
Winter 1982

The Customs Courts Act of 1980 - Pub. L. No. 96-417, 94 Stat. 1785 (to be Codified in Scattered Sections of 19 and 28 U.S.C.)

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Recommended Citation

Eugene C. Brooks IV, *The Customs Courts Act of 1980 - Pub. L. No. 96-417, 94 Stat. 1785 (to be Codified in Scattered Sections of 19 and 28 U.S.C.)*, 7 N.C. J. INT'L L. 85 (1982).

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NOTES

The Customs Courts Act of 1980—Pub. L. No. 96-417, 94 Stat. 1785 (to be Codified in Scattered Sections of 19 and 28 U.S.C.)

The U.S. Customs Court in the past has been the subject of intermittent legislation designed to ensure the court's effectiveness in dealing with contemporary trade issues. Since the establishment in 1890 of the court's predecessor, the Board of General Appraisers, Congress has recognized deficiencies in the court's jurisdiction, scope of review, and power to grant relief and has then acted on several occasions to correct these deficiencies. However, this congressional tendency to react to specific problems with ad hoc changes resulted in an unintegrated and inadequate scheme of enabling legislation. The Trade Agreements Act of 1979,¹ which substantially increased the Customs Court's responsibilities, finally made a major overhaul of the Customs Court an immediate necessity.²

In addition to renaming the U.S. Customs Court the Court of International Trade (CIT), the Customs Courts Act of 1980³ makes signifi-

¹ Pub. L. No. 96-39, tit. X, 93 Stat. 144 (codified in scattered sections of 19, 28 U.S.C.).

² House Committee on the Judiciary, Report on H.R. 7540, Customs Courts Act of 1980, H.R. Rep. No. 1235, 96th Cong., 2d Sess. 20, reprinted in [1980] U.S. Code Cong. & Ad. News 3729, 3731 [hereinafter cited as 1980 House Report].

³ Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified in scattered sections of 19, 28 U.S.C.). The 95th Congress had earlier considered two bills which were unaccepted versions of this Act, S. 2857, 95th Cong., 1st Sess. (1978); H.R. 12006, 95th Cong., 2d Sess. (1978). Hearings were held only in the Senate. Senate Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary: Hearings on the Customs Courts Act S. 2857, 95th Cong., 1st Sess. (1978) [hereinafter cited as 1978 Senate Hearings]. Neither the Senate nor the House acted on this legislation.

During the 96th Congress, Title X of the Trade Agreements Act of 1979 was enacted, *supra* note 1. It greatly increased the Customs Court's responsibility in international trade litigation. The Senate then introduced a new bill titled the Customs Courts Act of 1979, S. 1654, 96th Cong., 1st Sess. (1979), and held hearings on it in September of 1979. Senate Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, Hearings on the Customs Courts Act, S. 1654, 96th Cong., 1st Sess. (1979) [hereinafter cited as 1979 Senate Hearings]. On December 10, 1979, the bill passed the Senate; meanwhile, the House was considering its own bill for a Customs Courts Act. H.R. 6394, 96th Cong., 1st Sess. (1979). Hearings on this bill were held in February of 1980. House Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, Hearings on H.R. 6394, A Bill to Improve the Federal Judicial Machinery by Clarifying and Revising Certain Provisions of Title

cant changes in the court's jurisdiction, procedure, and equity power. These changes will affect U.S. importers as well as businesses, employees, and communities adversely affected by foreign imports. For example, importers may now obtain review of pre-importation Customs rulings and faster review of Customs determinations barring perishable goods from entry.⁴ Moreover, importers may be relieved of the full forfeiture penalty statutorily required when importers were found guilty of misinforming Customs.⁵ Importers may also be required to pay additional duties on liquidated⁶ shipments in classification or value disputes. Procedures are set forth by which businesses competing against importers of foreign products may receive quicker review of antidumping⁷ and countervailing⁸ duty determinations by the International Trade Commission (ITC),⁹ acquire confidential information gathered by U.S. agencies,¹⁰ and procure review of Customs country of origin¹¹ determinations.¹²

28 U.S.C. Relating to the Judiciary and Judicial Review of International Trade Matters, 96th Cong., 2d Sess. (1980) [hereinafter cited as 1980 House Hearings].

After its hearings, the House introduced a revised bill, H.R. 7540, 96th Cong., 2d Sess. (1980) which was reported out by the full House Judiciary Committee in August. 1980 House Report, *supra* note 2. The House ultimately passed S. 1654, as amended to conform with H.R. 7540, on September 22, 1980. The Senate concurred with the amendments on September 24, 1980, whereby the Customs Courts Act of 1980 was finally enacted.

⁴ 28 U.S.C.A. § 1581(h) (West Supp. 1981).

⁵ Equity jurisdiction was conferred upon the Court of International Trade. 28 U.S.C.A. § 1585 (West Supp. 1981). It is believed the Court of International Trade may relieve, through equitable doctrines, the harsh result of 19 U.S.C.A. § 1592 (West & West Supp. 1981) where appropriate.

⁶ 28 U.S.C.A. § 1583 (West Supp. 1981). See 1980 House Report, *supra* note 2, at 49. The liquidation of an entry is usually Customs' last involvement with a shipment. Customs computes the final duty on the merchandise and bills the importer for additional payments due, remits any amount of overpayment to the importer, or closes the account. Frequently, the importer will have the shipment in his possession but under a bond required for an immediate delivery permit. Most customhouse brokers have such a permit. Gerhart, *Judicial Review of Customs Service Actions*, 9 Law & Pol'y Int'l Bus. 1101, 1107-11 (1977).

⁷ 19 U.S.C. § 1673 (Supp. III 1979). This statute authorizes the President to levy additional duties on imported goods which are being dumped on the U.S. market. To justify the duties, the ITC must find that the foreign manufacturer is selling his goods for less than fair market price and that U.S. businesses or persons are being economically harmed as a result of the dumping. The additional duty is devised to create an arms-length selling price for the import.

⁸ 19 U.S.C. §§ 1303, 1671 (1976 & Supp. III 1979). These statutes authorize the President to levy additional duties on imported goods in order to countervail foreign industrial subsidization. To justify the duties, the International Trade Commission must find that the foreign manufacturer who is the subject of the complaint is receiving a subsidy and that the sale of goods made by the foreign manufacturer is harming U.S. businesses or persons. The additional duty is equal to the dividend that results from dividing the subsidy used in the production of the exported goods into the volume of goods exported to the United States.

⁹ Title X of the Trade Agreements Act of 1979 provided for expanded judicial review of ITC antidumping and countervailing duty determinations. Trade Agreements Act of 1979: Report of the Comm. on Ways and Means of the House of Representatives to Accompany H.R. 5437, H.R. Rep. No. 317, 96th Cong., 1st Sess. 179-83 (1979) [hereinafter cited as 1979 House Trade Act Report]. However, the Trade Agreements Act of 1979 did not provide the procedures and time limits for starting a civil action. These procedures and time limits are set forth by the Customs Courts Act of 1980. 1980 House Report, *supra* note 2, at 20.

¹⁰ 28 U.S.C.A. § 1581(f) (West Supp. 1981).

¹¹ 19 U.S.C. § 2518(4)(B) (Supp. III 1979) defines the rule of origin. It requires that an

Employees and communities now have standing to bring actions to contest refusals to certify them for trade adjustment assistance.¹³ In summary, the Act vastly expands the Customs Court's exclusive jurisdiction over international trade issues. Edward D. Re, as Chief Judge of the Customs Court, reported in a Senate hearing¹⁴ that this legislation would furnish the first major substantive changes in the court since its creation in 1890.¹⁵

Titles I-IV of the Customs Courts Act contain the needed substantive changes. Title I renames the court¹⁶ and permits the assignment of CIT judges to other courts when the need arises.¹⁷ Title II expands the jurisdiction of the court, provides that no case should be dismissed because it was filed in the wrong court, and grants the CIT equity powers.¹⁸ Title III allows standing in the court to a greater number of persons and streamlines the CIT's procedure so that it is similar to other Article III courts.¹⁹ Title IV makes appropriate concurring changes in the Court of Customs and Patent Appeals.²⁰ The remaining titles deal with technical and conforming amendments and set forth effective dates

article purporting to be from a country be (1) wholly grown or manufactured in the country, or (2) substantially transformed within the country into an article differing from what it was when it entered the country.

