. 1986) ("The terms of the government's consent to be sued in any particular court define that court's jurisdiction to entertain the suit.").

11 Lane, 518 U.S. at 192.

12 See Nordic Village, 503 U.S. at 37 ("[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text [and]... if clarity does not exist there, it cannot be supplied by a committee report.").

13 Lane, 518 U.S. at 192.

14 See Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424-34 (1990) (explain-
Branch's Article II powers and the Judicial Branch's Article III powers are "limited by a valid reservation of congressional control over funds in the Treasury." The Supreme Court's strict construction of statutory waivers of immunity thus ensures that "public funds will be spent [only] according to the letter of the difficult judgments reached by Congress as to the common good . . . ."16

1.2. The Administrative Procedure Act

Congress enacted the APA in 1946 to foster an efficient and organized means for government agencies to make rules and to "adjudicate," or to make determinations concerning requests by the public for specific agency actions. In the rulemaking context, the APA provides for notice and comment to interested parties, as well as the general public. In the adjudicating context, the APA similarly provides procedures for agencies to follow in reaching decisions with respect to individuals seeking relief before the agency.19

[T]he entire act is based upon [the] dichotomy between rule making and adjudication. . . . Rule making . . . is essentially

---

15 OPM, 496 U.S. at 425; See also U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law . . . .").

16 See OPM, 496 U.S. at 428.

17 See generally ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDE ACT § 1(c), at 12-16 (1947) (distinguishing "adjudication" from "rulemaking" on the grounds that the former involves assessing whether past conduct was unlawful in determining an individual's right to benefits under existing law) [hereinafter "AG Manual"]. The Supreme Court has noted that the Attorney General's Manual on the APA is "a document whose reasoning we have often found persuasive . . . ." Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63-64 (2004).

18 See 5 U.S.C. § 553 (2000) (stipulating that this section applies to everyone as long as the following matters are not involved: matters relating to military or foreign affairs functions in the United States, agency management or personnel, public property, loans, grants, benefits and contracts).

19 Id. § 554 (2000) ("This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that [certain matters are] involved.").
legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. In such proceedings, the issues of fact are often sharply controverted.\textsuperscript{20}

The APA also provides for judicial review of agency actions. Specifically, the APA mandates that "[agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

The APA identifies the scopes and standards of review for courts to apply in adjudicatory challenges to agency actions:

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

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limi-

\textsuperscript{20} Marathon Oil Co. v. EPA, 564 F.2d 1253, 1261–62 (9th Cir. 1977) (quoting AG Manual, \textit{supra} note 17, at 14-15).

tations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.22

Only “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute” may initiate an APA action.23 This provision further mandates that “[n]othing herein ... (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.”24 The APA defines “person” as “an individual, partnership, corporation, association, or public or private organization other than an agency.”25

1.3. Court of International Trade Review in Section 1581(i) Cases

The Court of International Trade has exclusive subject matter jurisdiction to hear the cases identified in 28 U.S.C. §§ 1581 to 1584. Section 1581, which identifies actions against the United States over which the court has jurisdiction, is the relevant provision here. Sections 1581(a) through 1581(h) identify specific agency determinations issued pursuant to specific grants of statutory authority.

22 Id. § 706.
23 Id. § 702.
24 Id.
25 Id. § 551(2).
Section 1581(i) confers to the Court of International Trade subject matter jurisdiction over any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— (1) revenue from imports or tonnage; (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to [certain] matters.\(^{26}\)

over which the court possesses jurisdiction.

