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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, 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 . . . ." Among the revisions enacted was the enlargement of the jurisdiction of the United States Customs Court, renamed the United States Court of International Trade. Congress provided for exclusive jurisdiction within the Court of International Trade ("CIT" or "Court") over most actions involving import transactions into the United States. 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."8

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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. 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. As the types of decisions pertaining to import transactions expanded to include antidumping duty and subsidy determinations, Congress in 1926 created the United States Customs Court as an article I court to replace the Board. 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.

status.\textsuperscript{11}

With the enactment of the Trade Agreements Act of 1979,\textsuperscript{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.\textsuperscript{13} Multilateral trade negotiations being conducted under the auspices of the General Agreement on Tariffs and Trade\textsuperscript{14}—particularly the Kennedy and Tokyo Rounds of negotiations concluded in 1967\textsuperscript{15} and 1979,\textsuperscript{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."\textsuperscript{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.\textsuperscript{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,\textsuperscript{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,\textsuperscript{20} and (2) to expand the Court's powers by making them equal to the powers of the federal district courts.\textsuperscript{21}

The one area in greatest need of clarification regarding subject matter jurisdiction was in the penumbral region where district court...
jurisdiction overlapped that of the Customs Court in international trade matters. District court jurisdiction encompassed civil actions involving revenue from imports on tonnage.\textsuperscript{22} It also included jurisdiction of any civil action on a bond executed under any law of the United States.\textsuperscript{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 CIT\textsuperscript{24} by enacting sweeping revisions to existing provisions governing the Customs Court's jurisdiction.\textsuperscript{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 . . . ."\textsuperscript{26} Some district courts had asserted jurisdiction over international trade actions,\textsuperscript{27} while others dismissed such actions for lack of jurisdiction.\textsuperscript{28} Whether or not the 1980 amendments have achieved their intended purpose of eliminating this jurisdictional confusion remains an open question.\textsuperscript{29} Nevertheless, at a minimum, it is fairly clear that in light of the CIT's new equitable powers,\textsuperscript{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


\textsuperscript{26} S. Rep. No. 466, supra note 18, at 1-2.

\textsuperscript{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).


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

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).
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.
trial de novo.\textsuperscript{42}

Section 1581(b)\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{47} among other things. Those determinations are then referred to the U.S. International Trade Commission for its approval or re-

\textsuperscript{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].

\textsuperscript{44} 19 U.S.C. § 1516 (1982).

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

\textsuperscript{46} 19 U.S.C. § 1337 (1982).

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.

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 duties — 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. 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-
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. In addition, unlike the judicial adjudicatory process, statutory deadlines can be imposed on the administrative adjudication process, thereby allaying fears that the determinations may not be expeditiously reached. 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). 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 1979 made wholesale revisions to those laws, superseding in large measure the Tariff Act of 1930 and the Antidumping Act of 1921.

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].


In brief, section 1581(c), in conjunction with section 516A of the Tariff Act of 1930, 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. Those determinations which are judicially reviewable include the following:

1. A determination by the ITA not to initiate an investigation;
2. A determination by the ITC not to review a determination under 19 U.S.C. § 1675(b) based upon changed circumstances;
3. A preliminary determination of no injury by the ITC;
4. A final determination, either affirmative or negative, by the ITC or ITA under the AD or CVD law;
5. A determination by the ITA to suspend an AD or CVD investigation;
6. An injurious effect determination by the ITC under 19 U.S.C. §§ 1671c(h) or 1673c(h); 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.

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, the Nuclear Regulatory Commission, the Interstate Commerce Com-

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61. Id. § 1516a(a)(1)(B).
62. Id. § 1516a(a)(1)(C).
63. Id. § 1516a(a)(2)(B)(i), (ii) & (iii).
64. Id. § 1516a(a)(2)(B)(iv).
65. Id. § 1516a(a)(2)(B)(v).
66. Id. § 1516a(a)(2)(B)(vi).
mission, the Federal Communications Commission, or the Merit Systems Protection Board. In section 1581(c) cases, CIT review is upon the administrative record, 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.

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, 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, not to mention the attendant delay, 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

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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)(l)(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).
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,\textsuperscript{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).\textsuperscript{79} Among the purposes for the bill was the reduction of litigation expense and delays connected with AD and CVD appeals.\textsuperscript{80} The Senate bill was deleted from the final version of the Trade and Tariff Act of 1984.\textsuperscript{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. \textit{Section 1581(d)}.—Section 1581(d)\textsuperscript{82} gives the CIT exclu-

\begin{footnotesize}
\begin{enumerate}
\item 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).
\item As noted in the fact sheet accompanying the bill:
\item 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.


\textit{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.

\textit{Conference agreement}

The Conferes agreed to strike the Senate provision.

\item 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-
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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 straits and in immediate need of assistance. Strong reasons thus exist for restoring the status quo ante with regard to the certification...
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

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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)].


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.").


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 . . . .


