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United States Court of International Trade Advisory Committee on Jurisdiction

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REPORT OF THE UNITED STATES COURT OF INTERNATIONAL TRADE ADVISORY COMMITTEE ON JURISDICTION – PART I*

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* This Report represents an advisory document addressed to the United States Court of International Trade. The members of the Court subsequently requested the Advisory Committee to continue its work by preparing draft legislative language to implement several of the recommendations in this Report. As published here, the Report has been edited slightly and supplementary footnotes have been added, while the Advisory Committee's background research memoranda have been omitted.

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INTRODUCTION

The United States Court of International Trade established an Advisory Committee on Jurisdiction in June 2000. The Court requested the Advisory Committee to make recommendations that would provide a basis for improvements in customs and international trade law and practice and the administration of justice in the Court. The specific goals of these recommendations would be to reduce jurisdictional confusion for parties and advance the constitutional requirement and policy objective of uniformity for laws relating to customs and international trade.

The Advisory Committee understood that its work should focus on the Court's current and potential jurisdictional grants. Ultimately the Committee considered nearly twenty areas of jurisdiction. Some ideas would involve revising the Court's existing jurisdictional statutes to reduce jurisdictional confusion and improve the administration of justice. Others would involve transferring a particular class of litigation to the Court of International Trade.

In evaluating the various ideas, the Committee noted five general principles that appeared to be useful in the evaluation of potential expansions or revisions of the Court's jurisdiction: *jurisdictional clarity* (avoidance of confusion over the intended allocation of jurisdiction); *judicial expertise* (similarity to matters currently heard by the Court); *jurisdictional comprehensiveness* (the creation of a jurisdictional system in the Court encompassing the field of customs and international trade law); *judicial efficiency* (using the judicial resources of the Court to reduce the caseload in district courts by transferring cases to the Court); and, *decisional uniformity* (assuring that a given statute will be interpreted and applied in a uniform manner). In short, the Committee sought to determine whether, or to what extent, the foregoing principles would be served if the existing jurisdictional laws were revised or if the class of litigation were transferred to the Court.

The results of the Committee's evaluation are presented in Part I of its Report, which was submitted to the Court in 2001. After the members of the Court reviewed Part I of the Report, they requested the Advisory Committee to continue its work by drafting legislative language that would implement the several of the recommendations in the Report. This second stage of the work is published separately as Part II of the Advisory Committee's Report.[1]

The Advisory Committee is composed of representatives of both the private sector and federal departments and agencies. From the inception of the Committee, however, the representatives from the federal departments and agencies indicated that they could not take an official position on any recommendations from the Committee regarding potential legislation, because the official position of the respective departments and agencies on these matters would have to be determined by the Administration or, if applicable, the independent agency. Accordingly, these representatives were designated *ex officio* members of the Committee. As such, they serve in an advisory capacity but will not formally participate in the views of the Committee in its recommendations and report to the Court.

At the outset of the Advisory Committee's work, the *ex officio* member from the Department of Justice advised the Committee that the Department of Justice would probably oppose any recommendation that would create any new cause of action. As the Committee understands this position, it encompasses proposals that would provide judicial review of agency action that is not currently subject to review, as well as proposals to alter the existing scope of review to provide more searching judicial review than currently exists. In addition, as the Committee understands its mandate, its work does not include a review of substantive laws currently within the Court's jurisdiction or non-jurisdictional procedural laws applicable in the Court, such as provisions governing remedies. Nor does this Committee's work involve the Rules of the Court, for which a separate advisory committee exists.

[1] *Report of the United States Court of International Trade Advisory Committee on Jurisdiction – Part II*, 18 ST. JOHN'S J. LEGAL COMMENT. 31 (2003).

The nearly twenty areas of jurisdiction the Advisory Committee considered are discussed in the following sections of this report. The report is also based in part on additional background materials that the Advisory Committee prepared or considered, but which are not reproduced here because of space limitations.

I. DISCUSSION OF JURISDICTIONAL ISSUES

A. Actions Arising from Customs Seizures

Current Law: Under 28 U.S.C. § 1356,[2] the federal district courts have exclusive original jurisdiction of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under 28 U.S.C. § 1582.[3] The statutes within the jurisdiction of the Court of International Trade under 28 U.S.C. §1582 do not, however, currently provide for judicial forfeiture, and therefore the Court does not hear seizure/forfeiture cases.

Recommendation: The Court of International Trade should be given exclusive original jurisdiction of any seizure by the U.S. Customs Service under (1) the Tariff Act of 1930 or any other provision of law codified in title 19 of the U.S. Code, (2) the Trading With the Enemy Act (50 U.S.C. app. §§ 1-44), or (3) section 1 of title VI of the Act of June 15, 1917, 40 Stat. 233 (22 U.S.C. § 401), other than seizures of narcotics or other controlled substances.

Explanation of Recommendation: Cases arising from the Customs Service's seizure of goods are logically within the area of responsibility assigned to the Court of International Trade. They involve government action affecting imported goods and often raise issues closely related to customs litigation presently conducted in the Court of International Trade. Thus, giving the Court of International Trade jurisdiction in customs seizures would be consistent with the considerations discussed above of similarity to matters currently heard by the Court (judicial

2 28 U.S.C. § 1356 (2003).
3 28 U.S.C. § 1582 (2003).

expertise) and the creation of a jurisdictional system in the Court encompassing the field of customs and international trade law (jurisdictional comprehensiveness).