¹² Title X of the Trade Agreements Act of 1979 provided for judicial review by the Customs Court of country-of-origin determinations made on products covered by the Government Procurement Code under Title III of the Trade Agreements Act of 1979. 1979 House Trade Report, *supra* note 9, at 183. The Customs Courts Act of 1980 clarifies this grant of exclusive jurisdiction. 1980 House Report, *supra* note 2, at 45.

¹³ 28 U.S.C.A. § 2631(d) (West Supp. 1981). See also trade adjustment assistance provisions 19 U.S.C. §§ 2273, 2341, 2371 (1976).

¹⁴ 1979 Senate Hearings, *supra* note 3, at 4 (statement of Judge Edward D. Re).

¹⁵ On June 10, 1890, Congress created the Board of United States General Appraisers as an administrative unit within the Department of the Treasury. Its purpose was to review decisions by customs officials pertaining to the valuation, and the rate of duty imposed on, imported merchandise. Act of June 30, 1890, ch. 407, § 12, 26 Stat. 131 (repealed 1926).

¹⁶ Customs Courts Act of 1980, Pub. L. No. 96-417, § 101, 94 Stat. 1727 (codified at 28 U.S.C.A. § 251 (West Supp. 1981)).

¹⁷ Id. § 102 (codified at 28 U.S.C.A. § 293(b), (d) (West Supp. 1981)).

¹⁸ Id. § 201 (codified at 28 U.S.C.A. §§ 1581-1585 (West Supp. 1981)).

¹⁹ Id. §§ 301-302 (codified at 28 U.S.C.A. §§ 2631-2647, 1876, 1862 (West Supp. 1981)).

²⁰ Id. §§ 401-405 (codified in scattered sections of 19, 28 U.S.C.). The first four sections of Title IV are amendments necessary to align the U.S. Court of Customs and Patent Appeals (CCPA) with the new procedures and jurisdiction of the CIT. The final section calls for an annual judicial conference to consider business and possible improvements of the court. This conference has been held since 1974 and has lately been reported to be the largest gathering of international trade lawyers in the world. 1980 House Hearings, *supra* note 3 (statement by Chief Judge Markay).

The House version of the Act, H.R. 7540, *supra* note 3, also contained the renaming of the CCPA to the U.S. Court of Appeals for International Trade, Patents, and Trademarks, but the final Act left the name unchanged. One reason the name change may not have been adopted is that another bill, H.R. 3806, 96th Cong., 2d Sess. (1980), which had passed the House of Representatives but not the Senate, would have merged the CCPA and the Court of Claims under the new name. The jurisdiction of this new appellate court would have included disputes involving patents, government contracts, trademarks, and international trade. House Committee on the Judiciary, Hearings on H.R. 3806, Court of Appeals Federal Circuit Act of 1980, 96th Cong., 2d Sess. (1980): 15 Cong. Q. 2600 (1980).

and miscellaneous provisions.²¹

I. Title I—Composition of the Court of International Trade and Assignment of Judges to Other Courts

The Act²² renames the old Customs Court the Court of International Trade and provides that the President shall continue to appoint its judges. It sets the maximum permissible age for the chief judge at seventy years but allows a former chief judge to serve as a judge after he reaches this age. There is also an express provision that the offices of the CIT be located in New York City but the new law imposes no restrictions on the court's travel. The greatest surprise is the retention of the provision allowing only five of the nine judges on the court to be affiliated with the same political party. It had been pointed out that the provision was a historical result of the political concerns present at the creation of the Board of General Appraisers.²³ In the 1890's, the United States was politically divided between Republicans who favored a high tariff, restrictive trade philosophy and Democrats who espoused a low tariff, liberal trade policy.²⁴ Thus, to keep the Board as bipartisan as possible, Congress provided for a political balance. Many witnesses who testified before Congress suggested the decline of tariff barriers and the Act's grant of Article III status rendered the political affiliation requirement unimportant.²⁵ Nevertheless, Congress retained the political party provision, believing that partisanship was still a danger.²⁶

Title I²⁷ allows CIT judges to "perform judicial duties" for other Article III courts in the same manner that district judges may perform such duties.²⁸ Previously, an active judge of the Customs Court could not be designated to serve on a U.S. court of appeals or the Court of Claims, although he could be appointed to serve on a district court or on the Court of Customs and Patent Appeals.²⁹ The Act extinguishes this anomaly by giving CIT judges the statutory authority to sit on any Article III court on which they are asked to serve.³⁰

II. Title II—Jurisdiction of the Court of International Trade

Title II replaces the two previous sections of Chapter 95 of title 28

²¹ Customs Courts Act of 1980, Pub. L. No. 96-417, tits. V-VII, 94 Stat. 1727. Title V is composed of technical and conforming amendments. The Department of Justice is given responsibility for representing the government in CIT proceedings. District court clerks are authorized to serve as CIT clerks when the CIT is sitting outside of New York.

²² 28 U.S.C.A. § 251 (West Supp. 1981).

²³ See Act of June 30, 1890, ch. 407, § 12, 26 Stat. 131 (repealed 1926).

²⁴ 1980 House Hearings, *supra* note 3, at 194 (testimony of Andrew P. Vance).

²⁵ 1980 House Report, *supra* note 2, at 30-31.

²⁶ *Id.*

²⁷ 28 U.S.C.A. § 293(b), (d) (West Supp. 1981).

²⁸ 1980 House Report, *supra* note 2, at 43.

²⁹ *Id.*

³⁰ *Id.*

U.S.C. with five new sections.³¹ The first three new sections expand the CIT's exclusive jurisdiction. These detailed provisions are intended to dispel confusion over which actions may be commenced in the CIT and which are to go to the district courts.³² If a party initiates an action in the wrong court, the fourth section allows for its transfer. The fifth section provides the court with equity powers.

Section 1581(a) broadens the traditional jurisdiction of the Customs Court which permits importers and their agents to obtain review of U.S. Customs Service determinations.³³ This provision also retains the requirement that all liquidated payments due the government be paid before an action can be commenced.³⁴ Section 1581(b) retains the traditional right of U.S. manufacturers, producers, and wholesalers to challenge administrative decisions classifying and valuing imports against which they compete.³⁵ Under this section, the CIT has exclusive jurisdiction over civil actions authorized by section 516 of the Tariff Act of 1930.³⁶ Section 516 requires the complaining party to unsuccessfully petition Customs to change its finding before bringing an action in the CIT.³⁷

Section 1581(c) grants the Court of International Trade jurisdiction over actions initiated under section 516A of the Tariff Act of 1930.³⁸ Section 516A provides for the quick review of antidumping and countervailing duty determinations.³⁹ American businesses whose products compete against foreign products in the U.S. may desire review of such International Trade Commission determinations. They may initiate ac-

³¹ 28 U.S.C.A. §§ 1581-1585 (West Supp. 1981).

³² 1980 House Report, *supra* note 2, at 21.

³³ 28 U.S.C.A. § 1581(a) (West Supp. 1981); see 1980 House Report, *supra* note 2, at 21, 44; Gerhart, *supra* note 6, at 1136. The acts of customs officials subject to protest are listed in 19 U.S.C.A. § 1514(a) (West & West Supp. 1981) as follows:

1. the appraised value of merchandise;
2. the classification and rate and amount of duties chargeable;
3. all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
4. the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provisions of customs laws, except a determination applicable under section 1337 of this title;
5. the liquidation or reliquidation of an entry or a modification thereof;
6. the refusal to pay a claim for drawback; and
7. the refusal to reliquidate an entry under § 1520(c) of this title.

³⁴ 28 U.S.C.A. § 1581(a) (West Supp. 1981); see 1980 House Report, *supra* note 2, at 44.