Congress also identified parties that may bring a 1581(i) action; in describing the standing requirement, the statute states, "[an action] 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 [the APA standing provision]."\(^{27}\)

1.4. The Court Of International Trade’s Statutory Standard and Scope of Review in Section 1581(i) Cases

When Congress created the Court of International Trade in 1980, the legislature enacted 28 U.S.C. § 2640, which identifies the "[s]cope and standard of review" for all actions brought in that court. With respect to matters initiated pursuant to section 1581(i), the statute mandates that "the Court of International Trade shall review the matter as provided in section 706 of title 5 [the APA scope and standard of review]."\(^{28}\) Likewise, Congress explicitly referenced the APA standing statute in identifying the "[p]ersons entitled to commence a civil action" in 28 U.S.C. § 2631: "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 [the APA standing provision]."\(^{29}\)

---

\(^{28}\) Id. § 2640(e).
\(^{29}\) Id. § 2631(i).
The APA's all-inclusive scope and standard of review statute encompasses many of the statutory standards of review employed by the Court of International Trade in a host of matters challenging governmental action.\(^\text{30}\) For example, the deferential substantial evidence standard is applied in reviewing the agencies' factual findings in challenges to antidumping and countervailing duty determinations,\(^\text{31}\) as well as to Department of Labor factual determinations concerning eligibility of worker groups to apply for Trade Adjustment Assistance.\(^\text{32}\) Likewise, the Court of International Trade applies the "abuse of discretion" standard to certain agency actions, including the Department of Commerce's verification procedures in antidumping duty proceedings, which the agency implements on an "ad hoc" basis,\(^\text{33}\) and the ultra vires standard to determinations by the United States Trade Representative ("USTR").\(^\text{34}\)

The statute specifying the standard and scope of review of the Court of International Trade also identifies specific instances where that court will apply the de novo standard.\(^\text{35}\) Section 706(2)(F) of the APA permits de novo review in two situations: (1) "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate," and (2) "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action."\(^\text{36}\) Courts generally hold that agency fact finding procedures are adequate where the agency follows applicable statutes and regulations.\(^\text{37}\)

\(\text{30}\) 5 U.S.C. § 706.
\(\text{31}\) 19 U.S.C. §§ 1516a(b), 1581(c) (2000).
\(\text{32}\) 28 U.S.C. §§ 1581(d), 2395(b) (2000).
\(\text{33}\) Micron Tech., Inc. v. United States, 117 F.3d 1386, 1396 (Fed. Cir. 1997).
\(\text{34}\) Gilda Indus. v. United States, 353 F. Supp. 2d 1364, 1369 (Ct. Int'l Trade 2005), aff'd in relevant part, 446 F.3d 1271 (Fed. Cir. 2006).
1.5. Tembec

In Tembec, the Court of International Trade concluded that foreign governments fall within the class of plaintiffs Congress intended to allow to bring suit against the United States under the APA.\(^{38}\) Tembec involved the administration of antidumping and countervailing duty laws on softwood lumber from Canada. The antidumping and countervailing duty laws are remedial measures that provide relief to domestic manufacturers by imposing duties upon imports of competitive products that are either sold in the United States at less than fair value or are unfairly subsidized by the government of the exporting country.\(^{39}\) Imposing these duties is a multi-step process. Upon receipt of a petition by a domestic industry alleging dumping or subsidization of competitive merchandise from a specific country or countries, the Department of Commerce conducts an investigation to determine whether these imports are being sold at less than fair value or are being subsidized by the government of the exporting country. The second step involves the International Trade Commission ("ITC"). If Commerce determines that dumping or subsidization is occurring, the ITC investigates whether the domestic industry is materially injured or threatened with material injury as a result of the dumping or subsidization. If the ITC's injury determination is affirmative, Commerce then issues an antidumping or countervailing duty order. Accordingly, any antidumping or countervailing duty order must be supported by a dumping or subsidization determination as well as an ITC injury or threat of injury determination.

Antidumping and countervailing duty determinations may be reviewed by the Court of International Trade,\(^{40}\) and when the order involves Canadian or Mexican goods, by a North American Free Trade Agreement ("NAFTA") binational panel.\(^{41}\) Governments of exporting countries may complain to the World Trade Organization ("WTO").\(^{42}\) In Tembec, the Canadian government (as well as

---


\(^{39}\) See 19 U.S.C. §§ 1671, 1673.