With respect to the goal of jurisdictional clarity, some aspects of existing law seem anomalous. First, since the main customs penalty statute, 19 U.S.C. § 1592, does not currently provide for forfeiture, any case in which the government wishes to seek both forfeiture and recovery of customs penalties must be bifurcated between a district court and the Court of International Trade.[4] Second, in some instances, a case has begun as an "exclusion" of merchandise that is subject to judicial review in the Court of International Trade, but was later converted into a "seizure" that is subject to judicial review in a district court.[5] Thus, it would promote jurisdictional clarity, or at least jurisdictional logic, if the Court of International Trade were assigned jurisdiction over statutes providing for seizure and judicial forfeiture.

On the other hand, giving the Court of International Trade jurisdiction over seizure/forfeiture cases might not eliminate jurisdictional confusion in all situations. District courts would have jurisdiction in seizure cases not assigned to the Court of International Trade, and it would be necessary to decide how jurisdiction is to be allocated between the Court of International Trade and district courts. One issue is that the Customs Service may seize goods under a broad range of statutes, many of which are not codified in title 19 of the U.S. Code. A second issue is that the Drug Enforcement Agency or the Federal Marshals Service, in addition to the Customs Service, may make seizures under title 19 of the U.S. Code. After considering this question, the Advisory Committee felt that the most practical solution would be to (1) limit the Court of International Trade's jurisdiction to seizures by the Customs Service and not other agencies, and (2) mirror the statutory bases for seizure that were excluded from the scope of Civil Asset Forfeiture Reform Act

4 *See* United States v. One Red Lamborghini, 10 C.I.T. 7, 12 (1986) (holding that section 1592 does not provide a cause of action for forfeiture), *vacated as moot*, 10 C.I.T. 654 (1986).

5 *Compare* Milin Industries, Inc. v. United States, 12 C.I.T. 658, 664 (1988) (holding that the Court of International Trade has jurisdiction where an exclusion is protested before goods are seized) *with* International Maven, Inc. v. McCauley, 12 C.I.T. 55, 60 (1988) (holding that the Court of International Trade lacks jurisdiction where goods are seized before an exclusion is protested).

(CAFRA).[6] The provisions of CAFRA do not apply to (1) the Tariff Act of 1930 or any other provision of law codified in title 19 of the U.S. Code, (2) the Trading With the Enemy Act[7] or (3) section 1 of title VI of the Act of June 15, 1917,[8]— all three of which provide the basis for seizures by the Customs Service.[9] In addition, the Committee felt that Customs Service seizures of narcotics or other controlled substances should also be excluded, because they are qualitatively different from the type of cases traditionally heard in the Court of International Trade.

Data provided by the Advisory Committee's *ex officio* member from the U.S. Customs Service indicate that during Fiscal Year 2000, the three categories of Customs Service seizure cases identified in the preceding paragraph were referred for the institution of judicial forfeiture proceedings in the various district courts in approximately 120 cases. This information led the Advisory Committee to conclude that the goal of using the judicial resources of the Court of International Trade to reduce the caseload in district courts would be eminently served if the Court of International Trade were to be given jurisdiction of these seizure cases.

B. Section 1581(i) as an Allocation of Federal Jurisdiction in General

Current Law: One of the purposes of the Court of International Trade's grant of "residual jurisdiction" in 28 U.S.C. § 1581 is to allocate jurisdiction between the Court of International Trade and federal district courts. Certain appellate court decisions since 1980 have held, however, that district courts possessed jurisdiction in situations that arguably should be within the

6 Pub. L. No. 106-185, 114 Stat. 202 (adding 18 U.S.C. § 983) (2000).

7 50 U.S.C. App. §§ 1-44 (2003).

8 22 U.S.C. § 401 (2003).

9 In addition, CAFRA does not apply to seizures under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301, but this statute has been omitted because it does not provide the basis for Customs Service seizures.

jurisdiction of the Court of International Trade.[10] These decisions seem to be "jurisdictional anomalies" that create confusion for litigants and frustrate the intent of Congress to provide a clear demarcation between "federal question" jurisdiction of district courts and the "residual jurisdiction" of the Court of International Trade.[11]

Recommendation: Consideration should be given to amending section 1581(i) to provide that, in addition to the existing definition of its jurisdiction, the Court of International Trade has exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises under any law codified in title 19 of the U.S. Code, except as provided in subsection (j) of 28 U.S.C. § 1581. Section 1581(j) should then be amended by adding section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337 (2003)) as a statute excluded from the jurisdiction of the Court of International Trade.

