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A Proposal to Abolish the U.S. Court of International Trade

Kevin C. Kennedy*

In 1980 Congress enacted the Customs Courts Act of 1980,¹ a law designed "to improve the Federal judicial machinery by clarifying and revising certain provisions of title 28, United States Code, relating to the judiciary and judicial review of international trade matters"² Among the revisions enacted was the enlargement of the jurisdiction of the United States Customs Court, renamed the United States Court of International Trade.³ Congress provided for exclusive jurisdiction within the Court of International Trade ("CIT" or "Court") over most actions involving import transactions into the United States.⁴ Born out of a legislative concern that litigants were being frustrated in their attempts to obtain judicial review, the Customs Courts Act of 1980 sought to remedy this problem "by revising the statutes to clarify the present status, jurisdiction and powers of the Customs Court."⁵

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1. Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified in scattered sections of Title 28, U.S.C.).

2. H.R. Rep. No. 1235, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3729 [hereinafter cited as H.R. Rep. No. 1235].

3. Pub. L. No. 96-417, § 101, 94 Stat. 1727 (1980) (codified at 28 U.S.C. § 251 (1982)).

4. Pub. L. No. 96-417, § 201, 94 Stat. 1727, 1728-30 (1980) (codified at 28 U.S.C. §§ 1581-1582 (1982)). *See* H.R. Rep. No. 1235, *supra* note 2, at 20.

5. H.R. Rep. No. 1235, *supra* note 2, at 20. As noted in the House report on the Customs Courts Act of 1980:

Many suits involving international trade issues are and have been instituted in the federal district courts rather than the U.S. Customs Court. One reason is that often it is difficult to determine in advance whether or not a particular case falls within the jurisdictional scheme of the Customs Court, that is, an action primarily challenging classification and valuation determinations. In addition, because of the limited powers of the Customs Court, litigants often choose another forum, for example, the federal district courts, where they can gain the appropriate relief for their alleged injuries. Most district courts have refused to entertain such suits, citing the Constitutional mandate requiring uniformity of decisions relating to imports. (See U.S. CONST. art. I, § 8.) In so doing, the district courts sought to preserve the Congressional grant of exclusive jurisdiction to the United States Customs Courts for judicial review of all matters relat-

Now that five years have passed since enactment of the Customs Courts Act, it merits a preliminary inquiry whether that Act has achieved its purposes and whether there is any continuing justification for the CIT as a forum for dispute resolution. This article explores these questions and concludes that the administration of justice would be better served if the Court were abolished. This article proposes substituting either a system of administrative adjudication with direct appeal to the Court of Appeals for the Federal Circuit or, in certain instances, transferring jurisdiction to the federal district courts. Before discussing this issue, the history of the CIT will be briefly reviewed.

I. The Genesis of the CIT

The predecessor court to the Court of International Trade, the Customs Court, had its genesis in 1890 as the Board of General Appraisers.⁶ This Board was an administrative body within the Department of the Treasury. It had responsibility for reviewing the decisions of officials of the Bureau of Customs in areas such as duty rates and valuation of merchandise.⁷ As the types of decisions pertaining to import transactions expanded to include antidumping duty⁸ and subsidy⁹ determinations, Congress in 1926 created the United States Customs Court as an article I court to replace the Board.¹⁰ In 1956 the Customs Court was elevated to article III

ing to imports.

The result has been inconsistent judicial decisions with litigants proceeding cautiously when choosing a forum for judicial review. If an improper forum is chosen, that may well result in a holding that the plaintiff is before the wrong court. A dismissal for want of jurisdiction can effectively preclude a judicial determination of the case on its merits. Furthermore, the type of relief available depends greatly upon a plaintiff's ability to persuade a court that it possesses jurisdiction over a particular case. Thus, some individuals will obtain relief which is denied others, who by chance select an improper forum to institute suit.

With the growth in international trade, the number of suits in the district courts and subsequent dismissals for want of jurisdiction have increased. Congress is greatly concerned that numerous individuals and firms, who believe they possess real grievances, are expending significant amounts of time and money in a futile effort to obtain judicial review of the merits of their case.

H.R. Rep. No. 1235, *supra* note 2, at 19.

6. Tariff Act of 1890, ch. 407, §§ 12-13, 26 Stat. 136-37. See H.R. Rep. No. 1235, *supra* note 2, at 18; J. LOMBARDI, *THE UNITED STATES CUSTOMS COURT — A HISTORY OF ITS ORIGIN AND EVOLUTION* (1976).

7. *Id.* The Board of General Appraisers was an administrative tribunal composed of nine individuals. Its jurisdiction consisted of all controversies arising out of the tariff laws governing imports. See Rodino, *The Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 459 (1981).

8. See Antidumping Act, 1921, ch. 14, § 201, 42 Stat. 11 (codified at 19 U.S.C. § 160 (1976)), *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 143, 193.

9. Act of Sept. 21, 1922, ch. 356, 42 Stat. 935, *repealed by* Tariff Act of 1930, ch. 497, § 651(a)(1), 46 Stat. 590, 762.

10. See 28 U.S.C. § 251 (1976); H.R. Rep. No. 1235, *supra* note 2, at 18. See generally Rao, *A Primer on Customs Court Practices*, 40 BROOKLYN L. REV. 581 (1974).

status.¹¹

With the enactment of the Trade Agreements Act of 1979,¹² Congress recognized that the Customs Court's caseload would be gradually shifting from tariff classification and valuation issues to antidumping and countervailing duty cases.¹³ Multilateral trade negotiations being conducted under the auspices of the General Agreement on Tariffs and Trade¹⁴ — particularly the Kennedy and Tokyo Rounds of negotiations concluded in 1967¹⁵ and 1979,¹⁶ respectively — had led to a significant decrease in tariff duties and, consequently, “a diminishing importance in classification and valuation cases in the overall spectrum of international trade litigation.”¹⁷ In light of the projected surge in antidumping and countervailing duty litigation, Congress in 1980 believed it was again time to revamp the jurisdiction of the Customs Court.¹⁸

Against this backdrop, we turn to an examination of the Customs Courts Act of 1980 as it relates to the CIT.

II. The Customs Courts Act of 1980 — An Overview

As noted, the Customs Courts Act of 1980 (“the Act”) not only made the cosmetic change of renaming the Customs Court the Court of International Trade,¹⁹ but, more importantly, the Act set out to accomplish two major objectives vis-à-vis the CIT: (1) to enlarge and clarify the Court's subject matter jurisdiction,²⁰ and (2) to expand the Court's powers by making them equal to the powers of the federal district courts.²¹

The one area in greatest need of clarification regarding subject matter jurisdiction was in the penumbral region where district court

11. 28 U.S.C. § 251 (1976). As of 1956 the Customs Court held all of the powers of an Article III court except the power to rule in equity. Equitable powers were granted to the Court in 1980. 28 U.S.C. § 1584. *See also infra* note 30 and accompanying text.

12. Pub. L. No. 96-39, 93 Stat. 144 (1979).

13. H.R. Rep. No. 1235, *supra* note 2, at 19.

14. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (1948).

15. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 223-29 (1969).

16. J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 473 (1977); Pub. L. No. 96-39, 93 Stat. 143, 147-48 (1979).

17. H.R. Rep. No. 1235, *supra* note 2, at 19.

18. *Id.*; S. Rep. No. 466, 96th Cong., 1st Sess. 3 (1979) [hereinafter cited as S. Rep. No. 466]. With the increased resort to negotiated quotas and voluntary restraint agreements as a vehicle for resolving international trade disputes — most notably in the steel, textile and automobile industries — this projected surge has failed to materialize. *See infra* text accompanying notes 164-78.

19. Pub. L. No. 96-417, § 101, 94 Stat. 1727 (1980) (codified at 28 U.S.C. § 251 (1982)). The Act also made conforming changes to the jurisdiction of the Court of Customs and Patent Appeals, the predecessor court to the Court of Appeals for the Federal Circuit. Pub. L. No. 96-417, §§ 401-404, 94 Stat. 1740-41 (1980).

20. *See* H.R. Rep. No. 1235, *supra* note 2, at 19-20.