\(^{40}\) 19 U.S.C. § 1516a(b).

\(^{41}\) Id. § 1516a(g).

other Canadian interests) challenged the ITC's threat of injury determination before a NAFTA binational panel. At the same time, the Canadian government initiated a WTO challenge to the same determination. Before the NAFTA proceeding was completed, the WTO issued recommendations concerning the means by which the United States may comply with its WTO obligations. The government implemented those recommendations by issuing a new threat of injury determination pursuant to section 129 of the Uruguay Round Agreements Act ("section 129") and giving this new determination domestic legal effect. This new ITC determination provided support for the antidumping and countervailing duty orders, rendering the NAFTA binational challenge to the ITC's original determination moot.

The Canadian government sued the United States in the Court of International Trade, maintaining that the USTR's decision to give domestic legal effect to the ITC's new determination was *ultra vires*.

In addressing the government's motion to dismiss, the court concluded that it could hear foreign governments' complaints against the United States. The court first noted that the "APA defines 'person' as 'an individual, partnership, corporation, association, or public or private organization other than an agency.'" Notwithstanding the rule that waivers of sovereign immunity must be strictly construed, may not be implied, and must be unequivocally stated in statutory text, the court concluded that its decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction.

Applying this expansive approach to the waiver of sovereign immunity, the court concluded that Congress intended to allow foreign governments to challenge Executive Branch decisions in domestic courts. The court noted various cases, which did not in-

---

43 Tembec, 441 F. Supp. 2d at 1321 (quoting 5 U.S.C. § 551(2)).
44 Id. (quoting United States v. Cooper Corp., 312 U.S. 600, 604-05 (1941)).
volve suits against the United States by a foreign government, where courts excluded governments from the definition of a "person." Nevertheless the court here included foreign governments in "person."

Relying upon *Stone* and *Neal-Cooper*, two Freedom of Information Act ("FOIA") cases where the courts concluded that information obtained from a foreign government was discoverable in FOIA actions brought by private entities, the court here decided that cases including foreign governments as "persons" implied that foreign sovereign possess the right to sue the United States under the APA.

The court further relied upon statutes limited to certain classes of international trade cases for which foreign governments are statutorily granted the right to sue, to conclude that the APA definition of "person," mandated by section 2631(i), includes foreign governments. The court thus held that "interested parties" in antidumping and countervailing duty cases should be treated as "persons" for the purpose of the APA.

## 2. DISCUSSION

### 2.1. Section 1581(i) Cases Are APA Cases

The only causes of action available in matters initiated pursuant to 28 U.S.C. § 1581(i) either stem from the APA or from a non-statutory cause of action predicated upon a challenge to allegedly unconstitutional governmental action.

---

45 See Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989) (holding that a domestic state is not a person under the federal civil rights statute [42 U.S.C. § 1983]); Breed v. Greene, 523 U.S. 371, 379 (1998) ("It is clear that Paraguay is not authorized to bring suit under § 1983. Paraguay is not a 'person' as that term is used in § 1983."); Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002) (holding that foreign governments "are not 'persons' protected by the Fifth Amendment").

46 *Tembec*, 441 F. Supp. 2d at 1321-23 (citing Pfizer Inc. v. Gov't of India, 434 U.S. 308, 320 (1978); See Neal–Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 776 (D.D.C. 1974)) ("A foreign government or an instrumentality thereof appears to be a 'public or private' organization within the terms of the FOIA.").