³⁵ 28 U.S.C.A. § 1581(b) (West Supp. 1981); see 1980 House Report, *supra* note 2, at 44.

³⁶ 19 U.S.C.A. § 1516 (West & West Supp. 1981).

³⁷ 19 U.S.C. § 1516(c) (Supp. III 1979).

³⁸ 19 U.S.C.A. § 1516a (West & West Supp. 1981).

³⁹ Prior to amendments in the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001(b)(1), 93 Stat. 144, U.S. businesses had to petition for review of such determinations under section 516 of the Tariff Act of 1930, 19 U.S.C. § 1516(d) (1976) (amended 1979), which required that the aggrieved party first file a petition with the Secretary of the Treasury urging him to reconsider. The petition was accepted or denied. If denied, a publication of the dispute was made. Only then could the aggrieved party initiate action in the Customs Court. The slow path to the courts meant imports continued to be sold at below fair market value while U.S. businesses had to wait and suffer.

tion to have certain interlocutory decisions and all final decisions reviewed within thirty days of the decisions' publication in the *Federal Register*.⁴⁰ In a similar manner, Congress intended that importers use the section 516A procedure for challenging affirmative countervailing or antidumping duty determinations rather than waiting until the duties are assessed and then filing a protest under section 515 of the Tariff Act of 1930.⁴¹

Section 1581(d) grants the court exclusive jurisdiction for the first time over trade adjustment assistance determinations.⁴² Adjustment assistance is available to workers, firms, and communities who are economically harmed by foreign imports.⁴³ The Trade Act of 1974 had provided earlier that the United States courts of appeals would review a final decision by the Secretary of Labor not to certify workers for assistance.⁴⁴ However, the 1974 Trade Act did not provide for review of a final refusal by the Secretary of Commerce to certify firms or communities.⁴⁵ Section 1581(d) corrects this deficiency by providing that the CIT will hear anyone aggrieved by either a refusal of certification or by a grant of certification.⁴⁶ This provision was the primary reason that the AFL-CIO opposed the Customs Courts Act of 1980.⁴⁷ The union felt that the Court of International Trade would not be sufficiently knowledgeable about U.S. labor, industry, communities or economics to adequately review the determinations made by the Secretaries of Labor and Commerce.⁴⁸ The AFL-CIO thought that adjustment assistance questions would be better understood by district courts because they are regional in character and more familiar with the full impact of imports on a locality.⁴⁹ Testifying before a Senate subcommittee, Chief Judge Re responded to this criticism by noting that the Customs Court for many years had been considering U.S. domestic interests when it reviewed countervailing and antidumping duty determinations.⁵⁰

Section 1581(e) acknowledges the exclusive grant of jurisdiction to the Court of International Trade to review decisions made by Customs on an import's country of origin.⁵¹ To implement the newly negotiated

⁴⁰ 19 U.S.C.A. § 1516a(a) (West Supp. 1981).

⁴¹ See 1980 House Report, *supra* note 2, at 44-45.

⁴² 28 U.S.C.A. § 1581(d) (West Supp. 1981); see 1980 House Report, *supra* note 2, at 45.

⁴³ See 19 U.S.C. §§ 2273, 2341, 2371 (1976).

⁴⁴ This right to appeal was found in 19 U.S.C. § 2322 (repealed 1980). Now this right to appeal is granted by 19 U.S.C.A. § 2395 (West Supp. 1981).

⁴⁵ 1980 House Report, *supra* note 2, at 45.

⁴⁶ *Id.*

⁴⁷ 1979 Senate Hearings, *supra* note 3, at 71-72.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 5-6.

⁵¹ 28 U.S.C.A. § 1581(e) (West Supp. 1981). The Customs Court was given exclusive jurisdiction to review country of origin decisions in title X of the Trade Agreements Act of 1979, § 1001, Pub. L. No. 96-39, 93 Stat. 144. See Trade Agreements Act of 1979: Report of the Comm. on Finance, U.S. Senate, on H.R. 4537, To Approve and Implement the Trade Agree-

Government Procurement Code,⁵² Customs must determine the foreign source of an imported product.⁵³ The President is authorized to waive discriminatory treatment required in the Buy America Act⁵⁴ for certain products from designated reciprocating nations.⁵⁵

Section 1581(f) gives the CIT exclusive jurisdiction to hear disputes concerning the release of confidential business information.⁵⁶ Customs and the International Trade Commission often obtain sensitive information during their countervailing and antidumping duty investigations.⁵⁷ The data may contain trade secrets, details of business operations, and other commercial and financial data which, if publicly released, may jeopardize a business' competitive position. However, Congress apparently felt that a business harmed as a result of an administrative determination denying or affirming a countervailing or antidumping duty has a right to information on which to challenge the determination.⁵⁸ Therefore, Congress has allowed for limited disclosure.⁵⁹ The International Trade Commission unsuccessfully opposed this provision allowing a review of its decisions not to disclose confidential information on policy grounds.⁶⁰ The ITC argued that the access-to-information provision would destroy confidentiality and discourage business cooperation during their investigations.⁶¹

Section 1581(g) grants the Court of International Trade exclusive jurisdiction to review decisions by Customs to deny, revoke, and suspend the licenses of customhouse brokers. Previously, decisions to revoke or suspend licenses were reviewable only by the U.S. courts of appeals.⁶²

ments Negotiated Under the Trade Act of 1974 and for Other Purposes, S. Rep. No. 249, 96th Cong., 1st Sess. 255, reprinted in [1979] U.S. Code Cong. & Ad. News 381, 640-41.

⁵² 19 U.S.C. § 2511 (Supp. III 1979).

⁵³ 19 U.S.C. § 2518(4)(B) (Supp. III 1979) provides as follows:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

⁵⁴ Buy America Act, 41 U.S.C. §§ 10a-10d (1976 & Supp. III 1979). This statute requires the U.S. government to buy all of its supplies and construction materials from U.S. suppliers, unless there is no U.S. supplier of the needed items or materials or paying the U.S. price is unjustified because of large possible savings if foreign goods are bought.

⁵⁵ 19 U.S.C. § 2513 (Supp. III 1979).

⁵⁶ 28 U.S.C.A. § 1581(g) (West Supp. 1981); see 1980 House Report, *supra* note 2, at 46.

⁵⁷ 19 C.F.R. § 103.10(d) (1981); 1980 House Hearings, *supra* note 3, at 300 (memorandum from the International Trade Commission); Easton, Administration of Import Trade Statutes: Possibilities for Harmonizing the Investigative Techniques and Standards of the International Trade Commission, 10 Ga. J. Int'l & Comp. L. 65, 72 (1980).

⁵⁸ 1979 House Trade Act Report, *supra* note 9, at 77. 1980 House Report, *supra* note 2, at 46.

⁵⁹ 19 U.S.C. § 1677f(c) (Supp. III 1979); 19 C.F.R. § 103.14 (1981).

⁶⁰ 1980 House Hearings, *supra* note 3, at 300 (memorandum from the International Trade Commission).

⁶¹ *Id.*

⁶² 19 U.S.C. § 1641(b) (1976) (amended 1980). An applicant who was denied a broker's license had the right to file with the Commissioner of Customs and then the Secretary of the

Persons denied licenses had no access to review.⁶³ Section 1581(g) is an attempt to allow all persons the opportunity to have adverse decisions reviewed and to establish a uniformity in the standards used for decision.⁶⁴

Section 1581(h), a new provision, permits importers to obtain review of a Customs ruling before the merchandise is imported.⁶⁵ Pre-importation rulings give the importer information with which he can make business decisions.⁶⁶ Previously, importers could contest a ruling only after importing the goods, unsuccessfully protesting the Customs ruling, and paying the duties.⁶⁷ Congress recognized that there were some situations when this traditional method of obtaining review effectively denied the right of review to importers.⁶⁸ Under new section 1581(h), if the importer is able to prove that he will be irreparably harmed unless the Customs ruling is reviewed, the CIT will hear the case.⁶⁹ Congress broadened the irreparable harm requirement by indicating that the CIT should consider the commercial and financial impact on the plaintiff importer.⁷⁰ Pre-importation rulings pertain only to the precise fact situation the importer outlines for Customs.⁷¹

Section 1581(i)'s purpose is to remedy a problem of jurisdictional confusion which had caused cases to be dismissed without a hearing on their merits.⁷² In the past, the Customs Court has refused to hear cases because it was not statutorily granted jurisdiction over the type of action brought.⁷³ The district courts, on the other hand, have dismissed cases by claiming that the commerce clause of the U.S. Constitution required

Treasury for additional review of his application, 19 C.F.R. § 111.17 (1981). See Gerhart, *supra* note 6, at 1153 n.213.