21. *Id.* 28 U.S.C. § 1585 confers on the Court of International Trade “all the powers in law and equity of . . . a district court of the United States.”

jurisdiction overlapped that of the Customs Court in international trade matters. District court jurisdiction encompassed civil actions involving revenue from imports on tonnage.²² It also included jurisdiction of any civil action on a bond executed under any law of the United States.²³ This jurisdictional grant to the district courts was sufficiently broad to include actions seeking recovery on customs bonds. In an effort to rectify this situation, Congress made it clear that matters involving import transactions were within the exclusive jurisdiction of the CIT²⁴ by enacting sweeping revisions to existing provisions governing the Customs Court's jurisdiction.²⁵

Under the law which existed prior to the 1980 amendments, it had "become increasingly more difficult to determine, in advance, whether or not a particular case [fell] within the exclusive jurisdiction of the Customs Court The result [was] considerable jurisdictional confusion"²⁶ Some district courts had asserted jurisdiction over international trade actions,²⁷ while others dismissed such actions for lack of jurisdiction.²⁸ Whether or not the 1980 amendments have achieved their intended purpose of eliminating this jurisdictional confusion remains an open question.²⁹ Nevertheless, at a minimum, it is fairly clear that in light of the CIT's new equitable powers,³⁰ international trade actions which seek injunctive relief have not made their way into the district courts because of some doubt as to the scope of the Court's equitable powers.

With this overview, we turn next to an examination of each of

22. 28 U.S.C. § 1340 (1976). That jurisdictional grant continues today, subject to the jurisdiction of the CIT over comparable matters. 28 U.S.C. § 1340 (1982).

23. 28 U.S.C. § 1352 (1976). As with the district courts' jurisdiction under 28 U.S.C. § 1340, the district courts continue to possess jurisdiction over this class of cases, subject to the jurisdiction of the CIT. 28 U.S.C. § 1352 (1982).

24. H.R. Rep. No. 1235, *supra* note 2, at 30; S. Rep. No. 466, *supra* note 18, at 3-4. See Pub. L. No. 96-417, § 201, 94 Stat. 1728-30 (1980) (codified at 28 U.S.C. §§ 1581-1585 (1982)). See also *infra* text accompanying notes 127-34.

25. See 28 U.S.C. §§ 1581-1582 (1976), *repealed by* Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727.

26. S. Rep. No. 466, *supra* note 18, at 1-2.

27. See, e.g., *Sneaker Circus v. Carter*, 566 F.2d 396 (2d Cir. 1977); *Timken Co. v. Simon*, 539 F.2d 221 (D.C. Cir. 1976).

28. See, e.g., *Consumers Union of the United States v. Committee for the Implementation of Textile Agreements*, 561 F.2d 872 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 933 (1978).

29. See, e.g., *United States v. Gold Mountain Coffee, Ltd.*, 597 F. Supp. 510 (Ct. Int'l Trade 1984) (CIT declines ancillary jurisdiction over civil forfeiture action brought for violation of customs laws); *Vivitar Corp. v. United States*, 585 F. Supp. 1419 (Ct. Int'l Trade 1984) (not all international trade disputes are within CIT's jurisdiction), *aff'd*, 761 F.2d 1552 (1985); *Coalition to Preserve the Integrity of American Trademarks v. United States*, 598 F. Supp. 844 (D.D.C. 1984) (district court had jurisdiction of action involving importation of gray market goods under 19 U.S.C. § 1526); *Dabul v. von Raab*, No. 85-110-N (E.D. Va. filed Feb. 6, 1985) (action seeking declaratory judgment of rights under 19 U.S.C. § 1592); *Markey & Sons, Inc. v. Brock*, No. 84-4015-AHS(JRx) (C.D. Cal. Sept. 4, 1984) (action seeking mandatory relief under 19 U.S.C. § 1592 transferred to the CIT for lack of subject matter jurisdiction).

30. 28 U.S.C. § 1585 (1982).

the jurisdictional provisions enacted in 1980. As part of this examination, inquiry will be made as to whether each of those provisions could be repealed in favor of a combination of administrative proceedings, direct appellate review of agency decisions to the Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit"), or de novo proceedings in the district courts.

A. Section 1581

Section 1581,³¹ title 28, United States Code, is divided into ten subsections.³² The first eight subsections reflect a discrete type of civil action which may arise out of U.S. domestic international trade laws and over which the CIT has exclusive jurisdiction. The ninth subsection, section 1581(i),³³ is a residual jurisdictional provision designed to eliminate the confusion which existed regarding where the jurisdiction of the district courts ended and that of the CIT began.³⁴ The tenth subsection, section 1581(j),³⁵ specifically forbids the CIT from exercising jurisdiction over matters arising out of the importation of immoral articles.³⁶

1. *Sections 1581(a) and (b).*—Section 1581(a)³⁷ grants the Court exclusive jurisdiction over any civil action commenced to contest the denial of an administrative protest filed with the Customs Service under 19 U.S.C. §§ 1514 and 1515.³⁸ The subject matters encompassed by this subsection include the traditional tariff classification and valuation cases,³⁹ as well as cases involving exclusion of merchandise⁴⁰ and claims for drawback,⁴¹ among other things. A plaintiff who brings an action under this subsection is entitled to a

31. 28 U.S.C. § 1581 (1982).

32. 28 U.S.C. § 1581(a)-(j). The statutory provisions governing procedure for each of these civil actions are contained at 28 U.S.C. §§ 2631-2647 (1982).

33. 28 U.S.C. § 1581(i).

34. H.R. Rep. No. 1235, *supra* note 2, at 33. See generally 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 (1984); 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 (1981) [hereinafter cited as Cohen I].

35. 28 U.S.C. § 1581(j) (1982).

36. See section 305 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1305 (1982). That section includes within the heading "immoral articles" treasonous and obscene materials.

37. 28 U.S.C. § 1581(a). That subsection provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515].

38. This subsection restated in substance the Court's prior authority as set forth in former section 1582(a), title 28, United States Code. See H.R. Rep. No. 1235, *supra* note 2, at 44.

39. 19 U.S.C. § 1514(a)(1)&(2) (1982). See generally R. STURM, CUSTOMS LAW AND ADMINISTRATION § 32.1 (1983).

40. 19 U.S.C. § 1514(a)(4).

41. 19 U.S.C. § 1514(a)(6). See 19 U.S.C. § 1313 (1982).

trial de novo.⁴²

Section 1581(b)⁴³ is a restatement of former section 1582(b), title 28, United States Code. It empowers the CIT to hear any civil action commenced by an American manufacturer pursuant to section 516 of the Tariff Act of 1930.⁴⁴ In such an action, an American manufacturer, producer or wholesaler may challenge de novo a classification or valuation decision by the Customs Service in connection with importations of merchandise like that manufactured, produced or sold by the American firm.⁴⁵

There is good reason to believe that holding an administrative hearing before an administrative law judge in lieu of a trial before the CIT, with direct appeal to the Federal Circuit from such an administrative determination, would serve the ends of justice just as well, if not better, than the existing system of judicial proceedings established under section 1581(a) and (b). It is proposed, therefore, that such an administrative review process be established within the U.S. International Trade Commission, modelled in large part after the system of adjudication and review which is presently in place under section 337 of the Tariff Act of 1930.⁴⁶ Several sound arguments exist for implementing this proposal.

First, administrative law judges ("ALJ's") are fully capable of handling the types of cases commonly arising under section 1581(a) and (b). ALJ's are called upon to hear complex unfair trade practice cases under section 337 of the Tariff Act of 1930. In section 337 cases an ALJ is required to make a determination whether certain imports infringe upon United States patents, copyrights and trademarks,⁴⁷ among other things. Those determinations are then referred to the U.S. International Trade Commission for its approval or re-

42. H.R. Rep. No. 1235, *supra* note 2, at 44; 28 U.S.C. § 2640(a)(1).

43. 28 U.S.C. § 1581(b). That subsection provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930 [19 U.S.C. § 1516].

44. 19 U.S.C. § 1516 (1982).

45. *Id. See, e.g., Stewart-Warner Corp. v. United States*, 748 F.2d 663 (Fed. Cir. 1984).

46. 19 U.S.C. § 1337 (1982).