Explanation of Recommendation: In attempting to address the problem of the "anomalous" jurisdictional decisions, one should note that only a small number of these cases have arisen, each decision involved a separate legal issue, and none of the decisions has been followed by similar cases.[12]

10 *See* K Mart Corp. v. Cartier, Inc., 485 U.S. 176, 189-90 (1988) (holding that the statutory prohibition on trademark-infringing imports enforced by the Customs Service was not an "embargo" but a statutorily created private right of action affording a kind of injunctive relief); Trayco, Inc. v. United States, 994 F.2d 832, 839 (Fed. Cir. 1993) (holding that an importer-initiated lawsuit relating to customs penalties did not involve "administration and enforcement" of the customs laws); International Labor Rights Education & Research Fund v. Bush, 954 F.2d 745, 747 (D.C. Cir. 1992) (holding that statutory provisions allowing the grant of duty-free status were not integral parts of statutes "providing for . . . revenue from imports"); Commodities Export Co. v. U.S. Customs Service, 888 F.2d 431, 435-36 (6th Cir. 1989) (remanding to the lower court for further consideration of whether an importer-initiated lawsuit relating to breach of a customs bond involved "administration and enforcement" of the customs laws). The *Commodities Export* litigation subsequently moved to the Court of International Trade when the government commenced litigation under 28 U.S.C. § 1582 (2003).

11 *See* PATRICK C. REED, THE ROLE OF FEDERAL COURTS IN U.S. CUSTOMS & INTERNATIONAL TRADE LAW 187-199 (1997) (discussing the Court's "residual jurisdiction" and concluding that section 1581(i) has not fully achieved its intended purposes); *see also* Stephen M. De Luca, *Historical Retrospective and the Future Role and Jurisdiction of the U.S. Court of International Trade in the New Millennium*, 26 BROOKLYN J. INT'L L. 801, 806 (2001) (concurring that the residual jurisdiction clause of 28 U.S.C § 1581(j) has caused confusion with international trade practitioners, scholars, and the courts).

12 In *K Mart*, the Supreme Court's decision on the merits resolved the underlying substantive conflict between the statute and the implementing regulation, ending the need for further litigation on that issue. In *International Labor Rights*, the court held that the contested action was committed to unreviewable agency discretion. In *Trayco*, an amendment to the customs regulations in 2000 precluded further similar cases by providing that payment of a mitigated penalty constituted an accord and satisfaction.

The small number of "anomalous" cases suggests that, perhaps, the problem may not be particularly serious in the larger context of the system of judicial review under the customs and international trade laws. The lack of repetition of any particular decision suggests that, in practice, the "anomalous" cases have not created a high degree of confusion for litigants in subsequent cases, in spite of sometimes-serious confusion and uncertainty while the "anomalous" cases remained unresolved. The presence of a separate legal issue in each case means that it may be difficult to identify a single change to section 1581(i) that could avoid these cases. Instead, each "anomalous" decision might require a piecemeal amendment addressing the specific issue. However, amending the statute on a piecemeal basis might not prevent a future decision that does not fit the exact pattern of the past "anomalous" cases.

If a generalization can be drawn from the "anomalous" cases, it may be that the best way to reduce problems in the future would be to amend section 1581(i) to clarify that, in addition to the generic description of subject matters currently found in the statute, the Court of International Trade should have jurisdiction in any civil action commenced against the United States that arises under any provision codified in title 19 of the U.S. Code, except as exempted in section 1581(j). This approach would parallel the suggestion for forfeiture jurisdiction discussed in Point I, and arguably might have prevented the "anomalous" cases. It would be necessary to amend section 1581(j) by adding section 337 of the Tariff Act of 1930[13] as a statute excluded from the jurisdiction of the Court of International Trade.

In addition to this overall recommendation, the question of allocation of jurisdiction in import-related trademark and copyright litigation is discussed under Subheading C below, and issues relating to customs enforcement cases (penalties and customs bonds) are discussed in Subheading D below.

13 19 U.S.C. § 1337 (2003).

C. Trademark and Copyright Cases

Current Law: Based on the Supreme Court's decision in *K Mart Corp. v. Cartier, Inc.*,[14] the current allocation of jurisdiction in trademark and copyright cases is that (1) exclusions of imported trademark-infringing goods are subject to judicial review in the Court of International Trade under section 1581(a) jurisdiction following the filing and denial of a protest; (2) seizures of imported counterfeit goods are subject to judicial review in district courts; and, (3) litigation between rival private parties based on an alleged trademark or copyright infringement is within the jurisdiction of district courts.[15] In the event any further litigation alleging an inconsistency between a statutory import prohibition of trademarked or copyrighted goods and the implementing regulation were commenced, it would apparently be within the jurisdiction of district courts. However, no such litigation has arisen.

Recommendation: The only change in the existing allocation of federal courts' jurisdiction in trademark and copyright cases the Advisory Committee recommends is that the Court of International Trade should be given jurisdiction in forfeiture cases as discussed in Point I above. Since the specific issue in *K Mart* is unlikely to repeat itself, the Advisory Committee tentatively believes that the recommendation discussed in Point II above would not change the existing allocation of jurisdiction in remaining trademark and copyright cases.

Explanation of Recommendation: As a result of the Supreme Court's decision on the merits in *K Mart*,[16] the dispute over the validity of the customs regulation governing imports of trademark-infringing gray-market goods was resolved. There has apparently been no subsequent litigation in any district court alleging an inconsistency between a statutory import prohibition and the corresponding implementing regulation. Thus, the specific issue in *K Mart* involving the validity of a Customs

14 485 U.S. 176 (1988). For discussion of the case's jurisdictional result, see REED, *supra* note 11, at 188-94; Lynn S. Baker and Michael E. Roll, *Securing Judicial Review in the United States Court of International Trade: Has* Conoco, Inc. v. United States *Broadened the Jurisdictional Boundaries?*, 18 FORDHAM INT'L L.J. 726, 736-46 (1995).