48 See id. ("'Interested party' and 'person' have an identical meaning within the statute.").
The United States Court of Appeals for the Federal Circuit, which reviews Court of International Trade judgments, recently issued an en banc opinion that clarified the source of the court's authority in section 1581(i) cases with respect to a challenge to a presidential determination not to provide import relief to a domestic industry pursuant to the United States-China Relations Act of 2000.\(^\text{49}\) Section 421 of this statute provides, among other things, a mechanism for the President to impose trade restrictions upon surges of Chinese imports that cause market disruption in the United States. In \textit{Motion Systems Corp. v. Bush},\(^\text{50}\) the Court of Appeals, sitting en banc, addressed whether a domestic producer could sue the President under section 1581(i) to challenge his decision not to impose trade restrictions on competing Chinese products. The court implicitly recognized two primary characteristics of sections 421 and 1581(i). First, section 421 contains no express provision for judicial review. Second, the subject matter of the section 421 claim in \textit{Motion Systems} fell within the jurisdiction of the Court of International Trade under 28 U.S.C. § 1581(i)(2).\(^\text{51}\) Pursuant to this backdrop—namely the lack of an express statute providing for judicial review of the specific subject matter that falls under section 1581(i)—the en banc court explained that, in cases where there "is no explicit statutory cause of action[,] . . . [a plaintiff] has only two potential sources for relief: (1) the Administrative Procedure Act . . . or (2) some form of non[-]statutory review."\(^\text{52}\)

Accordingly, any section 1581(i) case must be treated by the Court of International Trade exactly as a district court would treat an APA claim where the plaintiff alleges "final agency action for which there is no other adequate remedy in a court [which the APA renders] subject to judicial review."\(^\text{53}\)


\(^{50}\) See \textit{Motion Sys Corp. v. Bush}, 437 F.3d 1356, 1359-62 (Fed. Cir. 2006) (en banc), \textit{cert. denied}, 127 S. Ct. 69 (2006) ("The President's actions cannot be challenged because judicial review is unavailable when a statute allegedly violated itself commits a decision to the discretion of the President.").

\(^{51}\) 28 U.S.C. § 1581(i)(2) (2000) (providing for exclusive review by the Court of International Trade for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue").

\(^{52}\) \textit{Motion Sys}, 437 F.3d at 1359. See also \textit{Shinyei Corp. v. United States}, 355 F.3d 1297, 1304 (Fed. Cir. 2004) (noting that a section 1581(i) case's "cause of action is based in the [APA] pursuant to 5 U.S.C. § 702").

2.2. The APA Does Not Allow Foreign Governments to Bypass the Executive in Favor of the Judiciary

2.2.1. Monaco v. Mississippi: Ordinary sovereign immunity principles apply to actions brought by foreign governments against governmental defendant

The APA does not allow foreign governments to seek redress for the actions of the United States before the courts. The courts have long looked to the status of individual plaintiffs in determining whether the plaintiff possesses a right to initiate an action. This general rule is even more pronounced when the government is being sued, and the courts are asked to find a waiver of sovereign immunity.

Foreign sovereign plaintiffs enjoy broad immunity from suit in the U.S. courts pursuant to the Foreign Sovereign Immunities Act.\(^{54}\) There must likewise be an express waiver of the United States' sovereign immunity so as to allow foreign sovereigns to sue the government in the United States' own courts.

The principle that foreign sovereigns must be treated differently from any other class of plaintiff is expressed in the Supreme Court's seminal decision in \textit{Monaco v. Mississippi}.\(^{55}\) In that case, the Government of Monaco sued the State of Mississippi to recover upon bonds that were in default. The Court identified the question as whether it has "jurisdiction to entertain a suit brought by a foreign State against a State without her consent."\(^{56}\) Monaco's argument relied upon the constitutional provision that "the judicial power shall extend to controversies 'between a State, or the Citizens thereof, and foreign States, Citizens or Subjects' . . . and that in cases 'in which a State shall be Party[,]' this Court shall have original jurisdiction."\(^{57}\) The Court, however, explained that while the Constitution does contain similar language extending jurisdiction "to Controversies to which the United States shall be a Party,"\(^{58}\) these provisions did not waive the federal government's sovereign


\(^{55}\) Monaco v. Miss., 292 U.S. 313, 325 (1934).

\(^{56}\) \textit{Id.} at 320.

\(^{57}\) \textit{Id.} (quoting U.S. CONST. art. III, § 2).