47. 19 U.S.C. § 1337(c). *See Ablondi & McCarthy, Impact of the United States International Trade Commission on Commercial Transactions*, 3 DICK. J. INT'L L. 163, 174-76 (1985) [hereinafter cited as Ablondi & McCarthy]; Minchew & Webster, *Regulating Unfair Practices in International Trade: The Role of the United States International Trade Commission*, 8 GA. J. INT'L & COMP. L. 27 (1978); Leonard & Foster, *The Metamorphosis of the U.S. International Trade Commission Under the Trade Act of 1974*, 16 VA. J. INT'L L. 719, 749-63 (1976); Note, *Scope of Action Against Unfair Import Trade Practices Under Section 337 of the Tariff Act of 1930*, 4 NW. J. INT'L L. & BUS. 234 (1982). *See also Kaye & Plaia, The Relationship of Countervailing Duty and Antidumping Law to Section 337 Jurisdiction of the U.S. International Trade Commission*, 2 INT'L TRADE L.J. 3 (1977).

jection,⁴⁸ with direct appeal to the CAFC.⁴⁹

If complex patent infringement decisions have been entrusted by Congress for determination by an ALJ, it would seem that a fortiori the same could be done with classification, valuation, drawback, American manufacturer actions and related customs law matters. There is certainly nothing so inherently difficult or complex about this area of the tariff laws that an ALJ could not adequately and fairly adjudicate the rights of litigants under these statutes. More importantly, there are no vested rights at risk, nor are there any other matters so sacrosanct in this field, that the services of an article III judge are necessarily required, at least insofar as the adjudicatory phase of these proceedings are concerned.⁵⁰

Second, as for one of the most frequently cited reasons for having a national court such as the CIT — uniformity of decision in matters involving customs duties⁵¹ — adjudication by ALJ's under the Commission's direction would equally ensure that uniformity of decision is preserved. Moreover, any aberrations in this respect could be corrected by the Federal Circuit on appeal, or by the International Trade Commission when it reviews the decision of the ALJ.

Another reason advanced for having a special court such as the CIT is the expertise which the judges of the Court supposedly bring to bear upon trade and tariff issues.⁵² It is worth noting in this connection, however, that of the last four judges appointed to the CIT since 1983 (Judges Carman, Restani, DiCarlo and Aquilino), none had any background or experience in the international trade field before joining the Court. Whatever expertise the CIT does have in this respect, it is safe to say that it has been acquired by and large from experience gleaned from the bench and from the more senior judges on the Court. It was not brought to the Court with the appointee. Clearly, expertise acquired from exposure to a field of law can just as easily be acquired by an ALJ as it can by a federal judge.

Finally, there are sound reasons for bringing this class of tariff cases within the ambit of the International Trade Commission's jurisdiction. As an independent international trade agency, the Com-

48. 19 U.S.C. § 1337(c). Under 19 U.S.C. § 1337(g), the President may disapprove a Commission's recommended remedy within 60 days "for policy reasons." Of over 50 affirmative determinations forwarded to the President, only four recommended remedies have been disapproved. [Current Reports] 2 INT'L TRADE REP. (BNA) 617 (May 1, 1985).

49. 19 U.S.C. § 1337(c). See, e.g., *Textron, Inc. v. ITC*, 753 F.2d 1019 (Fed. Cir. 1985).

50. In this connection, it is worth recalling that for 66 years an administrative tribunal and article I judges adjudicated these cases. See *supra* notes 6-7 and accompanying text.

51. See H.R. Rep. No. 1235, *supra* note 2, at 29; S. Rep. No. 466, *supra* note 18, at 3.

52. S. Rep. No. 466, *supra* note 18, at 3 ("The United States Court of International Trade would continue to be equipped with the same expertise and specialized skills that the United States Customs Court has acquired through the years.")

mission would be an appropriate body for reviewing the various decisions of the Customs Service in the classification, valuation and drawback area. The Commission is well-equipped to review these types of cases by virtue of the complex nature of the matters for which it currently is responsible in the international trade field.⁵³ In addition, unlike the judicial adjudicatory process, statutory deadlines can be imposed on the administrative adjudication process,⁵⁴ thereby allaying fears that the determinations may not be expeditiously reached.⁵⁵ In fact, they may be reached more quickly.

In short, a strong case can be made for eliminating the CIT's jurisdiction under section 1581(a) and (b), and for creating in lieu thereof an administrative review process under the direction of the International Trade Commission, with judicial review by the Federal Circuit.

2. *Section 1581(c)*.—Of perhaps the greatest significance of all the changes made by the Customs Courts Act is the enactment of section 1581(c).⁵⁶ This section vests in the CIT exclusive jurisdiction to review administrative determinations made by the International Trade Commission ("ITC" or "Commission") and the International Trade Administration of the Department of Commerce ("ITA") in the context of the antidumping duty and countervailing duty statutes. The Trade Agreements Act of 1979⁵⁷ made wholesale revisions to those laws, superseding in large measure the Tariff Act of 1930 and the Antidumping Act of 1921.⁵⁸

53. In addition to section 337 cases, the Commission is responsible for making injury determinations under the antidumping duty ("AD") and countervailing duty ("CVD") statutes, and import and injury determinations under the escape clause. See 19 U.S.C. §§ 1671, 1673, & 2251 (1982), respectively. See generally Adams & Dirlam, *Import Competition and the Trade Act of 1974: A Case Study of Section 201 and Its Interpretation by the International Trade Commission*, 52 IND. L.J. 535 (1977); Kennedy, *Causation Under the Escape Clause: The Case For Retaining the "Substantial Cause" Standard*, 3 DICK. J. INT'L L. 185 (1985).

54. Statutory deadlines for reaching determinations have been imposed on both the International Trade Commission and the Department of Commerce in several international trade statutes. See 19 U.S.C. §§ 1337, 1671b(a)&(b), 1673b(a)&(b), and 2251(d)(2); Ablondi & McCarthy, *supra* note 47, at 181-83. See also *infra* note 77.

55. See S. Rep. No. 466, *supra* note 18, at 3-4 ("This [clarification of the Court's jurisdiction] would enable the Customs Court to render extremely expeditious decisions in matters which are important both to our country and to our trading partners.").

56. 28 U.S.C. § 1581(c). That subsection provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a].

See Amerine, *Jurisdiction of the Court of International Trade: One Year After the Customs Courts Act of 1980*, 29 FED. B. NEWS & J. 43 (1982); Cohen, *The Trade Agreements Act of 1979: Executive Agreements, Subsidies, and Countervailing Duties*, 15 TEX. INT'L L.J. 96 (1980); Note, *Judicial Review of Antidumping Cases and the Trade Agreements Act of 1979: Towards a Unified System of Review*, 14 J. INT'L L. & ECON. 101 (1979).

57. Pub. L. No. 96-30, 93 Stat. 144 (1979).

58. 19 U.S.C. § 160 (1976), repealed by Pub. L. No. 96-39, § 106, 93 Stat. 193 (1979).

In brief, section 1581(c), in conjunction with section 516A of the Tariff Act of 1930,⁵⁹ empowers the CIT to review certain determinations made by the Commission and the ITA in the course of antidumping duty ("AD") and countervailing duty ("CVD") investigations.⁶⁰ Those determinations which are judicially reviewable include the following:

1. A determination by the ITA not to initiate an investigation;⁶¹
2. A determination by the ITC not to review a determination under 19 U.S.C. § 1675(b) based upon changed circumstances;⁶²
3. A preliminary determination of no injury by the ITC;⁶³
4. A final determination, either affirmative or negative, by the ITC or ITA under the AD or CVD law;⁶⁴
5. A determination by the ITA to suspend an AD or CVD investigation;⁶⁵
6. An injurious effect determination by the ITC under 19 U.S.C. §§ 1671c(h) or 1673c(h);⁶⁶ and
7. A determination by the ITA whether a particular type of merchandise is within the class or kind of merchandise described in an AD or CVD order.⁶⁷

In essence, review by the CIT of these various administrative determinations differs little from appellate review of agency decisions currently conducted by the federal courts of appeals in cases concerning decisions of the National Labor Relations Board,⁶⁸ the Nuclear Regulatory Commission,⁶⁹ the Interstate Commerce Com-

See generally Note, Injury Determinations Under United States Antidumping Laws Before and After the Trade Agreements Act of 1979, 33 RUTGERS L. REV. 1076 (1981).

59. 19 U.S.C. § 1516a, as amended by the Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 623, 98 Stat. 2948, 3040.