15 *See K Mart*, 485 U.S. at 190 (outlining the current jurisdictions for copyright and trademark cases).

16 486 U.S. 281 (1988).

Service regulation is unlikely to repeat itself.[17] Subject to its earlier recommendation to give the Court of International Trade jurisdiction in customs seizures, the Committee feels that the allocation of federal jurisdiction in trademark and copyright cases is proper. All or most substantive issues under trademark and copyright laws are heard in district courts, whereas the cases in the Court of International Trade relate to the admissibility of merchandise. In this regard, when the actions of the Customs Service are at issue, the Court of International Trade is uniquely qualified to review those actions. For example, to the extent the Customs Service is required to determine whether a product seeking entry into the United States violates a U.S. trademark or copyright, the Court of International Trade is capable of adjudicating whether the Customs Service's decision is correct.

With the single exception of *K Mart* itself, the existing allocation of jurisdiction does not appear to be a source of jurisdictional confusion. Consequently, retaining the existing allocation of jurisdiction appears to be consistent with the criteria of jurisdictional clarity and judicial expertise discussed above. The amendment of section 1581(i) discussed under Subheading B above might have led to a different jurisdictional result specifically in *K Mart*, but the Advisory Committee does not expect that the amendment would change the jurisdiction in other trademark and copyright cases, as it exists in current law.

D. Customs Enforcement

Current Law: "Customs enforcement" as used in this report refers to the imposition of civil penalties or liquidated damages for violation of a customs bond. Under 28 U.S.C. § 1582, the Court of International Trade has exclusive jurisdiction of a civil action arising out of an import transaction and commenced by the United States "(1) to recover a civil penalty under section 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930; (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United

[17] *See* REED, *supra* note 11, at 193. *But see* Steven M. Auvil, *Gray Market Goods Produced By Foreign Affiliates of the U.S. Trademark Owner: Should the Lanham Act Provide a Remedy?*, 28 AKRON L. REV. 437, 444 (1995) (suggesting that the *K Mart* decision did not resolve many important issues related to the gray market controversy).

States or by the Secretary of the Treasury; or, (3) to recover customs duties."[18]

The statutes defining the jurisdiction of the Court of International Trade do not expressly provide for jurisdiction of civil actions commenced by importers relating to customs penalties or customs bonds. There have nevertheless been a number of such cases initiated by importers, often in the Court of International Trade, but sometimes in a district court, and the Court of International Trade has acknowledged that there is a "very unsettled legal landscape with regard to jurisdiction over suits by importers to recover or avoid Customs duties or penalties."[19]

Recommendations: With respect to government-initiated lawsuits, clause (1) of section 1582 should be amended to provide that the jurisdiction of the Court of International Trade extends to civil actions commenced by the United States to recover any civil penalty provided for under the Tariff Act of 1930 or any other provision of law codified in title 19 of the U.S. Code. Section 1582 should also be amended to give the Court of International Trade jurisdiction over judicial enforcement of a Customs Service summons under section 510 of the Tariff Act of 1930.[20] With respect to importer-initiated lawsuits, although existing law in this area remains unsettled and confusing, it appears that the problem lies primarily in the underlying substantive law, rather than the jurisdictional statutes. Amending section 1581(i) without changing the substantive law would not be sufficient to remove the existing confusion.

Discussion of Recommendation: In government-initiated lawsuits, the jurisdiction under clause (1) of 28 U.S.C. § 1582 is limited to certain enumerated civil penalties under the customs laws.[21] However, the customs laws also include other civil penalties or fines that are not enumerated in the section, notably including fines for violations of the Foreign-Trade Zones Act,[22] penalties for intentionally destroying, defacing, or removing

18 28 U.S.C. § 1582 (2003).

19 Bridalane Fashions, Inc. v. United States, 22 C.I.T. 1064, 1064 (1998).

20 19 U.S.C. § 1510 (2003).

21 *See* 28 U.S.C. 1582(1) (providing that civil penalties recoverable in the Court of International Trade are those imposed under sections 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), and 734(i)(2) of the Tariff Act of 1930).

22 19 U.S.C. § 81s (2003).

country-of-origin labels,[23] penalties for violating NAFTA record keeping requirements,[24] penalties for violating general record keeping requirements[25] and penalties for aiding and abetting the importation of goods in violation of an United States trademark.[26] Actions to recover these penalties are currently within the jurisdiction of district courts. Logically, all civil actions commended by the United States to recover civil penalties under the customs laws should be heard in the Court of International Trade. Therefore, the Advisory Committee recommends amending clause (1) of section 1582 to include all civil penalties under provisions of law codified in title 19 of the U.S. Code. This amendment would parallel the recommendation under subheading A for Customs Service seizure cases. In addition, the judicial enforcement of Customs Service summons to produce records under section 510 of the Tariff Act of 1930[27] should be assigned to the Court of International Trade, particularly since such a lawsuit may be related to penalties for violating the record keeping requirements.

Turning to importer-initiated lawsuits, two of the "anomalous" cases discussed under subheading B above involve customs enforcement: *Trayco, Inc. v. United States*,[28] and *Commodities Export Co. v. U.S. Customs Service*.[29] The *Trayco* case has not led to similar litigation in district courts, and the September 2000 amendment of the customs regulations to provide that payment of a mitigated penalty constitutes an accord and satisfaction will preclude *Trayco*-type cases in the future.