\(^{58}\) \textit{Id.} at 321 (quoting U.S. CONST. art. III, § 2).
immunity.\textsuperscript{59} After drawing this analogy to the federal government's sovereign immunity, the Court noted that "the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, by one of her own citizens."\textsuperscript{60} Pursuant to this reasoning, the Court held that sovereign immunity bars action by a foreign government against a state government, absent consent by the state government.\textsuperscript{61}

In so holding, the Court recognized that each of a number of different classes of cases, including suits against a state "by a foreign state... has its characteristic aspect, from the standpoint of the effect, upon sovereign immunity from suits, which has been produced by the constitutional scheme."\textsuperscript{62} The Court also noted that this prohibition upon actions by foreign governments against governmental defendants did not extend to suits initiated against private defendants.\textsuperscript{63}

In sum, the \textit{Monaco} holding makes it clear that foreign governments occupy a wholly different sphere than ordinary litigants with respect to sovereign immunity. Specifically, not only must there be a waiver of sovereign immunity contained in a statute for a court to possess jurisdiction to entertain a certain type of case, this waiver should also specifically confer to foreign sovereigns the ability to sue the government.

\textbf{2.2.2. The APA provides no right of action to foreign governments}

Applied to the question of whether Congress has waived sovereign immunity for foreign governments to sue the United States, the basic principles of sovereign immunity indicate that there is no waiver, given that the APA's definition of a "person" who may initiate an action does not expressly include a foreign government pursuant to 5 U.S.C. § 702.

Specifically, the APA defines "person" to "include[ ] an indi-

\textsuperscript{59} See id. ("[T]here is no express provision that the United States may not be sued in the absence of consent" and that "by reason of the established doctrine of the immunity of the sovereign from suit except upon consent, the [Constitution] does not authorize the maintenance of suits against the United States.").

\textsuperscript{60} Id. at 322.

\textsuperscript{61} Id.

\textsuperscript{62} Id. at 328.

\textsuperscript{63} Id. at 324, n.2 ("There is no question but that foreign States may sue private parties in the federal courts.").
vidual, partnership, corporation, association, or public or private organization other than an agency.”

The definition does not identify foreign governments as parties entitled to sue the government. Thus, the general requirement that a waiver of sovereign immunity must be unequivocally contained in statutory text is not met, which precludes APA review of a foreign government’s complaint.

As previously noted, the only cases that address the APA’s definition of “person” with respect to foreign governments involve FOIA actions by private parties seeking information from the government. As none of these cases involved foreign governments as a party, they do not conduct a sovereign immunity analysis with respect to foreign governments.

One court has held that a foreign government is a “person” under section 551(2) for the purpose of the FOIA exception that protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential” information from disclosure. In Stone, the plaintiff sought disclosure of the terms of a financing arrangement between the Export-Import Bank and the Bank for Foreign Trade, a bank owned by the Soviet government. The plaintiff alleged that the arrangements were not protected because the information requested was not “obtained from a person” within the meaning of FOIA. The court agreed that the FOIA exception to § 552(b)(4) (2000) is not limited to protecting information obtained only from American citizens or organizations, and therefore reject[ed] plaintiff’s argument that information obtained from the Bank for Foreign Trade is not information obtained ‘from a person’ within the meaning of § 552(b)(4).”

Additionally, in a so-called “reverse FOIA” case, a district court denied a motion for a preliminary injunction seeking to prevent disclosure of information concerning certain imports to the Mexi-