60. *See* 19 U.S.C. §§ 1303, 1671-1677 (1982). *See generally* Barshefsky & Cunningham, *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 307 (1981) [hereinafter cited as Barshefsky & Cunningham]; deKieffer, *When, Why, and How to Bring a Countervailing Duty Proceeding: A Complainant's Perspective*, 6 N.C.J. INT'L L. & COM. REG. 363 (1981); Hemmendinger & Barringer, *The Defense of Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 427 (1981); Barringer & Dunn, *Antidumping and Countervailing Duties Investigations Under the Trade Agreements Act of 1979*, 14 J. INT'L L. & ECON. 1 (1979); Note, *The Trade Agreements Act of 1979: Countervailing and Antidumping Duty Procedures*, 14 J. INT'L L. & ECON. 63 (1979).

61. 19 U.S.C. § 1516a(a)(1)(A), as amended by the Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 623, 98 Stat. 2948, 3040.

62. *Id.* § 1516a(a)(1)(B).

63. *Id.* § 1516a(a)(1)(C).

64. *Id.* § 1516a(a)(2)(B)(i), (ii) & (iii).

65. *Id.* § 1516a(a)(2)(B)(iv).

66. *Id.* § 1516a(a)(2)(B)(v).

67. *Id.* § 1516a(a)(2)(B)(vi).

68. 29 U.S.C. § 160(e) (1982).

69. 28 U.S.C. § 2342(4) (1982); 42 U.S.C. § 2239 (1982).

mission,⁷⁰ the Federal Communications Commission,⁷¹ or the Merit Systems Protection Board.⁷² In section 1581(c) cases, CIT review is upon the administrative record,⁷³ with the standard of review generally being whether the agency's decision is supported by substantial evidence on the record considered as a whole, or otherwise not in accordance with law.⁷⁴

While this two-tiered appellate review of agency action by the CIT and the CAFC as created under 19 U.S.C. § 1516a is not unique in the field of administrative law,⁷⁵ it is doubtful that these two levels of judicial review are essential in the context of AD and CVD determinations by the ITA and the Commission.

First, considering the substantial litigation expense resulting from an additional appeal,⁷⁶ not to mention the attendant delay,⁷⁷ it is open to serious question whether the benefits, if any, of increased judicial scrutiny justify the increased costs and delays. The type of record sifting which may have to be done by a reviewing court in international trade cases is certainly no more complex or difficult than the type of record review which the courts of appeals face daily in reviewing voluminous agency records compiled by the National Labor Relations Board or the Nuclear Regulatory Commission, for example. The Federal Circuit itself regularly conducts such record

70. 28 U.S.C. § 2321 (1982).

71. 47 U.S.C. § 402(a) (1982); 28 U.S.C. § 2342(2) (1982).

72. 5 U.S.C. § 7703(b)(1) (1982).

73. 28 U.S.C. § 2640(b); 19 U.S.C. § 1516a(b).

74. *Id.* See generally *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1280-81 (Ct. Int'l Trade 1984). In certain preliminary determinations, such as a decision by the ITA not to initiate an investigation, the standard of review is whether the agency's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(A). See *Gilmore Steel Corp. v. United States*, 585 F. Supp. 670 (Ct. Int'l Trade 1984). An appeal as a matter of right may be taken to the Court of Appeals for the Federal Circuit from the CIT's decisions. 28 U.S.C. § 1295(a)(5).

75. See, e.g., *Danks v. Fields*, 696 F.2d 572 (8th Cir. 1982) (concerning review of decisions made by the Bureau of Indian Affairs); *Conservation Law Foundation v. Watt*, 560 F. Supp. 561 (D. Mass.), *aff'd sub nom. Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983) (National Environmental Policy Act); *Woods v. Weinberger*, 391 F. Supp. 318 (E.D. Tenn.), *aff'd*, 508 F.2d 845 (6th Cir. 1974) (Social Security Administration).

76. See *Barshefsky, & Cunningham, supra* note 60, at 313-14 ("Dumping cases are among the most expensive proceedings in the U.S. trade law arsenal. The cost to the petitioner of an antidumping investigation in even the simplest case will run into six figures."). See also *infra* note 80.

77. One of the chief purposes for enactment of the Trade Agreements Act of 1979 was to shorten the length of AD and CVD proceedings. See S. Rep. No. 249, 96th Cong., 1st Sess. 58, 75 (1979). As noted in that report, "a major objective of this revision of the countervailing duty law is to reduce the length of an investigation The committee intends the usual investigation under the new law to be no more than 205 calendar days." *Id.* at 58. Similar sentiments are expressed at page 75 of that report in connection with antidumping duty investigations. See also S. Rep. No. 466, *supra* note 18, at 3-4 (Customs Courts Act designed to ensure more expeditious decisions).

reviews in section 337 and Merit Systems Protection Board appeals.

In reviewing the AD and CVD decisions of the CIT, moreover, the CAFC undertakes its own independent examination of the agency record,⁷⁸ thereby duplicating the effort of the CIT in these cases. If expeditious and economical disposition of these cases is the desiderata, it is questionable whether two-tiered appellate review as a matter of right is the appropriate means to this end.

In 1983 a bill was introduced in the Senate to eliminate the CIT's jurisdiction under section 1581(c).⁷⁹ Among the purposes for the bill was the reduction of litigation expense and delays connected with AD and CVD appeals.⁸⁰ The Senate bill was deleted from the final version of the Trade and Tariff Act of 1984.⁸¹

One of the greatest inroads on the CIT's jurisdiction could be in the area of AD and CVD appeals. As the foregoing discussion has shown, sound reasons exist for eliminating the Court's jurisdiction over these two types of cases.

3. *Section 1581(d)*.—Section 1581(d)⁸² gives the CIT exclu-

78. *Matsushita Electric Industrial Co. v. United States*, 750 F.2d 927, 932 (Fed. Cir. 1984) ("resolution of whether the [CIT] correctly held that the Commission's decision was not supported by substantial evidence requires [the CAFC's] consideration of the evidence presented to and the analysis by the Commission."); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984).

79. S. 1672, 98th Cong., 1st Sess., 129 Cong. Rec. S10,755-57 (1983).

80. As noted in the fact sheet accompanying the bill:

JUDICIAL REVIEW

Under current law, the U.S. Court of International Trade is the court for review of AD/CVD cases. The bill would assign this responsibility to the Court of Appeals for the Federal Circuit.

AD/CVD cases are currently subject to a two-step appeals process, in which determinations are first appealed to the Court of International Trade and then to the Court of Appeals for the Federal Circuit. The only function of the courts in these cases is to conduct an appellate review of the agency proceedings. Such review is more appropriate for a court of appeals than for a trial court. By eliminating the first step in this process, the bill brings the import relief area into conformity with the usual administrative practice and reduces the costs associated with appellate review by two different courts.

129 CONG. REC. S10,757 (1983).

81. Pub. L. No. 98-573, 98 Stat. 2948 (1984). As reported in the conference committee report to the Trade and Tariff Act of 1984:

Senate bill

Eliminating the U.S. Court of International trade [sic] from judicial review of [AD and CVD] determinations so all appeals go directly to the Court of Appeals for the Federal Circuit; makes conforming changes in section 2639(a)(1) and 2647 of 28 U.S.C.

Conference agreement

The Conferees agreed to strike the Senate provision.

H.R. Rep. No. 1156, 98th Cong., 2d Sess. 179 (1984).

82. 28 U.S.C. § 1581(d). This subsection provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review —

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under sec-

sive jurisdiction of trade adjustment assistance cases which are appealed to it from the determinations of the Secretaries of Labor and Commerce. Under the Trade Act of 1974,⁸³ financial assistance is available to workers,⁸⁴ businesses,⁸⁵ and communities⁸⁶ which have suffered economic distress due to foreign imports. Receipt of benefits is conditioned upon a certification of eligibility made by the Secretary of Labor in the case of workers,⁸⁷ and by the Secretary of Commerce in the case of firms and communities.⁸⁸

Prior to enactment of the Customs Courts Act, jurisdiction over appeals from trade adjustment determinations of the Secretary of Labor refusing to certify workers as eligible for adjustment assistance was entrusted exclusively to the regional courts of appeals.⁸⁹ There was no right to appeal a negative determination of the Secretary of Commerce before 1980.⁹⁰

The explanation for expanding the CIT's jurisdiction to include all trade adjustment assistance cases was a simple one and singular: to give persons adversely affected by agency action arising out of import transactions the same access to judicial review as had been made available in other provisions of the Customs Courts Act to similarly aggrieved persons.⁹¹ Consequently, if rights to judicial review by the CIT granted by those other provisions of the Act were to be eliminated, then ipso facto the rationale for having CIT review of trade adjustment assistance cases would vanish.