⁶³ See *supra* note 62.

⁶⁴ 1980 House Report, *supra* note 2, at 46.

⁶⁵ 28 U.S.C.A. § 1581(h) (West Supp. 1981); see 1980 House Report, *supra* note 2, at 46.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ An example would be an importer with a cash flow problem who is considering whether to import a shipment of items which decay quickly. He asks Customs how they would treat his merchandise and receives a ruling that the duty will be twice what he expected. The importer believes that the high duty has been charged because of a classification error. His choices are to forego the transaction or to continue it with the risk that he will not be able to sell the items at a profit, which would cause his bankruptcy. He decides that the risk of bankruptcy is too great and so the ruling is never reviewed.

⁶⁹ This provision had been highly recommended. See Gerhart, *supra* note 3, at 1156-57, 1174; but see 1979 Senate Hearings, *supra* note 3, at 15-17 (statement by David M. Cohen).

⁷⁰ 1980 House Report, *supra* note 2, at 58. In 1973, a showing by the plaintiff that he may suffer a grievous economic loss was held to be insufficient as irreparable harm which would warrant an interlocutory review of an administrative decision. *Int'l Waste Controls, Inc. v. S.E.C.*, 362 F. Supp. 117 (S.D.N.Y.), *aff'd*, 485 F.2d 1238 (2d Cir. 1973). More recently, courts have been willing to balance the government interests with the possible loss to the plaintiff. *West v. Bergland*, 611 F.2d 720 (8th Cir. 1979). Irreparable harm must be proven by clear and convincing evidence. 28 U.S.C.A. § 2639(b) (West Supp. 1981).

⁷¹ This is a general rule governing all administrative rulings given by the Customs Service. Gerhart, *supra* note 6, at 1121-22.

⁷² 28 U.S.C.A. § 1581(i) (West Supp. 1981); see 1980 House Report, *supra* note 2, at 47.

⁷³ *M.M. Scher & Son, Inc. v. United States*, 24 Cust. Ct. 243 (1950).

the case to be heard in the Customs Court to insure the uniformity of foreign commerce laws.⁷⁴ Section 1581(i)'s "catch-all" provision grants the CIT exclusive jurisdiction to review agency actions not specifically listed in other provisions of the Customs Courts Act but which directly affect parties involved in international trade.⁷⁵

The major complaint about section 1581(i) is that it is too broad.⁷⁶ Congress adopted a generic approach in this provision to describe actions within the CIT's jurisdiction instead of specifically listing justiciable actions. This was done to avoid the confusion which would result from an inadvertent omission from a list of specific actions.⁷⁷ However, there are two explicit jurisdictional restrictions on this section. First, the CIT cannot hear any disputes involving restrictions on the importation of merchandise when the public safety or health is at issue.⁷⁸ There are many regulatory agencies in the United States which can restrict importation or halt the sale of domestically produced goods if they feel the public's safety or health would be impaired.⁷⁹ All cases based on these regulatory determinations must be tried in district courts so that uniform treatment can be accorded to both imports and domestically produced goods.⁸⁰ Second, Congress did not intend for this section to be used to challenge antidumping and countervailing duty determinations.⁸¹ Those challenges are to be brought pursuant to section 516A of the Tariff Act of 1930⁸² unless the determination challenged is not recognized in section 516A of the Tariff Act of 1930.⁸³ If section 516A omitted an agency decision relating to countervailing or antidumping duties from the list of reviewable agency actions, then the aggrieved party may use section 1581(i) to enter the CIT.⁸⁴

Section 1582 grants jurisdiction to the CIT for actions initiated by the U.S. Government to collect monies due. Previously, all such actions had to be filed in district courts.⁸⁵ The enumerated actions in this section include the recovery of civil penalties assessed in accordance with certain statutes,⁸⁶ the recovery of liquidated damages on violated

⁷⁴ 1980 House Report, *supra* note 2, at 19.

⁷⁵ *Id.* at 47.

⁷⁶ 1979 Senate Hearings, *supra* note 3, at 14-16 (statement of David M. Cohen); 1980 House Report, *supra* note 2, at 47-48.

⁷⁷ 1980 House Report, *supra* note 2, at 47-48.

⁷⁸ *Id.*

⁷⁹ The Food and Drug Administration is one such regulatory agency.

⁸⁰ Another group of disputes which must be taken to district court are violations of 19 U.S.C.A. § 1305 (West Supp. 1981), which prohibits the importation of obscene and seditious materials.

⁸¹ 1980 House Report, *supra* note 2, at 48.

⁸² 19 U.S.C.A. § 1516a (West & West Supp. 1981).

⁸³ *Id.* This statute specifies what preliminary and final countervailing and antidumping duty determinations may be contested under it.

⁸⁴ 1980 House Report, *supra* note 2, at 33-34.

⁸⁵ *Id.* at 49.

⁸⁶ See 19 U.S.C. §§ 1592(c), 1671c(i)(2), 1673c(i)(2) (Supp. III 1979).

bonds,⁸⁷ and the recovery of customs duties.⁸⁸ The major complaint during the congressional hearings about section 1582 was that sureties, which were jointly and severally liable to the United States by the terms of most customs bonds, were not permitted to adjudicate bond disputes against the bond principal in the CIT.⁸⁹ It was argued that if sureties could file cross-claims against the bond principals, in actions initiated by the United States to recover on a bond, then the sureties would not have to file separate actions in state and federal courts.⁹⁰ For the sake of judicial economy and decisional uniformity, the next section, 1583, was amended to allow such cross-claims. Section 1583 is the most controversial provision created by title II of the Act because it gives the government the right to counterclaim.⁹¹ Previously, the government was precluded from obtaining additional duty from an importer once his entry was liquidated.⁹² If an importer protested the duty he was charged, prior law permitted the government to allege, as a defense, that the correct duty was higher than the amount actually charged.⁹³ If the court found that the higher duty was the correct one, then Customs could levy the higher duty on subsequent shipments but not on the one in the instant controversy.⁹⁴ The policy was to encourage litigation to insure that all imported property was uniformly treated.⁹⁵

In the early drafts of the Customs Courts Act, section 1583 allowed the government to file counterclaims involving any past import transaction of the plaintiff.⁹⁶ Importers were terrified by this governmental right to collect potentially large amounts of duty on merchandise that had been sold years ago at a price which had been heavily influenced by the duty paid.⁹⁷ The government defended the provision by arguing that because the issues of valuation and classification were to be tried "de novo" in the Court of International Trade, a correct duty determination should be honored if higher or lower than the original assessment.⁹⁸ Pri-

⁸⁷ If an importer has been granted an immediate delivery permit, he may receive his merchandise once Customs has inspected it. Within ten days of the release, the importer or his broker must meet the entry requirements by filing the required forms and paying the assessed duty. Between the time of release and entry, the merchandise is under a bond which had to be posted in order to receive the immediate delivery permit. Most customhouse brokers have such a permit. If the entry requirements are not met on time or a bond provision is breached, Customs may claim liquidated damages as specified in the bond. Gerhart, *supra* note 6.

⁸⁸ Any importer who disagrees with the duty his goods are charged must file a protest in accordance with 19 U.S.C.A. § 1514 (West & West Supp. 1981).

⁸⁹ 1980 House Report, *supra* note 2, at 37-38.

⁹⁰ *Id.*

⁹¹ 28 U.S.C.A. § 1583 (West Supp. 1981); see 1980 House Report, *supra* note 2, at 49.