---

65 See Lane v. Pena, 518 U.S. 187, 192 (1996) (“A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text...and will not be implied.”).
68 Id. at 137.
can government, noting that Mexico could be considered a "person" for FOIA purposes. In that case, the plaintiff had sought to prevent disclosure of documents pursuant to an informal information-sharing agreement between the Customs Service and the Mexican government, alleging that the disclosure violated a criminal statute, 18 U.S.C. § 1905, which prohibits certain disclosures by government officials. The court preliminarily held that the disclosures could be made public pursuant to FOIA, noting that a possible defense to an 18 U.S.C. § 1905 criminal prosecution would be that the Mexican government, which was not a party to that case, could be considered a "person" under FOIA. In contrast, another district court took a different approach in defining "person" pursuant to the APA and concluded that foreign governments should not be considered "persons" entitled to sue the government under FOIA. In *Doherty v. U.S. Department of Justice*, the plaintiff was an Irish Republican Army member convicted of murder in the United Kingdom who filed a FOIA request with the Federal Bureau of Investigation ("FBI") as part of his defense against extradition. The court concluded that Doherty was entitled to challenge the FBI's denial of his FOIA request as a "person" pursuant to section 551(2). However, the court drew from FOIA's legislative history to determine that foreign governments should not be included within the definition of "person" for FOIA purposes and explained that the precedent set in *Neil-Cooper Grain Co. v. Kissinger* "goes beyond the plain meaning of the statute and which this Court does not accept as correctly decided." The court provided an example where, the Soviet government sought information, but "the KGB is not a 'person' who could file a FOIA request with the FBI.

Other cases where foreign governments were plaintiffs in U.S. courts did not involve actions against the government. *Pfizer, Inc.*

---

69 See *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 776 (D.D.C. 1974) (pointing out that "[a] foreign government or an instrumentality . . . appear[s] to be a 'public or private organization' within the terms of the Act," and that this view is supported by Customs Regulations which "contemplate requests from foreign governments" in implementing disclosure policies under the Act).

70 See *Doherty v. U.S. Dep't of Justice*, 596 F. Supp. 423, 425 (S.D.N.Y. 1984) (noting that Congress "provided no restrictive definition of the term 'person' to alter the original definition in the APA").

71 Id. at 427 n.4.

72 Id. at 428.
v. Government of India\textsuperscript{73} held that foreign sovereigns are "persons" entitled to sue private defendants for antitrust violations. There, the Government of India, as a customer, alleged injury due to price fixing of antibiotic drugs. The Court noted that the applicable definition of "persons" included "corporations and associations" formed under domestic and foreign laws.\textsuperscript{74} The Court then analyzed whether India could sue, "[i]n light of the law's expansive remedial purpose.\textsuperscript{75} In taking a broad view of the courts' antitrust jurisdiction, "the Court [did] not take[] a technical or semantic approach in determining who is a 'person' entitled to sue for treble damages.\textsuperscript{76}

3. TEMBEC WAS WRONGLY DECIDED

Tembec, by failing to apply the correct sovereign immunity analysis, erroneously held that foreign governments may sue the United States under the APA.\textsuperscript{77} Moreover, the court erred by basing its construction of the APA on a statute limited by its own terms to antidumping and countervailing duty proceedings before the Department of Commerce and the ITC.\textsuperscript{78}

As a preliminary matter, applying general sovereign immunity principles to the question of whether foreign sovereigns may sue the United States under the APA does not result in a waiver of immunity. Pursuant to Monaco and Lane, courts must conduct a sovereign immunity analysis focusing on whether there is an explicit waiver of sovereign immunity contained in statutory text that allows a foreign government to sue the United States. The Court's standing statute (which references the APA's standing statute), the

\textsuperscript{73} Pfizer Inc. v. Gov't of India, 434 U.S. 308, 318-19 (1978) ("This Court has long recognized the rule that a foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do.").

\textsuperscript{74} \textit{Id.} at 312 n.9.

\textsuperscript{75} \textit{Id.} at 314.

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} Tembec, Inc. v. United States, 441 F. Supp. 2d 1302, 1321-23 (Ct. Int'l Trade 2006).