At the same time, there have been a number of importer-initiated lawsuits relating to customs enforcement in the Court of International Trade based on section 1581(i) jurisdiction. Thus, the Court of International Trade does possess and exercise jurisdiction in such cases. In the majority of the cases, however,

23 19 U.S.C. § 1304(l) (2003).
24 19 U.S.C. § 1508(e) (2003).
25 19 U.S.C. § 1509(g) (2003).
26 19 U.S.C. § 1526(f) (2003).
27 19 U.S.C. § 1510 (2003).
28 994 F.2d 832, 836 (Fed. Cir. 1993) (discussing importer-initiated action to contest finding of a violation following importer's payment of mitigated customs penalty).
29 888 F.2d 431, 436 (6th Cir. 1989) (discussing importer-initiated action to contest alleged violation of customs bond).

the court held that the importer did not have a cause of action.[30] Furthermore, despite the Court's jurisdiction in customs penalty cases, a large percentage of penalty cases are resolved at the administrative level without judicial review. In such cases, there is sometimes the view that the importer pays a mitigated penalty, because the potential exposure in litigation is not worth the risk. As expected, the importer may believe that there was never an impartial adjudication of the alleged violation. For example, as illustrated in *Trayco*, the law does not provide for an independent review of the Customs Service's decision on whether a violation occurred and what level of culpability is involved, independent of the Customs Service's decision to accept a mitigated penalty.[31] Critics of the existing system suggest that this allows the Customs Service to allege a higher level of culpability than is warranted.[32]

The foregoing discussion suggests that the uncertainty surrounding judicial review of customs enforcement lies primarily in the substantive law rather than the jurisdictional statutes. The Advisory Committee believes it appropriate to re-examine the customs enforcement statutes to assure that there is a meaningful opportunity for judicial review, but that this task is not within the scope of the Advisory Committee's mandate. Importer-initiated litigation under the customs enforcement statutes should be conducted in the Court of International Trade, but the current jurisdictional statutes do, in fact, give the Court jurisdiction in such cases.

30 888 F.2d 431, 436 (6th Cir. 1989) (discussing importer-initiated action to contest alleged violation of customs bond).

31 *See* Carlingswitch, Inc. v. United States, 5 C.I.T. 70, 560 F. Supp. 46, *aff'd per curiam*, 720 F.2d 656 (1983) (holding that there is no cause of action supporting jurisdiction under 28 U.S.C. § 1581(i) to challenge a voluntary tender of duties); Carlingswitch, Inc. v. United States, 85 Cust.Ct. 63, 500 F. Supp. 223 (1980), *aff'd*, 68 CCPA 49, 651 F.2d 768 (1981) (holding that a voluntary tender of duties cannot be contested by protest). The progeny of *Carlingswitch* include *Tikal Distrib. Corp. v. United States*, 21 C.I.T. 715 (1997). *See generally* REED, *supra* note 11, at 240-44 (discussing cases such as *Carlingswitch* in which judicial review is implicitly precluded by the absence of a cause of action).

32 *See Proceedings of the Tenth Judicial Conference of the United States Court of International Trade*, 191 F.R.D. 547, 591 (1995) (remarks by Sidney N. Weiss) (suggesting that reductions in duty rates have "let to the use of penalties to extract money from importers. ... [W]e've come to a situation, basically, which is 'customs racketeering' .... Customs puts out a pre-penalty or a penalty notice for tens of millions of dollars, and does not expect to receive anything more that ten thousand dollars on this particular penalty.").

E. Other Issues under Section 1581(i)

Current Law: In addition to allocating jurisdiction between the Court of International Trade and district courts, section 1581(i) serves the purposes of (1) empowering the Court of International Trade to hear import-related civil actions against the government that are not within any of the Court's specific jurisdictional grants and (2) in limited cases, allowing the Court to hear cases that would potentially be within one of the Court's specific jurisdictional grants, where the cause of action supported by the specific jurisdictional grant is manifestly inadequate.[33]

Recommendation: In terms of the two purposes addressed in this Point of the report, the Advisory Committee concluded that section 1581(i) is performing its function properly. Therefore, other than the recommendation under Point II above to clarify the allocation of jurisdiction, the Advisory Committee does not recommend amendments to section 1581(i).

F. Actions Contesting Customs Service Rulings and Decisions

Current Law: The Court of International Trade has jurisdiction of civil actions by importers or other importing interests to review rulings and decisions by the Customs Service under three jurisdictional grants. First, the majority of importer-initiated customs litigation consists of litigation conducted under 28 U.S.C. § 1581(a) jurisdiction to contest the denial of a protest against final Customs Service action. In such cases, the filing and denial of the protest and the payment of all liquidated duties, charges, or exactions before the time of commencement of the civil action are jurisdictional prerequisites to the plaintiff's cause of action. Second, under section 1581(h), the Court of International Trade has jurisdiction to review, prior to importation of the goods involved, a Customs Service ruling, but only if the plaintiff demonstrates that it would be irreparably harmed unless given an opportunity to obtain judicial review prior to importation. Third, under the residual jurisdiction of section 1581(i), as interpreted in case law, the Court of International Trade may review a Customs Service ruling or