⁹² *Id.* at 35-37.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Certain Tariff and Trade Bills: Hearings Before the Subcomm. on Trade of the Comm. on Ways and Means, House of Representatives, 96th Cong., 2d Sess. 817-18 (1980) (statement of Andrew Vance) [hereinafter cited as 1980 Trade Hearings].

⁹⁶ 1980 House Report, *supra* note 2, at 35-37.

⁹⁷ *Id.*

⁹⁸ 1979 Senate Hearings, *supra* note 3, at 17 (statement by David M. Cohen).

vate interests felt that the section would have a chilling effect on the rights of importers to litigate and thereby defeat the policy of litigation.⁹⁹ A congressional compromise retained section 1583 but limited counter-claims, cross-claims, and third party claims to claims or actions on the merchandise for which a protest was filed.¹⁰⁰

Section 1584 solves a major problem caused by the confusion of whether a case should be initiated in a district court or the Customs Court. With the complexities involved in international trade litigation, parties with a complaint were often confused as to which court they should bring their action.¹⁰¹ As noted, cases taken to the wrong court were dismissed.¹⁰² Under new section 1584, the resolution of the jurisdictional issue depends on which federal agency is responsible for the regulation of the merchandise.¹⁰³ For example, if the Food and Drug Administration inspected a shipment, ruled it unacceptable by their standards, and directed Customs not to release the shipment, the aggrieved party will have a cause of action in a district court.¹⁰⁴ If Customs had made the final decision according to a guideline of the Food and Drug Administration that regulated only imports, or if Customs was enforcing a customs law, the plaintiff will have a cause of action in the CIT.¹⁰⁵ If a plaintiff brings the suit in the wrong court, new section 1584 permits it to be transferred to the appropriate forum.¹⁰⁶ The policy is to ensure that all cases will be decided on their merits.¹⁰⁷

Section 1585 expressly grants equity power to the Court of International Trade.¹⁰⁸ Although the Customs Court had the power to preserve order, to compel attendance of witnesses, and to compel the production of evidence, it did not possess the full plenary powers of other Article III courts.¹⁰⁹ In the past, the Customs Court would apply statutory penalties which it recognized as unfair, but which it was unable to mitigate

⁹⁹ 1980 House Report, *supra* note 2, at 35-37.

¹⁰⁰ *Id.*

¹⁰¹ Gerhart, *supra* note 6, at 1137-38.

¹⁰² See *Fritz v. United States*, 535 F.2d 1192 (9th Cir. 1976); *J.C. Penney Co. v. United States Treasury Dep't*, 439 F.2d 63 (2d Cir. 1971), cert. denied, 404 U.S. 869 (1971).

¹⁰³ 28 U.S.C.A. § 1584 (West Supp. 1981); see Gerhart, *supra* note 6, at 1124-26, 1158-59. Gerhart's recommendation was adopted by Congress.

¹⁰⁴ *Sugarman v. Forbragd*, 405 F.2d 1189, 1190 (9th Cir. 1968) (review of an order by the Food & Drug Administration to bar a shipment of coffee beans from entry).

¹⁰⁵ Gerhart, *supra* note 6, at 1153-55. The author advised that the demarcation between Customs Court jurisdiction and district court jurisdiction be decided in this way. With the present reforms, his advice was all but explicitly accepted.

¹⁰⁶ 1979 Senate Hearings, *supra* note 3, at 14 (statement by David M. Cohen). Mr. Cohen's recommendation was adopted by Congress.

¹⁰⁷ 1980 House Hearings, *supra* note 3, at 8 (statement by Judge Edward D. Re).

¹⁰⁸ 28 U.S.C.A. § 1585 (West Supp. 1981). This grant will ensure the ability of the CIT to provide timely and effective relief. The court can now compel agency action unlawfully withheld or delayed, 5 U.S.C. § 706(1) (1976); postpone the effective date of agency action and preserve the status of the rights of a person with an appeal pending, 5 U.S.C. § 705 (1976); declare the rights and legal relationships between parties within the CIT's jurisdiction, 28 U.S.C. § 2201 (Supp. III 1979); and issue writs in aid of jurisdiction, 28 U.S.C. § 1651 (1976).

¹⁰⁹ 1980 House Report, *supra* note 2, at 50.

without equity power.¹¹⁰ In addition to now providing equity powers, this reform will allow the court to consider mitigating circumstances in penalty actions initiated by the government under section 592 of the Tariff Act of 1930.¹¹¹ Section 592 violations include understatements of the quantity of goods in the shipment, misstatement of the value of the goods, and failure to report information relevant to the valuation of the merchandise such as blueprints and molds which the importer supplied to the foreign producer.¹¹² By showing such a violation, the government is entitled to seek forfeiture of either the shipment or the shipment's domestic value.¹¹³ In the past it was irrelevant whether the importer was culpable or not.¹¹⁴ If the Customs Court found a violation it had no choice but to levy the statutory penalty.¹¹⁵ New section 1585 authorizes the CIT to examine other factors, such as the frequency with which the importer provided misinformation, when it fashions an appropriate remedy.¹¹⁶

III. Title III—Procedure in the Court of International Trade

This title not only restates much of the existing law in a reorganized sequence, but also makes major changes to conform the Court of International Trade to title X of the Trade Agreements Act of 1979.¹¹⁷ The major changes include broadened standing provisions, a lessening of the importer's burden of persuasion, an authorization for and against the government, an establishment of a priorities ranking to determine which cases pending before the CIT will be heard first, and a provision allowing the CIT to conduct jury trials.¹¹⁸ Title III is composed of seventeen sections.¹¹⁹

Section 2631 broadens the standing provisions for each action over which the CIT has exclusive jurisdiction. Prior to the Trade Agreements Act of 1979, only importers and American manufacturers, producers, and wholesalers had access to review.¹²⁰ Now, nearly any party who is aggrieved by an import transaction or an administrative decision on an international trade issue may seek review.¹²¹

Section 2631(a) provides that when Customs denies an importer's

¹¹⁰ *Bullocks, Inc. v. United States*, 7 Cust. Ct. 12 (1941).

¹¹¹ 19 U.S.C.A. § 1592(e) (West & West Supp. 1981); 1980 House Hearings, *supra* note 3, at 242-45 (statement by Richard K. Berg & Jeffrey S. Lubbers); 1980 House Report, *supra* note 2, at 21.

¹¹² 19 U.S.C. § 1592(a) (Supp. III 1979); see Gerhart, *supra* note 6, at 1131-35, 1142, 1177.

¹¹³ 19 U.S.C. § 1592(c) (Supp. III 1979).

¹¹⁴ Gerhart, *supra* note 6, at 1131-35, 1142, 1177.

¹¹⁵ *Id.*

¹¹⁶ See *id.* at 1177-81. See also 1980 House Report, *supra* note 2, at 21.

¹¹⁷ See *supra* note 1.

¹¹⁸ 1980 House Report, *supra* note 2, at 22-23.

¹¹⁹ 28 U.S.C.A. §§ 2631-2647 (West Supp. 1981). See also 1980 House Report, *supra* note 2, at 22-23.

¹²⁰ See 1980 House Report, *supra* note 2, at 22.

¹²¹ *Id.*

protest of a determination brought under section 515 of the Tariff Act of 1930,¹²² the importer filing the protest or his surety has standing to seek review. An importer's surety is usually his customhouse broker, whose bond permitted the release of his goods before liquidation.¹²³ Section 2631(b) gives standing to all "domestic interested parties" to seek review of a Customs determination affecting imports against which the parties compete. Domestic interested parties is a category including U.S. manufacturers, producers, and wholesalers. This category also includes recognized employee organizations and trade and business associations which are making, producing, or selling a like product.¹²⁴ Another provision, section 2631(c), allows any "interested party" to seek review of a countervailing or antidumping duty determination. Section 2631(c) interested parties include domestic interested parties, importers, and foreign businesses and governments.¹²⁵ According to section 2631(d), any domestic interested party may contest a trade adjustment assistance determination. By 2631(e), any "party-at-interest" may challenge country of origin determinations. Parties-at-interest include domestic interested parties and foreign businesses but not foreign governments.¹²⁶ Section 2631(f) grants an interested party standing to seek review of refusals to provide disclosure of confidential information obtained by the federal government during an antidumping or countervailing duty determination. Any person whose customhouse brokers license has been revoked or suspended and any applicant for a license may contest the Customs licensing decision under section 2631(g). Section 2631(h) provides that an importer or his surety may seek review of a Customs pre-importation ruling.