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


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 information— 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) 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, or revoking or suspending a customhouse broker's license under section 641(b) of the Tariff Act of 1930. Prior to enactment of the Customs Courts Act, judicial review of these matters was committed to the courts of appeals.

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.

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. The broker may be represented by counsel, and witnesses may be cross-examined. The substantial evidence standard of review is applicable. There are no comparable administrative hearing rights conferred upon applicants whose customhouse broker's license application is denied. However, an aggrieved applicant is entitled

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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:

   (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.
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.\textsuperscript{116}

Considering that the only explanation given by Congress for expanding the CIT’s jurisdiction in this area was that of uniformity,\textsuperscript{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,\textsuperscript{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. \textit{Section 1581(h).—}Section 1581(h)\textsuperscript{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.\textsuperscript{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.\textsuperscript{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),\textsuperscript{122} this new grant of subject matter jurisdiction has

\textsuperscript{116} 28 U.S.C. § 2640(a)(5).
\textsuperscript{117} See supra note 107 and accompanying text.
\textsuperscript{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.
\textsuperscript{119} 28 U.S.C. § 1581(h). That subsection provides:

\textit{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.}

\textsuperscript{122} See Manufacture de Machines du Haut-Rhin v. von Raab, 569 F. Supp. 877, 882
been rarely used.\textsuperscript{123} It has, in fact, proven thus far to be a damp squib.\textsuperscript{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.\textsuperscript{126} Absent an agency decision supported by substantial evidence on the record, any such decision would not be sustained on appeal.\textsuperscript{126}

8. \textit{Section 1581(i).—}Section 1581(i),\textsuperscript{127} the CIT's grant of residual jurisdictional power,\textsuperscript{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).\textsuperscript{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.\textsuperscript{130}
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, would generally empower the district courts to entertain actions brought under trade and tariff laws. Second, and more specifically, the provision conferring jurisdiction on the district courts in cases involving customs duties, 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.

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 1582 empowers the CIT to hear actions commenced by the United States in three subject areas: (1) suits to recover certain civil penalties; (2) suits to recover upon a bond relating to imports; and (3) suits to recover customs duties.

Regarding the three types of civil penalty actions specified in section 1582(1), prior to 1980 the district courts had exclusive jurisdiction over civil penalty actions brought under section 592 of the Tariff Act of 1930. This arrangement was reaffirmed with the en-
actment in 1978 of the Customs Procedural Reform and Simplification Act, with jurisdiction of all section 592 penalty actions being maintained in the district courts. The Customs Courts Act eventually transferred jurisdiction over section 592 actions to the CIT.

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 CVD or AD suspension agreement.

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. Second, the Court and the parties are often put to great inconvenience because of the CIT's location in New York City. Section 592 penalty actions arise all over the United States, at any port of entry. Although the CIT is a court of national jurisdiction and is thus empowered to try cases throughout the United States, 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-

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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.

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).
149. S. Rep. No. 466, supra note 18, at 3.
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 venue\(^\text{151}\) and the well-developed body of case law\(^\text{152}\) 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.\(^\text{153}\) 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,\(^\text{154}\) 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.\(^\text{155}\) The United States has filed section 592 penalty actions with the CIT seeking not only a penalty under


\(^{154}\) 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.

that section, but also a forfeiture under related federal laws. However, in the only two decisions reported to date on this issue, the CIT declined to exercise ancillary jurisdiction over the related civil forfeiture claim. In one of those cases, United States v. Gold Mountain Coffee, Ltd., the United States filed a separate forfeiture action in district court 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.

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), statutory provisions currently exist conferring jurisdiction upon the district courts in such cases, except in cases in which the CIT has jurisdiction. 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? 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. 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.
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 (confering 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, over section 1581(f) cases involving access to confidential information, and over all actions commenced by the United States under section 1582. Through 1984 there were only three published CIT decisions involving a section 1581(f) action seeking access to confidential information. 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. That figure does not account for court time spent on pretrial 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. Several decisions of the CIT have, however, reached the merits of the cases.

While it is difficult to accurately determine to what extent the CIT's workload is attributable to section 1581(i) cases, one obiect...
A PROPOSAL TO ABOLISH THE CIT

Fall 1985

A PROPOSAL TO ABOLISH THE CIT

The 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:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Slip Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>124</td>
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<tr>
<td>1982</td>
<td>123</td>
</tr>
<tr>
<td>1983</td>
<td>140</td>
</tr>
<tr>
<td>1984</td>
<td>141</td>
</tr>
</tbody>
</table>

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

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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 em­
panelling 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. Only a small fraction of
the CIT's work involves de novo proceedings, 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 dis­
trict 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 Interna­
tional Trade would no longer exist. Not only would the costs of liti­
gating international trade cases be reduced by eliminating duplica­
tive appeals in AD and CVD cases, but overall uniformity of
decisions would be preserved in the remaining areas by having appel­
late 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 cases and by reducing travel and related expenses to
New York City by counsel who live in distant locations. Not only
would the burden on the district courts be minimal if the CIT were abolished, but the administration of justice would be improved.