Again, many of the same arguments made in connection with eliminating the CIT's jurisdiction under section 1581(c) are equally applicable to section 1581(d),⁹² *i.e.*, elimination of delay and reduction of litigation expense. These two goals are especially important in the case of trade adjustment assistance decisions in which individuals, firms and communities may very well be in dire economic straights and in immediate need of assistance. Strong reasons thus exist for restoring the *status quo ante* with regard to the certification

tion 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

See H.R. Rep. No. 1235, *supra* note 2, at 45.

83. Pub. L. No. 93-618, 88 Stat. 1978 (1974) (codified at 19 U.S.C. §§ 2101-2487 (1976)).

84. 19 U.S.C. § 2292 (1982).

85. *Id.* § 2344.

86. *Id.* § 2373.

87. *Id.* § 2273.

88. *Id.* §§ 2341, 2371.

89. 19 U.S.C. § 2322 (1976) (repealed 1980).

90. See 19 U.S.C. §§ 2341 & 2371 (1976); H.R. Rep. No. 1235, *supra* note 2, at 45.

91. H.R. Rep. No. 1235, *supra* note 2, at 45.

92. See *supra* text accompanying notes 66-79.

appeal process, with two refinements. Jurisdiction over all such appeals should be exclusively in the CAFC in order to maintain uniformity in the decisional process. In addition, Commerce Department certification determinations should be subject to the same type of appellate judicial review as was the case with Labor Department certification decisions, with appeals from both Departments being taken to the CAFC directly.

4. *Section 1581(e)*.—Section 1581(e)⁹³ confers upon the CIT exclusive jurisdiction to review all final determinations of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.⁹⁴ This latter section provides that the Secretary of the Treasury is to determine whether certain articles are the product of a foreign country and, if so, which foreign country for purposes of title III of the Trade Agreements Act of 1979.⁹⁵ That title implements the government procurement code.⁹⁶ The decisions of the Secretary of the Treasury are reviewed *de novo* by the CIT.⁹⁷ To date, there have been no reported decisions under section 1581(e).

Given the paucity of case law under section 1581(e), it is somewhat problematic to suggest an alternative forum or method of dispute resolution of cases which might arise under this section. It would seem, however, that some form of administrative adjudication process comparable to that suggested in connection with section 1581(d)⁹⁸ would be feasible. Alternatively, jurisdiction of section 1581(e) cases could be transferred to the district courts if the need to preserve *de novo* judicial review is deemed imperative. If the latter alternative is adopted, the risk of inconsistent decisions arising out of this area would appear to be slight, considering that no occasions for judicial review under section 1581(e) have ever arisen. Finally, since

93. 28 U.S.C. § 1581(e). That subsection provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979 [19 U.S.C. § 2515(b)(1)].

94. 19 U.S.C. § 2515(b)(1) (1985). That section provides:

RULES OF ORIGIN

(1) **ADVISORY RULINGS AND FINAL DETERMINATIONS**.—For the purposes of this title, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B), an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b).

See S. Rep. No. 249, 96th Cong., 1st Sess. 132-33 (1979) ("Section 301(b) [19 U.S.C. § 2511(b)] specifies for circumstances in which the President may designate a foreign country as eligible for a waiver from U.S. statutes which establish a preference for domestic suppliers.")

95. 19 U.S.C. §§ 2511-2518 (1982).

96. *See S. Rep. No. 249, 96th Cong., 1st Sess. 254-56 (1979)*.

97. 28 U.S.C. § 2640(a)(3).

98. *See supra* text accompanying notes 66-79 and 82-92.

section 1581(e) jurisdiction has never been invoked, the district courts would not be saddled with an onerous burden if section 1581(e) jurisdiction were transferred to them.

5. *Section 1581(f)*.—Section 1581(f)⁹⁹ clarified certain provisions of the Trade Agreements Act of 1979 relating to judicial applications for access to confidential information pursuant to section 777(c)(2) of the Tariff Act of 1930.¹⁰⁰ Under Section 1581(f), the CIT has exclusive jurisdiction over actions challenging agency refusals to disclose confidential information received by the ITA or the Commission during the course of an AD or CVD investigation.¹⁰¹

It is proposed that jurisdiction over these cases be transferred to the district courts. As is true with section 1581(e) cases, the number of cases arising under section 1581(f) has been extremely few.¹⁰² This kind of case is also one which the district courts are well-suited to decide. Not only do the district courts have responsibility for reviewing all administrative subpoena enforcement matters arising in connection with investigations conducted by the Customs Service,¹⁰³ but they handle motions to compel discovery on a regular basis.¹⁰⁴ The district courts are thus not strangers to this type of legal issue. Moreover, the three-pronged test employed by the CIT in determining generally whether to release confidential information obtained by an agency in the course of its investigation — (1) the government's

99. 28 U.S.C. § 1581(f). That subsection provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority [the Department of Commerce] or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

100. 19 U.S.C. § 1677f(c)(2) (1982). That section provides in part:

Disclosure under court order —

If the administering authority [the Department of Commerce] denies a request for information under paragraph (1) [19 U.S.C. § 1677f(c)(1)], or the [International Trade] Commission denies a request for confidential information submitted by the petitioner or an interested party . . . then application may be made to the United States [Court of International Trade] for an order directing the administering authority or the Commission to make the information available

See generally Garfinkel, *Disclosure of Confidential Documents Under the Trade Agreements Act of 1979: A Corporate Nightmare?* 13 L. & POL'Y IN INT'L BUS. 465 (1981).

101. H.R. Rep. No. 1235, *supra* note 2, at 46. See *Monsanto Industrial Chemical Co. v. United States*, No. 83-117 slip op. (Ct. Int'l Trade Nov. 10, 1983); *In re U.S. International Trade Commission Investigation No. AA1921-147A*, 491 F. Supp. 1356 (Cust. Ct. 1980). See generally *American Spring Wire Corp. v. United States*, 566 F. Supp. 1538 (Ct. Int'l Trade 1983), and cases cited therein for a discussion of release of confidential information when AD and CVD determinations are pending judicial review.

102. Only three decisions arising under section 1581(f) have been reported to date. See cases cited *infra* note 169.

103. 19 U.S.C. § 1509-1510 (1982).

104. See FED. R. CIV. P. 37. Such discovery questions include whether business confidential materials are to be released. FED. R. CIV. P. 26(c)(7). See C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2403 (1970).

need to obtain confidential information in future cases, (2) the need of litigants for data used by the government, and (3) the need of foreign manufacturers to protect sensitive business information¹⁰⁵ — is not so unique or complex a test that the district courts would encounter difficulties in adequately disposing of applications for release of confidential information.

6. *Section 1581(g)*.—Section 1581(g)¹⁰⁶ grants the Court exclusive jurisdiction to review any decision of the Secretary of the Treasury denying or revoking a customhouse broker's license under section 641(a) of the Tariff Act of 1930,¹⁰⁷ or revoking or suspending a customhouse broker's license under section 641(b) of the Tariff Act of 1930.¹⁰⁸ Prior to enactment of the Customs Courts Act, judicial review of these matters was committed to the courts of appeals.¹⁰⁹

Congress' rationale for giving the CIT jurisdiction over these cases was the same as that given in connection with section 1581(d) jurisdiction: uniformity of jurisdiction of civil actions involving tariff and international trade statutes.¹¹⁰

Present law maintains the prior statutory provision of affording customhouse brokers whose license is revoked or suspended with an administrative hearing at which testimony is taken.¹¹¹ The broker may be represented by counsel,¹¹² and witnesses may be cross-examined.¹¹³ The substantial evidence standard of review is applicable.¹¹⁴ There are no comparable administrative hearing rights conferred upon applicants whose customhouse broker's license application is denied.¹¹⁵ However, an aggrieved applicant is entitled

105. See S. Rep. No. 249, 96th Cong., 1st Sess. 100 (1979) (the CIT is to determine "whether the need of the party requesting the information outweighs the need of the party submitting the information for continued confidential treatment."); *American Spring Wire Corp. v. United States*, 566 F. Supp. 1538, 1539-40 (Ct. Int'l Trade 1983).