Section 2631(i) corresponds to the Act's new "catch-all" jurisdictional provision, section 1581(i).¹²⁷ Section 2631(i) grants standing to all persons "adversely affected or aggrieved by agency action." To meet this threshold standing requirement, a party must demonstrate that it will benefit from court interference in the dispute,¹²⁸ or that there is a sub-

¹²² 19 U.S.C.A. § 1515 (West & West Supp. 1981).

¹²³ See Gerhart, *supra* note 6, at 1107-11.

¹²⁴ 19 U.S.C.A. § 1516(a)(2) (West Supp. 1981) defines "domestic interested parties." 19 U.S.C.A. § 1516(a)(1) (West Supp. 1981) states:

(a) Request For Classification and Rate of Duty; Petition—

(1) The Secretary shall, upon written request by an interested party furnish the classification and the rate of duty imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by such interested party. If the interested party believes that the appraised value, the classification, or rate of duty is not correct, it may file a petition with the Secretary setting forth—

(A) a description of the merchandise,

(B) the appraised value, the classification, or the rate of duty that it believes proper, and

(C) the reasons for its belief.

¹²⁵ 19 U.S.C. § 1677(9) (Supp. III 1979).

¹²⁶ 28 U.S.C.A. § 2631(K)(2) (West Supp. 1981).

¹²⁷ 28 U.S.C.A. § 1581(i) (West Supp. 1981).

¹²⁸ *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 714 (D.C. Cir. 1977).

stantial probability that its interests will be harmed without court action.¹²⁹ Groups previously denied standing, such as consumer organizations,¹³⁰ will now have to meet only these requirements.

Section 2631(j) permits anyone who might be "adversely affected or aggrieved" by a CIT decision to intervene in the controversy. There are three exceptions to this general rule. First, no intervention is allowed in cases disputing the classification of merchandise or the duty charged.¹³¹ Second, only parties involved with the administrative proceeding leading to a countervailing or antidumping duty determination may intervene in action challenging such determinations.¹³² Third, parties who were not subject to the investigation that collected confidential information may not intervene in cases contesting the denial of disclosure of such information.¹³³ The CIT may also use discretion in allowing intervention and may disallow intervention if it will cause undue delay or prejudice the rights of the original parties.¹³⁴

The next few provisions specify the procedure for initiating an action in the Court of International Trade. Prior to the enactment of the Customs Courts Act of 1980, a plaintiff commenced an action by merely filing a summons.¹³⁵ Now, as a general rule, a plaintiff must concurrently file a summons and a complaint with the clerk of the court.¹³⁶ There are two exceptions to this rule. First, actions to contest classification and valuation of merchandise¹³⁷ may be commenced by filing only a summons. Second, actions to dispute a countervailing or antidumping duty determination must be commenced as specified in section 516A of the Tariff Act of 1930.¹³⁸ The review of preliminary determinations under section 516A is obtainable only after filing a summons and complaint concurrently,¹³⁹ while the review of final determinations is obtainable by the filing of a summons and then a complaint within thirty days.¹⁴⁰ The requirement of official documents which must be filed with the CIT for

¹²⁹ *Am. Maritime Ass'n v. Blumenthal*, 458 F. Supp. 849, 855-56 (D.D.C. 1977), *aff'd*, 590 F.2d 1156 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979).

¹³⁰ *Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements*, 561 F.2d 872 (D.C. Cir. 1977).

¹³¹ 28 U.S.C.A. § 2631(j)(1)(A) (West Supp. 1981). This provision deals with actions brought under 19 U.S.C.A. §§ 1515, 1516 (West & West Supp. 1981).

¹³² 28 U.S.C.A. § 2631(j)(1)(B) (West Supp. 1981). This provision deals with actions brought under 19 U.S.C.A. § 1516a (West & West Supp. 1981).

¹³³ 28 U.S.C.A. § 2631(j)(1)(C) (West Supp. 1981). This provision deals with actions brought under 19 U.S.C. § 1677f(c)(2) (Supp. III 1979).

¹³⁴ 28 U.S.C.A. § 2631(j)(2) (West Supp. 1981).

¹³⁵ *Certain Tariff & Trade Bills: Hearings Before the Subcomm. on Trade of the Comm. on Ways and Means, House of Representatives, 96th Cong., 1st Sess. 817 (1980)* (statement by Andrew Vance).

¹³⁶ 19 U.S.C.A. § 2632(a) (West Supp. 1981).

¹³⁷ 19 U.S.C.A. § 2632(b) (West Supp. 1981). This provision deals with actions brought under 19 U.S.C.A. §§ 1515, 1516 (West & West Supp. 1981).

¹³⁸ 19 U.S.C.A. § 2632(c) (West Supp. 1981). This provision deals with actions brought under 19 U.S.C.A. § 1516a (West & West Supp. 1981).

¹³⁹ 19 U.S.C.A. § 1516a (West & West Supp. 1981).

¹⁴⁰ *Id.*

certain actions has been changed. The general rule, subject to several exceptions,¹⁴¹ is that three categories of documents¹⁴² are required unless the parties agree otherwise.¹⁴³ The statutes of limitations for actions which may be commenced in the CIT vary widely. The general rule is that an action is barred unless begun within two years from when the cause of action arose.¹⁴⁴ There are ten exceptions with limits varying from 180 days to 10 days.¹⁴⁵

Generally, a complainant must exhaust his administrative remedies before seeking recourse to the CIT although the court has discretion to waive this requirement.¹⁴⁶ Administrative remedies usually consist of petitioning the appropriate agency to change its decision.¹⁴⁷ Section 2637 provides three rules for the CIT exercise of discretion. First, an importer contesting the duty charged on his goods is required to pay all duties and charges which Customs has levied before he may commence action.¹⁴⁸ Second, a domestic interested party aggrieved by the Customs duty charged on imports competing with its like product is expressly required to exhaust administrative remedies.¹⁴⁹ Third, if a party can show he will be irreparably harmed by Customs action or inaction, the CIT may

¹⁴¹ 28 U.S.C.A. § 2635(a)(1)-(2), (b)(2), (c) (West Supp. 1981). First, if the plaintiff is contesting a shipment's classification or valuation (19 U.S.C.A. §§ 1515, 1516 (West & West Supp. 1981)), nine specified documents must be filed with the clerk of the CIT. 28 U.S.C.A. § 2635(a)(i) (West Supp. 1981). If any of the required documents does not exist, an affirmative statement to the clerk explaining the situation will suffice. 28 U.S.C.A. § 2635(a)(2) (West & West Supp. 1981). Second, if the plaintiff is disputing a countervailing or an antidumping duty determination (19 U.S.C.A. § 1516a (West & West Supp. 1981)) and the complaint has been served on the appropriate agency, the agency must transmit a copy of all its data obtained during the investigation and a copy of its determination of facts and conclusions of law. 28 U.S.C.A. § 2635(b)(2) (West Supp. 1981). Third, if the plaintiff is contesting a denial by the International Trade Commission to release confidential information obtained during its investigation (19 U.S.C. § 1677f (Supp. III 1979)), the ITC must transmit the information to the court, where the information will be examined in camera. 28 U.S.C.A. § 2635(c) (West Supp. 1981).

¹⁴² The three generally required documents are (1) a copy of the contested determination and the explanation for it; (2) copies of any reported meetings conducted by the agency; (3) papers filed by amici curiae. 28 U.S.C.A. § 2635(d)(1) (West Supp. 1981).

¹⁴³ 28 U.S.C.A. § 2635(d)(3) (West Supp. 1981).