\textsuperscript{78} The comprehensive settlement of the Canadian lumber dispute entered into force on October 12, 2006. The agreement provides the Canadian parties with all of the relief requested in their complaints. However, the Court of International Trade issued a final judgment in Tembec on October 13, 2006. Tembec, Inc. v. United States, slip op. 06-152 (Ct. Int'l Trade Oct. 13, 2006). At this time, notices of appeal have been filed, and certain post-judgment motions remain pending.
APA’s standing statute (which references the APA’s definition of “person”), and the APA’s definition of “person,” do not identify foreign governments as parties allowed to sue the United States and, thus, there has been no waiver of immunity “unequivocally expressed in statutory text.”

Moreover, the Federal Circuit’s approach in *Motion Systems* would preclude the finding of a waiver of sovereign immunity. In *Motion Systems*, the court focused on whether the courts possessed jurisdiction over the President of the United States pursuant to the APA. The court followed clear and unambiguous precedent to determine that the identity of the defendant was dispositive in addressing whether there was a waiver. Likewise, under *Monaco*, this approach should govern with respect to the identity of the plaintiff.

No other authority relied upon by the court overcomes this absence of waiver. Neither of the two FOIA cases cited by the court involved issues as to whether a foreign sovereign could sue the United States or even whether a foreign sovereign could file a FOIA request with an agency. Likewise, the court acknowledged the existence of only one case that addressed, albeit in dicta, the issue of whether a foreign government could actually exercise any rights under FOIA.

The other cases likewise did not find, or even imply, a waiver of sovereign immunity. *Pfizer* held simply that a foreign government as a customer of a defendant may sue that private defendant in United States court for antitrust violations. This clearly follows the Supreme Court’s earlier teaching that “[t]here is no question but that foreign States may sue private parties in the federal courts.”

80 Motion Sys. Corp. v. Bush, 437 F.3d 1356, 1359-60 (Fed. Cir. 2006).
81 See Stone v. Exp.-Imp. Bank of United States, 552 F.2d 132, 136 (5th Cir. 1977) (detailing whether exemptions to disclosure under FOIA are available to foreign sovereigns in response to a FOIA suit filed by an American senator as to information on a financial agreement with a U.S. bank); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 776 (D.D.C. 1974) (“The Court must now decide whether the request herein, made by or on behalf of the Mexican Government, may be a request within the purview of the FOIA”).
82 See Tembec 441. F. Supp. 2d at 1322.
83 Monaco v. Miss., 292 U.S. 313, 323 n.2 (1934).
The court's expansion of 28 U.S.C. § 2631(c), which grants the court jurisdiction to entertain specifically enumerated claims by foreign governments involving antidumping and countervailing duty determinations, to matters not identified in that subsection, was similarly misplaced. The statutory definition of "interested party" allows foreign governments to initiate actions only pursuant to 28 U.S.C. § 1581(c). In such cases, "[a] civil action contesting a determination listed in section 516A of the Tariff Act of 1930 may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose."

84 The definition of "interested party" specifically includes "the government of a country in which such merchandise is produced..." 85 However, section 2631(c) says nothing about section 1581(i) cases. Rather, by its own terms, section 2631(i) is limited to section 1581(c) cases. Indeed, if Congress intended to waive sovereign immunity for foreign governments to initiate section 1581(i) claims, it certainly could have done so, especially given that Congress provided such waiver for section 1581(c) cases.

Furthermore, given the axiom that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text," 86 the court's reliance upon the legislative history of the Trade Act of 1980 cannot support a waiver. 87 The language in the legislative history was referring to the availability of section 1518(c) actions. Indeed, the preceding sentence referenced the grant of "authority to the Court of International Trade to conduct jury trials"; yet, this does not mean that all cases before the court would be subject to trial de novo before a jury.

Lastly, given the substantial immunities afforded to foreign governments pursuant to the Foreign Sovereign Immunities Act ("FSIA") 88 and the Head of State doctrine, the Court of International Trade's holding in Tembec creates the absurd result that the

87 See Tembec 441 F. Supp. 2d at 1323 (referring to H.R. Rep. No. 96-1235, at 28, as having "emphasiz[ed] Congressional intent to 'enlarge[] the class of persons eligible to sue in civil actions in the Court of International Trade to include... foreign governments.").
United States' courts are open to hear the complaints of foreign sovereigns against the United States, while the courts are closed to complaints against the very same foreign governments.