106. 28 U.S.C. § 1581(g). That subsection provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review —

(1) any decision of the Secretary of the Treasury to deny or revoke a customs broker's license under section 641(b)(2) or (3) or (c) of the Tariff Act of 1930 or to deny a customs broker's permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act; and (2) any decision of the Secretary of the Treasury to revoke or suspend a customhouse broker's license under section 641(d)(2)(B) of the Tariff Act of 1930.

107. 19 U.S.C. § 1641(a) (1982). See *Nikolic v. United States*, 565 F. Supp. 1042 (Ct. Int'l Trade 1983).

108. 19 U.S.C. § 1641(b) (1982).

109. 19 U.S.C. § 1641 (1976) (repealed 1980).

110. H.R. Rep. No. 1235, *supra* note 2, at 46.

111. 19 U.S.C. § 1641(b).

112. *Id.*

113. *Id.*

114. *Id.*

115. Customs Service regulations provide for notice of a denial of a license application

to a trial de novo before the CIT.¹¹⁶

Considering that the only explanation given by Congress for expanding the CIT's jurisdiction in this area was that of uniformity,¹¹⁷ there would certainly be little continuing justification for not turning review of license revocations under section 641(b) over to the Federal Circuit if the CIT's jurisdiction is abrogated under the other jurisdictional provisions of section 1581. In the case of license applicants whose application is denied, additional due process guarantees should be implemented at the administrative level. These should include some form of hearing,¹¹⁸ inasmuch as an unsuccessful applicant's right to a trial de novo would be eliminated. Direct appeal to the CAFC could then be taken after the hearing, with the scope of review being the substantial evidence standard.

7. *Section 1581(h)*.—Section 1581(h)¹¹⁹ confers exclusive jurisdiction upon the CIT to entertain actions challenging rulings of the Secretary of the Treasury issued prior to the importation of goods regarding such questions as the tariff classification, valuation or rate of duty of those goods.¹²⁰ Persons seeking judicial review must demonstrate that they would be irreparably harmed unless given an opportunity to obtain judicial review of the Secretary's decision prior to importation of the merchandise.¹²¹

Due to the requirement that an aggrieved person must make this showing of irreparable harm in order to obtain review under section 1581(h),¹²² this new grant of subject matter jurisdiction has

together with reasons therefor. 19 C.F.R. §§ 111.11-19 (1984).

116. 28 U.S.C. § 2640(a)(5).

117. See *supra* note 107 and accompanying text.

118. By regulation, an unsuccessful applicant can seek review of a license denial with the Commissioner of Customs and the Secretary of the Treasury. 19 C.F.R. § 111.17. However, that regulation does not provide any standards for denying such a request, apparently leaving it to the discretion of the Commissioner and Secretary whether or not to grant further review. *Id.*

119. 28 U.S.C. § 1581(h). That subsection provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

120. See *Bally/Midway Manufacturing Co. v. Regan*, 565 F. Supp. 1045 (Ct. Int'l Trade 1983); H.R. Rep. No. 1235, *supra* note 2, at 46. See generally Cohen, *Recent Decisions of the Court of International Trade Relating to Jurisdiction: A Primer and A Critique*, 58 ST. JOHN'S L. REV. 700, 743-46 (1984) [hereinafter cited as Cohen II].

121. 28 U.S.C. § 1581(h). See *American Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1552 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 1909 (1984); 718 Fifth Avenue Corp. v. United States, No. 83-39 slip op. (Ct. Int'l Trade Apr. 13, 1984); *Manufacture de Machines du Haut-Rhin v. von Raab*, 569 F. Supp. 877 (Ct. Int'l Trade 1983).

122. See *Manufacture de Machines du Haut-Rhin v. von Raab*, 569 F. Supp. 877, 882

been rarely used.¹²³ It has, in fact, proven thus far to be a damp squib.¹²⁴

It is proposed that in lieu of review by the CIT, the CAFC be given jurisdiction over section 1581(h) cases directly from an administrative proceeding at which the person seeking a ruling may present evidence and argumentation in support of his or her position.¹²⁵ Absent an agency decision supported by substantial evidence on the record, any such decision would not be sustained on appeal.¹²⁶

8. *Section 1581(i)*.—Section 1581(i),¹²⁷ the CIT's grant of residual jurisdictional power,¹²⁸ confers subject matter jurisdiction upon the Court over international trade and tariff actions which arise out of certain tariff and revenue cases, embargoes, and the administration of matters referred to in section 1581(a)-(h).¹²⁹ The purpose of this broad jurisdictional grant over a variety of international trade issues was to eliminate the confusion that existed as to the demarcation between the jurisdiction of the district courts and the Customs Court in these matters.¹³⁰

(Ct. Int'l Trade 1983) ("There has been no showing that Manurhin does not have the ability to import a test shipment of pistols and file a protest against any adverse decision by Customs."); H.R. Rep. No. 1235, *supra* note 2, at 46-47. See also 28 U.S.C. § 2640(d).

123. See cases cited *supra* note 121; Pagoda Trading Co. v. United States, 577 F. Supp. 22 (Ct. Int'l Trade 1983). See generally Cohen II, *supra* note 120, at 743-46, and cases cited therein.

124. See H.R. Rep. No. 1235, *supra* note 2, at 47 ("It is not the Committee's intent to permit judicial review prior to the completion of the import transaction in such a manner as to negate the traditional method of obtaining judicial review of import transactions.")

125. See *supra* text accompanying notes 46-55.

126. *Id.*

127. 28 U.S.C. § 1581(i). This subsection provides:

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

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

128. H.R. Rep. No. 1235, *supra* note 2, at 47; United States v. Uniroyal, Inc., 687 F.2d 467 (C.C.P.A. 1982).

129. *Id.* See Cohen II, *supra* note 120, at 746; Cohen I, *supra* note 34, *passim*.

130. H.R. Rep. No. 1235, *supra* note 2, at 47. As that report noted:

This provision makes it clear that all suits of the type specified are properly commenced only in the Court of International Trade. The Committee has included this provision in the legislation to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction. The grant of jurisdiction in subsection (i) will ensure that these suits will

If section 1581(i) were repealed along with the rest of section 1581, provisions within title 28 which confer jurisdiction upon the district courts in certain customs matters would adequately fill the gap. First, 28 U.S.C. § 1331, the federal question jurisdictional statute, in conjunction with the Administrative Procedure Act,¹³¹ would generally empower the district courts to entertain actions brought under trade and tariff laws.¹³² Second, and more specifically, the provision conferring jurisdiction on the district courts in cases involving customs duties,¹³³ if expanded to include cases involving actions concerning tariffs and duties on imports for non-revenue purposes and cases concerning embargoes, would account for a large percentage of the balance of cases coming within the CIT's section 1581(i) jurisdiction.¹³⁴

The potential burden on the district courts of assuming jurisdiction over this category of cases is discussed in Part III below.

B. Section 1582

While section 1581(a)-(i) provides for jurisdiction over suits against the United States, section 1582¹³⁵ empowers the CIT to hear actions commenced by the United States in three subject areas: (1) suits to recover certain civil penalties,¹³⁶ (2) suits to recover upon a bond relating to imports,¹³⁷ and (3) suits to recover customs duties.¹³⁸

Regarding the three types of civil penalty actions specified in section 1582(1), prior to 1980 the district courts had exclusive jurisdiction¹³⁹ over civil penalty actions brought under section 592 of the Tariff Act of 1930.¹⁴⁰ This arrangement was reaffirmed with the en-

be heard on their merits.

Id. But see *supra* note 29.

131. 5 U.S.C. §§ 701-706 (1982).

132. 28 U.S.C. § 1581(i) has been analogized to 28 U.S.C. § 1331. See Cohen I, *supra* note 34, at 497-98.

133. 28 U.S.C. § 1340.

134. See 28 U.S.C. § 1581(i)(1) & (2).

135. 28 U.S.C. § 1582 (1985). That section provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States —

(1) to recover a civil penalty under section 592, 641(a)(1)(C), 641(d)(2)(A), or 734(i)(2) of the Tariff Act of 1930;

(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or

(3) to recover customs duties.

136. 28 U.S.C. § 1582(1). See H.R. Rep. No. 1235, *supra* note 2, at 48-49.

137. 28 U.S.C. § 1582(2).