¹⁴⁴ 28 U.S.C.A. § 2636(i) (West Supp. 1981).

¹⁴⁵ 28 U.S.C.A. § 2636(a)-(h) (West Supp. 1981). Previous limits on actions brought under sections 515 and 516 of the Tariff Act of 1930, as amended, have been retained at 180 days and 30 days respectively. *Id.* § 2636(a), (b). The statutes begin to run at dates adapted to the action contested. Some statutes of limitations, such as the one for actions commenced under 19 U.S.C. § 1515(a) (Supp. III 1979), begin to run after the mailing of a petition's denial while others, such as actions to contest determinations of countervailing or antidumping duties (19 U.S.C.A. § 1516a (West & West Supp. 1981)) or country of origin (19 U.S.C. § 2515 (Supp. III 1979)), begin to run after the date of the determination's publication in the *Federal Register*. *Id.* § 2636(a), (c), (f).

¹⁴⁶ 28 U.S.C.A. § 2637(d) (West Supp. 1981); 15 U.S.C.A. § 1585 (West Supp. 1981); 1980 House Report, *supra* note 2, at 57; Gerhart, *supra* note 6, at 1115-19.

¹⁴⁷ 19 C.F.R. § 171 (1981); 1979 House Trade Act Report, *supra* note 9, at 181.

¹⁴⁸ 28 U.S.C.A. § 2637(a) (West Supp. 1981). This provision applies to civil actions under 19 U.S.C.A. § 1515 (West & West Supp. 1981).

¹⁴⁹ *Id.* § 2637(b). This provision applies to civil actions under 19 U.S.C.A. § 1516 (West & West Supp. 1981).

waive the exhaustion rule.¹⁵⁰

Section 2638 permits an importer or his surety, who is bringing an action pursuant to section 515 of the Tariff Act of 1930¹⁵¹ and who is required to file a petition with Customs before the court will take his case, to assert new grounds to support his case upon the denial of his petition. However, the new grounds must relate to both the goods subject to the protest and to the same determination which is protested.¹⁵² For instance, if an importer is contesting a classification determination, he may advance new grounds supporting his claim only if the grounds are relevant to the classification of the particular shipment.¹⁵³

New section 2639 reduces the burden of proof that a plaintiff must bear in a case against the government brought under sections 515, 516, or 516A of the Tariff Act of 1930.¹⁵⁴ Although the government is still presumed to be correct,¹⁵⁵ section 2639 dispenses with the plaintiff's dual burden of proof. Previously, the challenger had to prove not only that the government was wrong but was also required to establish what the correct determination should be.¹⁵⁶ If the private party could prove the first element but not the second, the Customs Court would hold the party liable for the original assessment.¹⁵⁷ Now, if the plaintiff proves that the government is wrong but is unable to establish the correct determination, the CIT may order a retrial, a rehearing, or further procedures necessary to reach a correct decision.¹⁵⁸ There is no presumption of government correctness if the government initiates proceedings.¹⁵⁹

The scope and standard of judicial review is the next topic covered in the Customs Courts Act of 1980. Section 2640 provides a general rule that all actions will be reviewed in the manner described by section

¹⁵⁰ *Id.* § 2637(c). This provision applies to civil actions under 28 U.S.C.A. § 1581(h) (West Supp. 1981). See 1980 House Report, *supra* note 2, at 57.

¹⁵¹ 19 U.S.C.A. § 1515 (West & West Supp. 1981).

¹⁵² 28 U.S.C.A. § 2638(1), (2) (West Supp. 1981).

¹⁵³ For example, Import Co. is importing blouses. Customs classifies the garments as ornamental blouses because they are embroidered. As ornamental blouses, they are subject to a higher duty than decorated blouses. Import Co. petitions Customs to reclassify the blouses as decorated on the ground that the design in question was woven into the blouses and so is an integral part of the blouse and so is not embroidery. Customs denies the petition and Import Co. files the required summons with the CIT. As a new ground to support its contention, Import Co. asserts that the designs were not handmade, as the definition of embroidery requires. The CIT may allow this evidence because it relates to both the blouses and to the specific determination, that of classification.

¹⁵⁴ 28 U.S.C.A. § 2639(a)(1) (West Supp. 1981). This provision deals with civil actions brought under 19 U.S.C.A. §§ 1515, 1516, 1516A (West & West Supp. 1981). See *infra* note 156 and accompanying text.

¹⁵⁵ 28 U.S.C.A. § 2639(a)(1) (West Supp. 1981).

¹⁵⁶ *Schott Optical Glass, Inc. v. United States*, 468 F. Supp. 1318 (Cust. Ct. 1979).

¹⁵⁷ 1980 House Report, *supra* note 2, at 35; Gerhart, *supra* note 6, at 1169-71.

¹⁵⁸ 28 U.S.C.A. § 2643(b) (West Supp. 1981).

¹⁵⁹ 28 U.S.C.A. § 2639(a)(2) (West Supp. 1981). Also, an importer trying to prove irreparable harm under 28 U.S.C.A. § 1581(h) (West Supp. 1981) must support his claim with clear and convincing evidence. *Id.* § 2639(b).

706¹⁶⁰ of the Administrative Procedure Act.¹⁶¹ There are three exceptions to this rule. First, a trial "de novo" is provided for six major actions.¹⁶² Second, actions commenced by parties to contest countervailing duty and antidumping determinations must be reviewed according to section 516A(b) of the Tariff Act of 1930.¹⁶³ In section 516A(b) actions, the court is authorized to test preliminary decisions by the arbitrary and capricious standard and final determinations by the standard of substantial evidence.¹⁶⁴ Third, if a trade adjustment assistance decision is challenged, the CIT must decide if the determination is based on substantial evidence.¹⁶⁵ If there is insufficient evidence, the CIT may remand the determination to the proper agency for additional fact-finding,¹⁶⁶ or the court may request more evidence from the parties themselves in preparation for a new review of the determination.¹⁶⁷

In regard to evidentiary rules, section 2641 provides that the Federal Rules of Evidence will be used in the CIT.¹⁶⁸ Although section 2641 marks the first time the Federal Rules of Evidence are expressly required, the Customs Court had been following evidentiary rules used in federal courts of general jurisdiction for decades.¹⁶⁹ This section also allows the CIT to order the disclosure of confidential trade information given to the U.S. Government by foreigners or their governments.¹⁷⁰

The next few sections establish the Court of International Trade's power to fashion remedies. In granting relief, the CIT may now enter money judgments for or against the United States.¹⁷¹ Previously, if the Customs Court found in favor of an importer, the court ordered the entry in question reliquidated and a refund given to the importer.¹⁷² The new procedure is much simpler because reliquidation is unnecessary.¹⁷³ New section 2644 requires the government to pay interest to the successful plaintiff who had been required to pay the assessed duty on his goods before he could initiate a suit. The Customs Court was previously un-

¹⁶⁰ 5 U.S.C. § 706 (1976).

¹⁶¹ 28 U.S.C.A. § 2640(d) (West Supp. 1981).

¹⁶² *Id.* § 2640(a)(1)-(6) (West Supp. 1981). These actions are: challenges to petition denials under § 515 of the Tariff Act of 1930, challenges to denials under § 516 of the Tariff Act, protests of a Customs' country of origin decision, protests of an ITC denial to disclose confidential information, challenges to a denial or revocation of a customshouse broker's license, civil penalty and collection cases instituted by the government.

¹⁶³ *Id.* § 2640(b).

¹⁶⁴ 19 U.S.C.A. § 1516a(b) (West 1980).

¹⁶⁵ 28 U.S.C.A. § 2640(c) (West Supp. 1981). See 19 U.S.C.A. § 2395(b) (West Supp. 1981).

¹⁶⁶ *Id.* § 2643(b).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* § 2641(a).

¹⁶⁹ *United States v. Western Electric Co.*, 26 Cust. Ct. 534 (1951); *Consol. Merchandising Co. v. United States*, 375 F. Supp. 1356, 1360 (Cust. Ct. 1974).