33 *See* REED, *supra* note 11, at 187-88 (discussing the multiple purposes of section 1581(i)).

action if, for some reason, the remedy under subsection (a) or (h) is manifestly inadequate. [34]

Recommendations: In conjunction with recently pending proposals to revise and modernize Customs Service duty-assessment procedures, there should be consideration of the following:

(1) The Court of International Trade could be given jurisdiction of a civil action to contest any final decision by the Customs Service relating to the assessment of additional or supplemental duties, charges or exactions, or any liquidated (final) assessment of such duties, charges or exactions, without the existing requirement of filing a protest and awaiting its denial, and without the existing requirement of having paid all liquidated duties, charges, or exactions at the time of commencement of the civil action; and

(2) Section 1581(h) could be amended to remove or relax the existing prerequisite of demonstrating that the plaintiff would be irreparably harmed unless given an opportunity to obtain judicial review prior to importation.

Explanation of Recommendations: The pair of recommendations relating to importer-initiated litigation to contest Customs Service decisions and rulings are intended to be considered in conjunction with proposals to revise the administrative process before the Customs Service for the entry of goods and assessment of customs duties. It currently appears that consideration of proposals to revise the administrative process is temporarily on hold. Since the framework for judicial review cannot be considered in isolation from the process for reaching the administrative decisions or taking the administrative actions that are subject to review, it should be understood that the proposals set out in this Point might require modification in light of changes in the administrative process that are ultimately adopted.

34 *See* REED, *supra* note 11, at 221-36 (discussing case law establishing the principle that section 1581(i) may be involved in a lawsuit potentially within one of the specific jurisdictional grants of the Court of International Trade where the remedy available under the specific jurisdictional grant is "manifestly inadequate" or the case involves "special urgency" necessitating the avoidance of delays inherent in the exhaustion of administrative remedies).

Subject to the foregoing qualification, the Advisory Committee's first proposal involves providing for judicial review of final agency decisions on duty assessment without the existing requirements of exhausting the protest remedy at the administrative level and paying the amount of duties claimed by the Customs Service. This proposal is modeled on one of the options for judicial review in federal income tax law.

In federal income tax procedure, the Internal Revenue Service relies on audits to check taxpayers' returns and determine whether, in the Service's view, any additional taxes are owed. If the audit finds a deficiency and the matter is not otherwise resolved, the Service sends the taxpayer a statutory notice of deficiency which advises the taxpayer that, unless the taxpayer files a petition in the Tax Court within 90 days, the deficiency will be assessed and collected.[35] After the taxpayer receives the notice of deficiency, it has two options: (1) it may file a petition in the Tax Court contesting the deficiency assessment, or (2) it may pay the tax and file a claim for a refund, and if the claim is denied, may file a lawsuit for a refund in federal district court or the Court of Federal Claims.[36] One of the considerations affecting the taxpayer's choice between these two procedures is that interest continues to run on the unpaid deficiency if the taxpayer litigates in the Tax Court.

Based on the preliminary discussions of the new administrative procedures being considered by the Customs Service, the Advisory Committee understands that the Customs Service intends to rely much more heavily on post-entry audits to verify whether the amount of customs duties paid at the time of entry was correct. The Customs Service's expanded use of audit procedures suggests that it would be appropriate to adopt a framework for judicial review similar to that used in federal income tax law. Rather than having a choice of fora, however, the importer should have the option of commencing a civil action in the Court of International Trade to contest a final decision by the Customs Service (such as findings of a customs audit that are approved and adopted by the Service through the issuance of a

35 IRC §§ 6212 & 6213; Treas. Reg. §§ 301.6212-1 & 301.6213-1(a) & (c).

36 *See* 1 GERALD A. KAFKA & RITA A. CAVANAGH, LITIGATION OF FEDERAL TAX CONTROVERSIES ¶1.01 (2d ed. 1995 & Supp. 1999). For a detailed exposition of federal tax litigation, see generally *id., passim.*

demand for additional duties) that additional or supplemental duties are owed.[37] In this civil action, the importer would not be required to pay the duties prior to the commencement of the action, but interest on the duty liability would continue to accrue. Alternatively, the importer would have the option of using the existing procedure of filing a protest after liquidation and paying all liquidated duties prior to commencement of a civil action in the Court of International Trade for a refund of the duties paid.

The Advisory Committee's second proposal involves relaxing the requirements of section 1581(h) to make it easier for an importer to obtain judicial review. In the Advisory Committee's discussions, the *ex officio* observer from the Customs Service indicated that the Customs Service might well have no objection to amending 28 U.S.C. § 1581(h) to relax or possibly even eliminate the "irreparably harmed" requirement. As the observer explained, since the new administrative-level process might establish a much longer time between entry and final duty assessment (liquidation) than in current law, it might well be appropriate to allow early judicial review of an issue on which the Customs Service's final position was set out in a ruling. The observer cautioned, however, that the availability of pre-importation judicial review would need, at a minimum, to assure that the plaintiff would not be seeking an "advisory opinion" in contravention of the constitutional requirement that judicial decisions address an actual "case or controversy."