The FSIA codifies the traditional rule in international law (and in domestic courts) that, except in certain circumstances irrelevant to the Tembec decision, a foreign government may not be sued in United States courts.

Similarly, under the Head of State doctrine, foreign government leaders may not be sued in domestic courts of the United States. The doctrine of head-of-state immunity is rooted in the Supreme Court's decision in Schooner Exchange v. McFadden. Although the Court in this case held that an armed ship of a friendly state was exempt from United States jurisdiction, the decision "came to be regarded as extending virtually absolute immunity to foreign sovereigns." Over time, the absolute immunity of the state itself was diminished through the widespread acceptance by states of the restrictive theory of sovereign immunity—a theory reflected in the passage of the FSIA in 1976.

Nevertheless, courts have held that limitations upon immunity contained in the FSIA do not apply to heads of state. As the Court of Appeals for the Seventh Circuit recently explained:

The FSIA does not . . . address the immunity of foreign heads of states. The FSIA refers to foreign states, not their leaders. The FSIA defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state. 28 U.S.C. § 1603(a).

Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976—with the Executive Branch.

Accordingly, the courts have concluded that the Head of State doctrine continues to apply, as long as the Executive elects to con-

---

89 See id. § 1604 (2000) (noting that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").
90 Schooner Exch. v. McFadden, 11 U.S. (7 Cranch) 116 (1812).
92 Ye v. Zemin, 383 F.3d 620, 625 (7th Cir. 2004) (citations and footnotes omitted).
fer immunity upon a foreign head of state. In such cases, the courts must follow the Executive's directive.93

The reasons for these long-standing prohibitions of suits against foreign sovereigns in our domestic courts apply equally to the question of whether foreign sovereigns may bring suit against the United States in our domestic courts. In both instances, the issues concern diplomacy and foreign affairs, not the adjudication of any private rights based upon our domestic law. Yet, under the decision in Tembec, a foreign government would be immune from suits in our courts could sue the United States. In other words, in the Tembec court's view, although Congress and the President have affirmatively closed our courts to actions against foreign governments, they have opened our courts to actions by foreign governments against our own.

Indeed, the absurdity of allowing foreign governments to challenge Executive Branch decisions in U.S. courts is further propagated by the procedures that foreign governments must follow to request that the Executive Branch assert head-of-state immunity. Specifically, the foreign government must petition the Department of State, requesting that the Secretary of State recommend to the Department of Justice that the foreign head of state be granted immunity.94 The Department of Justice, as the agency responsible for litigation involving the United States and with authority to intervene in any state or federal litigation that may involve the U.S. interests,95 then files a "suggestion of immunity" with the court. The


94 See Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1201 (2d Cir. 1971) ("The State Department is to make [an immunity determination] in light of the potential consequences to our own international position. Hence once the State Department has ruled in a matter of this nature, the judiciary will not interfere.").


96 Id. § 517 provides, in relevant part, that "any officer of the Department of
participation of foreign governments in litigation in the U.S. courts thus implicates the Executive Branch's foreign affairs function. Accordingly, it would be absurd to allow the foreign government to try an offense against the United States in its own courts.97

In sum, the requirement that waivers of sovereign immunity be explicitly contained in statutory text that is narrowly construed, in conjunction with the Supreme Court’s direction that lawsuits by foreign governments against governmental defendants may only proceed pursuant to a sovereign immunity analysis concerning whether the defendant has consented to be sued by a foreign government, require that no APA right of action is available to foreign governments. Rather than using the courts, a foreign government’s only option is to lobby the President and use diplomacy, as the framers envisioned.

---

97 To the best of our knowledge, Tembec is unique in that no other country possesses laws that would allow the United States to sue the foreign government in its own courts to challenge a sovereign (non-commercial) act of the foreign country.