138. 28 U.S.C. § 1582(3).

139. 19 U.S.C. § 1592 (1976) (repealed 1980); 28 U.S.C. § 1355 (1976).

140. 19 U.S.C. § 1592.

actment in 1978 of the Customs Procedural Reform and Simplification Act,¹⁴¹ with jurisdiction of all section 592 penalty actions being maintained in the district courts.¹⁴² The Customs Courts Act eventually transferred jurisdiction over section 592 actions to the CIT.¹⁴³

In addition to conferring jurisdiction over section 592 penalty actions, the Act also enlarged the Court's jurisdiction to entertain penalty actions brought by the United States for breach of a CVD¹⁴⁴ or AD¹⁴⁵ suspension agreement.¹⁴⁶

Several good reasons exist for returning section 592 jurisdiction to the district courts, and to include as part of that jurisdiction the power to hear penalty actions under the CVD and AD statutes as well. First, there is nothing particularly unique about these cases besides the fact that they arise out of violations of the tariff and international trade laws of the United States. The elements of these penalty actions are essentially no different from other types of fraud actions presently tried in the district courts under related tariff laws.¹⁴⁷ Second, the Court and the parties are often put to great inconvenience because of the CIT's location in New York City.¹⁴⁸ Section 592 penalty actions arise all over the United States, at any port of entry. Although the CIT is a court of national jurisdiction¹⁴⁹ and is thus empowered to try cases throughout the United States,¹⁵⁰ the problem is not one of power but rather one of logistics. This is especially true in instances of status conferences, discovery motions, and other pre-trial matters. Frequently, oral argument is waived because of the great distances involved. A good deal of the Court's business is thus necessarily conducted by telephone, particularly when counsel are located outside of the New York City area. While this arrange-

141. Pub. L. No. 95-410, 92 Stat. 893 (1978).

142. 19 U.S.C. § 1592(e) (Supp. IV 1980) (repealed 1980).

143. Pub. L. No. 96-417, § 609, 94 Stat. 1746 (codified at 19 U.S.C. § 1592(e) and 28 U.S.C. § 1582(1) (1982)).

144. Section 704(i)(2) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1671c(i)(2) (1982).

145. Section 734(i)(2) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1763c(i)(2) (1982). The elements of a penalty action under sections 704(i)(2) and 734(i)(2) are based on the identical elements of a section 592 penalty action.

146. See Holmer & Bellow, *U.S. Import Law and Policy Series: Suspension and Settlement Agreements in Unfair Trade Cases*, 18 INT'L LAW. 683 (1984).

A suspension agreement is an agreement between the United States and a foreign government or foreign manufacturer wherein the United States agrees to suspend an AD or CVD investigation in exchange for the foreign government's commitment to completely eliminate all subsidies, 19 U.S.C. § 1671c(b); or a foreign manufacturer's commitment to cease dumping or importing altogether, 19 U.S.C. § 1673c(b).

147. See, e.g., 18 U.S.C. § 542 (entry of goods by means of false statements); 18 U.S.C. § 545 (smuggling goods into the United States); and 18 U.S.C. § 1001 (false statements to an officer of the United States). See also *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972).

148. See 28 U.S.C. § 251(c).

149. S. Rep. No. 466, *supra* note 18, at 3.

150. 28 U.S.C. § 256(a) (1982).

ment may be economical in some respects, case supervision via telephone is a poor second best. A certain sharp edge in the litigation process is lost. In addition, probably owing in some measure to the CIT's location in New York City, East coast law firms have tended to dominate the international trade and tariff market.

Because of the infrequency of face-to-face meetings, the judges of the CIT are not as familiar with counsel. This would be otherwise if section 592 penalty actions were managed from the district where counsel for the parties are located. Supervising a case by long-distance telephone calls is hardly the most desirable method for handling a court's docket on a regular basis. The benefit of face-to-face encounters, although an intangible one, cannot be minimized. Judges can get a "feel" for the attorneys in a case through such meetings. This can be especially helpful when the possibilities of settlement need to be explored.

In addition, based on the author's own experience at the CIT as a law clerk and as a trial attorney for the Justice Department, disagreements often arise over where the Court should hold a trial in penalty actions. The parties jockey for position in the hope of capturing some perceived benefit in having the trial at a particular site. If the district courts had jurisdiction over these cases, by contrast, the well-defined statutory provisions on venue¹⁵¹ and the well-developed body of case law¹⁵² under the doctrine of *forum non conveniens* would resolve problems in this regard with a minimum of contention.

Another difficulty in having penalty actions tried by the CIT is that of jury trials. A defendant is entitled to a jury trial in a section 592 action.¹⁵³ A problem arises, however, with jury selection by the CIT, a court which has conducted only one jury trial in its history. While not an insurmountable problem,¹⁵⁴ it is one more factor adding friction to an otherwise slow and frequently protracted process.

Finally, the genuine possibility exists that defendants who are sued under section 592 in the CIT will have to defend against two actions simultaneously in two different federal forums based on the same set of operative facts.¹⁵⁵ The United States has filed section 592 penalty actions with the CIT seeking not only a penalty under

151. 28 U.S.C. §§ 1391, 1392, 1395 & 1402 (1982).

152. See 28 U.S.C. § 1404; 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1352 (1969).

153. See H.R. Rep. No. 1235, *supra* note 2, at 34; 28 U.S.C. § 1876 (1982).

154. With assistance from the clerks of the various district courts the CIT could probably conduct a jury trial with some level of efficiency. See 28 U.S.C. § 1876.

155. The CIT has declined to exercise ancillary jurisdiction over a pendent civil forfeiture claim under 18 U.S.C. § 545 in two cases where the United States was seeking to recover civil penalties under 19 U.S.C. § 1592. *United States v. Tabor*, 608 F. Supp. 658 (Ct. Int'l Trade 1985); *United States v. Gold Mountain Coffee, Ltd.*, 597 F. Supp. 510 (Ct. Int'l Trade 1984).

that section, but also a forfeiture under related federal laws.¹⁵⁶ However, in the only two decisions reported to date on this issue,¹⁵⁷ the CIT declined to exercise ancillary jurisdiction over the related civil forfeiture claim.¹⁵⁸ In one of those cases, *United States v. Gold Mountain Coffee, Ltd.*,¹⁵⁹ the United States filed a separate forfeiture action in district court¹⁶⁰ following dismissal by the CIT of the forfeiture claim for lack of subject matter jurisdiction. The defendants were thus exposed to the expense of defending against two separate actions arising out of the same set of facts in federal forums 3,000 miles apart. Clearly, if the district courts had jurisdiction over section 592 penalty actions, this untenable situation for defendants would not arise.¹⁶¹

As for the two collection actions which the United States may commence under the customs laws and over which the CIT has jurisdiction under section 1582(2) and (3),¹⁶² statutory provisions currently exist conferring jurisdiction upon the district courts in such cases, except in cases in which the CIT has jurisdiction.¹⁶³ Amending those provisions by deleting references to the CIT and repealing section 1582 would place jurisdiction over these actions squarely in the district courts.

III. The Potential Burden on the Judicial System

The foregoing proposals will unquestionably mean more work for the district courts if adopted. What is that burden and can the district courts absorb the additional caseload?¹⁶⁴ One of the primary reasons for enactment of the Customs Courts Act was to relieve some of the pressure on the burgeoning dockets of the district courts.¹⁶⁵ An examination of the reported decision of the CIT, how-

156. See cases cited *supra* note 155.

157. See cases cited *supra* note 155.

158. See cases cited *supra* note 155.

159. 597 F. Supp. 510 (Ct. Int'l Trade 1984).

160. *United States v. 34,108 Bags of Robusta Green Coffee Beans*, No. C84-6878 AJZ (N.D. Cal. filed Oct. 22, 1984).

161. Regarding the civil penalty actions under sections 704(i)(2) and 734(i)(2), the district courts presently possess jurisdiction of any action for the recovery of "any fine, penalty or forfeiture." 28 U.S.C. § 1355. By eliminating the CIT's jurisdiction over such penalty actions, the district courts would automatically assume jurisdiction over them.

162. 28 U.S.C. § 1582(2) & (3).

163. 28 U.S.C. §§ 1340 (customs duties) and 1352 (bonds). See 28 U.S.C. § 1345 (conferring jurisdiction upon the district courts of all civil actions commenced by the United States).