In light of this discussion, it is suggested, for example, that the plaintiff be required to demonstrate that it has a bona fide intention to import the goods that are the subject of the ruling and that there is "good cause" to obtain judicial review prior to importation. Or, as an alternative formula, the plaintiff would be required to demonstrate that it has a bona fide intention to import the goods and that it would be "commercially

[37] Findings of lost revenue in a Customs Service audit may not constitute final agency action. Instead, the findings must be followed by a rate advance and liquidation (or reliquidation) or by a demand for duties. In current Customs Service practice, demands for duties are sometimes based on section 592(d) of the Tariff Act of 1930 (19 U.S.C. § 1592(d) (2003)) where the time for liquidation or reliquidation has elapsed. In this situation, as well as in cases involving disputes over the calculation of duties under the "prior disclosure" statute (19 U.S.C. § 1592(b)(4) (2003)), the proposed non protest-based judicial review would help address some of the uncertainty over importer-initiated litigation in customs enforcement discussed in Point IV above.

impracticable" to wait until after importation to obtain judicial review.

G. State Law Violations of WTO Obligations

Current Law: Under 19 U.S.C. § 3512(b)(2),[38] which was enacted as part of the Uruguay Round Agreements Act,[39] the United States may commence a civil action seeking to declare a state law or the application of a state law invalid on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements. Jurisdiction in such an action is vested in federal district courts under 28 U.S.C. § 1331 (federal question) and § 1345 (United States as plaintiff).

Recommendation: The Court of International Trade should be given jurisdiction of the civil action by the United States provided for in 19 U.S.C. § 3512(b)(2) relating to state law violations of the Uruguay Round Agreements, although few such cases, if any, are expected to be filed.

Explanation of Recommendation: Because of the experience of Court of International Trade in adjudicating issues arising under the international trade agreements administered by the World Trade Organization, giving the Court of International Trade jurisdiction over alleged state law violations of such agreements is consistent with the concept of relying on the Court's judicial expertise. Assigning section 3512(b)(2) actions to the Court of International Trade is also consistent with the idea of establishing a comprehensive system of judicial review under the U.S. international trade laws in the Court of International Trade. However, it is expected that cases challenging state laws will be extremely rare. Therefore, few if any cases would actually be heard, and any gains in judicial efficiency from assigning the cases to the Court of International Trade would largely be hypothetical.

38 19 U.S.C. § 3512(b)(2) (2003).

39 Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 19 U.S.C. §§ 3501-3624 and also amending other scattered sections of 19 U.S.C. and other titles of U.S.C.). *See generally* David W. Leebron, *Implementation of the Uruguay Round results in the United States*, in IMPLEMENTING THE URUGUAY ROUND (John H. Jackson & Alan Sykes, eds. 1997) (explaining that this act was the legislation approving the membership of the United States in the World Trade Organization and the package of international trade agreements administered under the auspices of the World Trade Organization).

H. Other Civil Actions Relating to WTO Obligations

Current Law: The international trade agreements administered by the World Trade Organization contain a number of provisions that require the United States to provide opportunities for judicial review of agency action.[40] In a number of cases, such as the Anti-Dumping Agreement,[41] the Subsidies and Countervailing Measures Agreement,[42] the Valuation Agreement,[43] and the provision of GATT 1994 relating to customs administration,[44] the Court of International Trade has jurisdiction to conduct the judicial review required under the agreement. In other cases, such as the Agreement on Sanitary and Phytosanitary Measures[45] and the General Agreement on Trade in Services (GATS),[46] the Court of International Trade lacks jurisdiction and the required judicial review would occur in district courts under federal question jurisdiction. The Advisory Committee noted the previous suggestion by the Customs and International Trade Bar Association (CITBA) that all judicial review required under an international trade agreement should be conducted in the Court of International Trade. [47]

[40] *See* Patrick C. Reed, *Expanding The Jurisdiction Of The U.S. Court Of International Trade: Proposals By The Customs And International Trade Bar Association*, 26 BROOK. J. INT'L L. 819, 826-38 (2001) (identifying fifteen provisions in the trade agreements administered by the WTO that require WTO members to provide judicial review).

[41] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (popularly known as the Anti-Dumping Agreement), *reprinted in* H.R. Doc. 103-316, vol. 1, at 1453 (1994).

[42] Agreement on Subsidies and Countervailing Measures, *reprinted in* H.R. Doc. 103-316, vol. 1, at 1533 (1994).

[43] Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (popularly known as the Valuation Agreement), *reprinted in* H.R. Doc. 103-316, vol. 1, at 1478 (1994). *See also* Zviad V. Guruli, *What is The Best Forum For Promoting Trade Facilitation?*, 21 PENN ST. INT'L L. REV. 157, 161 (2002) (opining that the Valuation Agreement is one of the leading WTO instruments in customs law).

[44] General Agreement on Tariffs and Trade 1994, art. X(3)(b) ("Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative actions relating to customs matters.").

[45] Agreement on the Application of Sanitary and Phytosanitary Agreements, *reprinted in* H.R. Doc. 103-316, vol. 1, at 1381 (1994). *See generally* MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 486-510 (2003).

[46] General Agreement on Trade in Services, *reprinted in* H.R. Doc. 103-316, vol. 1, at 1586. *See generally* MATSUSHITA, ET AL., *supra* note 45, at 227-58.

[47] *See* Reed, *supra* note 40, at 827 (suggesting that wherever a new cause of action for judicial review is created under the Uruguay Round Agreements, jurisdiction to conduct the judicial review should be assigned to the Court of International Trade).