¹⁷⁰ 28 U.S.C.A. § 2641(b) (West Supp. 1981). In addition, 28 U.S.C.A. § 2642 (West Supp. 1981) allows the CIT to order public laboratories to analyze imported merchandise.

¹⁷¹ *Id.* § 2643(a)(1)-(2).

¹⁷² 1980 House Report, *supra* note 2, at 60.

¹⁷³ *Id.*

able to award interest.¹⁷⁴ Also for the first time, the CIT can award money judgments to the government in cases commenced by the government for the collection of penalties and duties from citizens.¹⁷⁵

Providing new equity power, section 2643(c) establishes the general rule that the CIT may fashion any appropriate relief,¹⁷⁶ subject to three exceptions. First, if the action is challenging a trade adjustment assistance ruling, the court may not issue an injunction or writ of mandamus.¹⁷⁷ Second,¹⁷⁸ the CIT may order disclosure of confidential information only as specified in section 777(c)(2) of the Tariff Act of 1930.¹⁷⁹ Third, the CIT may order only declaratory relief for suits brought under the provision allowing the court accelerated review because of a showing of irreparable harm.¹⁸⁰ As noted, if the court is unable to reach a decision with the evidence before it, it may order a retrial, a rehearing, or procedures necessary to enable it to reach a decision.¹⁸¹

When the CIT reaches a decision it must issue an opinion or a statement of findings of fact and conclusions of law.¹⁸² This is a restatement of existing law.¹⁸³ A new power of the court¹⁸⁴ allows it to amend its findings *sua sponte* or upon a motion of a party made within thirty days after the entry of judgment.¹⁸⁵ In a restated provision, the CIT may order a retrial or rehearing *sua sponte* or on the motion of a party made within thirty days after the entry of judgment.¹⁸⁶ If no motions are made, the CIT's decision is final.¹⁸⁷

Another provision of title III of this Act expands previous law by establishing a new precedential order for cases pending in the CIT.¹⁸⁸ The CIT will first hear cases involving perishable merchandise.¹⁸⁹ Second, the court will try actions challenging final countervailing and antidumping duty determinations.¹⁹⁰ Third, the court will hear actions by importers contesting the exclusion or redelivery of their merchandise.¹⁹¹ Last, the CIT will schedule actions by domestic interested parties to contest the classification and rate of duty on competing imports and actions

¹⁷⁴ 1980 House Hearings, *supra* note 3, at 129.

¹⁷⁵ 28 U.S.C.A. § 2643(a)(1) (West Supp. 1981). See *id.* § 1582.

¹⁷⁶ *Id.* § 2643(c)(1).

¹⁷⁷ *Id.* § 2643(c)(2).

¹⁷⁸ *Id.* § 2643(c)(3).

¹⁷⁹ 19 U.S.C. § 1677f(c)(2) (Supp. III 1979).

¹⁸⁰ 28 U.S.C.A. § 2643(c)(4). This provision concerns a civil action as described in 28 U.S.C.A. § 1581(h) (West Supp. 1981).

¹⁸¹ *Id.* § 2643(b).

¹⁸² *Id.* § 2645(a)(1)-(2).

¹⁸³ 1980 House Report, *supra* note 2, at 62.

¹⁸⁴ *Id.*

¹⁸⁵ 28 U.S.C.A. § 2645(b) (West Supp. 1981).

¹⁸⁶ *Id.* § 2646. See also 1980 House Report, *supra* note 2, at 62.

¹⁸⁷ 28 U.S.C.A. § 2645(c) (West Supp. 1981).

¹⁸⁸ *Id.* § 2647.

¹⁸⁹ *Id.* § 2647(1).

¹⁹⁰ *Id.* § 2647(2).

¹⁹¹ *Id.* § 2647(3).

contesting interlocutory determinations regarding countervailing and antidumping duties.¹⁹²

Title III also authorizes the Court of International Trade to conduct jury trials in the same manner as district courts.¹⁹³ The CIT will utilize the officers of the district court within the judicial district in which the case is to be tried.¹⁹⁴ The CIT will also select the jury from the local jury list and will follow district court procedure in all matters concerning a jury.¹⁹⁵ There have been some questions raised concerning the appropriateness of a jury in CIT proceedings. Certain cases may require the expertise which the CIT judges have acquired through their familiarity with many international trade issues.¹⁹⁶ However, a jury may be useful in determining a defendant's culpability in a government action seeking forfeiture of an importer's shipment because of a misstatement of value.¹⁹⁷

During the formation of the Customs Courts Act of 1980, there was much debate over whether the Act should authorize a small claims procedure.¹⁹⁸ Several private interests advocated the adoption of such a procedure.¹⁹⁹ Their position was that annually hundreds of small importers had claims involving a contested overcharge of less than \$2,500.²⁰⁰ Customs Bar attorneys often advise these small importers that litigating the action is not economically worthwhile.²⁰¹ One proposal set forth a small claims procedure which restricted the procedure's use to claims of less than \$5,000 brought under section 515 of the Tariff Act of 1930.²⁰² Any decisions would be relevant only to the particular facts of the case.²⁰³ However, Judge Re argued that a small claims procedure was unnecessary.²⁰⁴ He stated that the precedential effect of any commercial matter resolved by the Customs Court had far reaching implications and that cursory hearing would be inappropriate to resolve such matters.²⁰⁵ He cited the possible creation of a two-tiered system of justice which would destroy uniformity in the customs laws.²⁰⁶ Judge Re believed that small claims could be handled using the suspension procedure, which suspends small cases with similar facts until a test case is

¹⁹² Id. § 2647(4).

¹⁹³ Id. § 1876; id. § 1862 (West & West Supp. 1981).

¹⁹⁴ Id. § 1876(a) (West Supp. 1981).

¹⁹⁵ Id. § 1876(b).

¹⁹⁶ 1980 House Hearings, *supra* note 3, at 196-99 (statement of Andrew Vance).

¹⁹⁷ Id.

¹⁹⁸ 1980 Trade Hearings, *supra* note 95, at 810 (statement of the American Importers Association); 1980 House Hearings, *supra* note 3, at 106, 262-71.

¹⁹⁹ See *supra* note 198.

²⁰⁰ Id.

²⁰¹ Id.

²⁰² 1980 House Hearings, *supra* note 3, at 271 (published letter of Judge Re).

²⁰³ Id.

²⁰⁴ Id. at 10-13 (statement of Judge Re).

²⁰⁵ Id.

²⁰⁶ Id.

tried.²⁰⁷ Also, he noted that the Customs Court appoints attorneys for parties who are unable to provide one.²⁰⁸ Judge Re's arguments prevailed, since the Customs Courts Act of 1980 does not authorize a small claims procedure.

IV. Conclusion

The Customs Courts Act of 1980 makes sweeping changes in this country's administration of international trade law. By conferring exclusive jurisdiction on the Court of International Trade for almost all international trade disputes, Congress has ensured consistent treatment of U.S. citizens and the citizens and governments of foreign states. Moreover, the Act greatly expands the class of persons with standing to litigate before the CIT to include exporters, consumer groups, and in certain situations, foreign governments and businesses adversely affected by administrative trade decisions. The result will be a fairer and more public administration of U.S. trade law.

Further, increasing numbers of attorneys who would not have previously appeared before the old Customs Court will now find themselves representing clients before the CIT, as jurisdiction for many actions moves from federal district courts to the CIT.²⁰⁹ Their clients, including workers, communities, and small businesses injured by foreign competition, must now seek review of administrative determinations and litigate trade law issues in the Court of International Trade.

In summary, the Customs Courts Act of 1980 provides a well designed system for the 1980's. It is a system that reflects the lessening importance of tariff barriers to trade and the concomitant increase in foreign government subsidization of domestic industry and erection of nontariff trade barriers.

—EUGENE C. BROOKS, IV

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ The Court of International Trade may be requested by an aggrieved party to send a judge or judges to a convenient federal court. 28 U.S.C. § 256 (1976); 1979 House Trade Act Report, *supra* note 9, at 179.