164. The proposals made in this article, if adopted, would not create any additional work for the CAFC *per se*.

165. S. Rep. No. 466, *supra* note 18, at 3. As noted in that report:

Recently, the district courts have become overburdened and overworked through the years leading to considerable delays in the resolution of disputes. The comparatively recent increase in litigation in the field of international trade has compounded this problem by overtaxing the already outstanding caseload of

ever, indicates that the additional caseload on the district courts would be insubstantial.

Under the proposals suggested in this article, the district courts would assume jurisdiction over section 1581(i) "residual jurisdiction" cases,¹⁶⁶ over section 1581(f) cases involving access to confidential information,¹⁶⁷ and over all actions commenced by the United States under section 1582.¹⁶⁸ Through 1984 there were only three published CIT decisions involving a section 1581(f) action seeking access to confidential information.¹⁶⁹ As for the section 1582 cases, from November 1, 1980 through December 31, 1984, there were twenty-two reported CIT decisions involving section 1582 jurisdiction.¹⁷⁰ That figure does not account for court time spent on pre-trial conferences and related matters, of course. Still, for a period of time spanning more than four years, twenty-two published opinions is hardly a daunting figure, especially if those cases were spread nationwide among all of the district courts. Under these circumstances, the impact of the additional cases on the district courts would be minimal.

It is somewhat more problematic to determine what the additional burden on the district courts would be in connection with section 1581(i) cases. Many of the issues that have arisen in section 1581(i) cases that have been the subject of published opinions have involved questions of jurisdiction and exhaustion of administrative remedies.¹⁷¹ Several decisions of the CIT have, however, reached the merits of the cases.¹⁷²

While it is difficult to accurately determine to what extent the CIT's workload is attributable to section 1581(i) cases,¹⁷³ one objec-

the district courts. Conversely, the volume of litigation instituted in the Customs Court has decreased. Under these circumstances, the Committee believes that it makes good sense to require that some of the cases now instituted in the overcrowded district courts clearly belong in the under-utilized Customs Court.

Id.

166. See *supra* text accompanying notes 127-34.

167. See *supra* text accompanying notes 99-105.

168. See *supra* text accompanying notes 135-63.

169. *Monsanto Industrial Chemical Co. v. United States*, No. 83-117 slip op. (Nov. 10, 1983); *Sacilor, Acieries et Laminoirs de Lorraine v. United States*, 542 F. Supp. 1020 (Ct. Int'l Trade 1982); *In re U.S. International Trade Commission Investigation No. AA1921-147A*, 491 F. Supp. 1356 (Cust. Ct. 1980).

170. In some instances, a single action was the source of more than one published opinion. See, e.g., *United States v. Gold Mountain Coffee, Ltd.*, 597 F. Supp. 510, 601 F. Supp. 212, 601 F. Supp. 215 (Ct. Int'l Trade 1984).

171. See, e.g., *American Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546 (Fed. Cir. 1983); *United States v. Uniroyal, Inc.*, 687 F.2d 467 (C.C.P.A. 1982); *U.S. Cane Sugar Refiners' Association v. Block*, 638 F.2d 399 (C.C.P.A. 1982).

172. See, e.g., *American Association of Exporters & Importers v. United States*, 751 F.2d 1239 (Fed. Cir. 1985); *Mast Industries, Inc. v. Regan*, 596 F. Supp. 1567 (Ct. Int'l Trade 1984), *appeal dismissed*, No. 85-835 (Fed. Cir. Feb. 19, 1985).

173. In 1981, there were 14 CIT slip opinions in which the Court's section 1581(i) jurisdiction was either cited as a basis for jurisdiction or was an issue in the case. In 1982, there

tive measure is the total number of published opinions the CIT promulgates annually. By this measure, not only is the CIT far from overworked, but the district courts could probably assume jurisdiction over *all* actions now brought in the CIT without any appreciable difficulty. Indeed, based on the work production of the CIT, one could well wonder why the CIT was not abolished long ago.¹⁷⁴

Although the number of judges on the CIT has fluctuated somewhat over the past five years due to death and judges taking senior status, the average number of judges actively participating in the Court's work has been nine from 1981 through 1984. The number of slip opinions published by the CIT for each of those four years has been fairly constant, as shown in the following table:

<i>Year</i>	<i>Number of Slip Opinions</i>
1981	124
1982	123
1983	140
1984	141

Dividing the number of judges (nine) by the number of published opinions yields an annual figure of slip opinions per judge of 14 for 1981-82, and 16 for 1983-84. That is less than two slip opinions per month per judge. By comparison, in 1984 the district court judges of the First Circuit had nearly 450 opinions published in Federal Supplement and Federal Rules Decisions. There are twenty-two judges on active status and six who are on senior status. Assuming that the six senior judges were active on a full-time basis, as an average figure each of those twenty-eight judges wrote approximately sixteen opinions in 1984. That figure equals the number of slip opinions published by each of the judges of the CIT in 1983 and 1984. It must be remembered, however, that frequently memorandum opinions and findings of fact and conclusions of law issued by the district courts are not published. Without exception, comparable opinions by the CIT are published as slip opinions and eventually printed in the official of the Court. In addition, extremely short slip opinions of three pages or less are published by the CIT.¹⁷⁵ These statistics then, although reflecting a comparable work effort by the CIT and the district court judges of the First Circuit in terms of published opinions, are clearly skewed in favor of the CIT.¹⁷⁶

were nine such opinions; in 1983, eleven; and in 1984, nine.

174. The Senate noted in 1979 that "the volume of litigation in the Customs Court has decreased." S. Rep. No. 466, *supra* note 18, at 3. That report described the Customs Court as "under-utilized." *Id.*

175. Of the 65 slip opinions published in volume 5 of U.S. Court of International Trade Reports, for example, 31 opinions were three pages or less in length.

176. Another comparison can be made with the number of published opinions promul-

Moreover, with few exceptions nearly all of the district court's docket is composed of de novo proceedings. A large percentage of a district court judge's working time is thus spent on the bench empanelling juries, hearing trials, and preparing findings of fact and conclusions of law in bench trials. By marked contrast, the CIT functions more like an appellate court.¹⁷⁷ Only a small fraction of the CIT's work involves de novo proceedings,¹⁷⁸ meaning that the CIT judges spend far less time on the bench than do their district court brothers and sisters. Given this consideration, the number of published opinions issued by the district court judges of the First Circuit is impressive.

In short, considering the total workload of the CIT as measured by its published opinions issued over the past four years, the burden on the district courts would be negligible if the CIT's jurisdiction under sections 1581(f), 1581(i) and 1582 were transferred to the district courts.

IV. Conclusion

The preceding discussion has shown that through a combination of: (1) shifting classification and valuation cases to administrative law judges; (2) having direct appellate review by the Federal Circuit of antidumping and countervailing duty appeals, trade adjustment assistance appeals, and customhouse broker license determinations; and (3) giving the district courts jurisdiction of certain penalty and duty collection actions, the continuing need for the Court of International Trade would no longer exist. Not only would the costs of litigating international trade cases be reduced by eliminating duplicative appeals in AD and CVD cases, but overall uniformity of decisions would be preserved in the remaining areas by having appellate review of all trade and tariff matters in the CAFC. Cost savings would be realized by litigants by eliminating two-step appeals in four categories of cases¹⁷⁹ and by reducing travel and related expenses to New York City by counsel who live in distant locations. Not only

gated by the Court of Appeals for the First Circuit in 1984. That court published nearly 300 opinions in 1984, representing an average of 50 opinions per circuit judge for that year, or three times the number of opinions published by the CIT in 1984. While this figure does not take into account the contributions of visiting judges who sat by designation on the First Circuit in 1984, that figure also does not include the innumerable summary dispositions by that court.

177. Only one jury trial to date has been held in the CIT. See 28 U.S.C. § 1876 (permitting trials by jury in the CIT). The overwhelming number of CIT slip opinions involve motion practice, *e.g.*, motions for summary judgment, to dismiss, to compel discovery, and for review upon the administrative record. In 1983 the CIT conducted 19 trials. In 1984, there were only 14 CIT trials de novo.

178. *Id.*

179. Those cases are AD, CVD, trade adjustment assistance and customhouse broker's license appeals.

would the burden on the district courts be minimal if the CIT were abolished, but the administration of justice would be improved.