Recommendation: The Advisory Committee does not recommend that all judicial review required under an international trade agreement be conducted in the Court of International Trade.

Explanation of Recommendation: The suggestion of giving the Court of International Trade jurisdiction in the full range of WTO matters is based on the concept of jurisdictional comprehensiveness in international trade law, as discussed in the introduction to this report. However, on further consideration of the idea, the Advisory Committee feels that it would not be in harmony with the principles of jurisdictional clarity and judicial expertise.[48] First, certain WTO agreements, though they involve trade in goods, are inextricably related to domestic regulatory regimes. For example, the WTO Agreement on Sanitary and Phytosanitary Measures (i.e., measures necessary for the health and protection of human, animal and plant life) relates to the programs administered by the Food and Drug Administration and the Animal and Plant Health Inspection Service. In many cases, it does not appear possible to separate judicial review with respect to imported goods as required by the WTO agreement from normal judicial review under the domestic regulatory regime. Consequently, the Advisory Committee recommends retaining the existing allocation of jurisdiction in which the Court of International Trade would have jurisdiction over a protestable "exclusion" of goods by the Customs Service, but other aspects of judicial review under these laws should remain in district courts.

The WTO's General Agreement on Trade in Services (GATS) encompasses numerous sectors such as banking, financial services, insurance, and transportation. The Advisory Committee felt that these areas are far removed from the substantive areas of law traditionally heard in the Court of International Trade and no good reason would be served by giving the Court jurisdiction.

48 *See Proceedings of the Eleventh Judicial Conference of the United States Court of International Trade*, 198 F.R.D. 89, 113 (1999) (remarks by David W. Leebron) (questioning whether issues in which trade issues are closely linked to domestic regulatory programs and "all those sets of issues which make for service regulation" should be assigned to a trade court).

With respect to the WTO agreement on Trade-Related Aspects of Intellectual Property ("TRIPs"),[49] subheading C of this report sets out the Advisory Committee's recommendation of retaining the existing allocation of jurisdiction in trademark and copyright cases with the exception of giving the Court of International Trade jurisdiction over Customs Service seizures. The U.S. International Trade Commission under section 337 of the Tariff Act of 1930[50] hears import-related patent cases, with direct appellate-level judicial review in the Federal Circuit.[51] The Advisory Committee concluded that section 337 cases function satisfactorily and that involvement of the Court of International Trade is not required.

The Advisory Committee's conclusions are reinforced by the fact that the current U.S. implementing statutes for the WTO agreements provide that the agreements are not self-executing and do not create any cause of action based on an alleged violation of the agreements in a statute, regulation, or agency action.[52] Hence, the potential judicial role in current law is much more limited than it might be if there were a domestic cause of action for violation of a WTO agreement.

I. Certain Private Rights Of Action Under The Customs Laws

Current Law: In current law, two categories of litigation involving the customs laws arise relatively often between private parties: (1) lawsuits by importers against customsbrokers for alleged malpractice; and (2) lawsuits by sureties against importers for liability on customs bonds. These cases are currently heard in state courts or, where applicable, in federal district courts based on diversity jurisdiction.

Recommendation: Giving the Court of International Trade jurisdiction in these two types of private lawsuits under the customs laws should be strongly considered.

Explanation Of Recommendation: Litigation in the Court of International Trade has always involved the federal government

49 Agreement on Trade-Related Aspects of Intellectual Property, *reprinted* in H.R. Doc. 103-316, vol. 1, 1621 (1994). *See generally* MATSUSHITA, ET AL., *supra* note 45, at 395-438.

50 19 U.S.C. § 1337 (2003).

51 28 U.S.C. § 1295(a)(6) (2003).

52 *See* 19 U.S.C. § 3512(a) & (c)(1) (2003).

as one of the parties. Nevertheless, the Advisory Committee felt that strong consideration should be given to allowing the Court to hear lawsuits by importers against customs brokers for alleged malpractice, and lawsuits by sureties against importers for liability under customs bonds. Both categories of cases are closely related to the customs law issues already heard in the Court, where there are likely to be present unusual issues for the courts of general jurisdiction that hear these cases now. Consequently, the principle of judicial expertise in customs law strongly supports transferring these cases to the Court of International Trade.

J. Export Control

Current Law: The "export control" laws encompass the International Emergency Economic Powers Act,[53] the Trading with the Enemy Act,[54] the Arms Export Control Act,[55] and the Department of Commerce's export control program that was originally promulgated under the Export Administration Act (EAA).[56] Under the EAA, Department of Commerce civil enforcement actions were reviewable in the Court of Appeals for the D.C. Circuit, but otherwise the EAA largely precluded judicial review.

Recommendation: Export control cases should be considered as a possible candidate for assignment to the Court of International Trade, although the volume of such litigation is limited.

Explanation of Recommendation: Judicial review under the export control laws could take the form of actions by potential exporters contesting the denial of licenses, or actions by the government to enforce civil penalties for violations of the export control laws. For example, the embargoes administered by the Treasury Department's Office of Foreign Assets Control incorporate civil penalties enforced under procedures similar to those used by the Customs Service in the customs penalty

53 50 U.S.C. §§ 1701-1707 (2003).

54 50 App. U.S.C. §§ 1-44 (2003).

55 22 U.S.C. §§ 2751-2799aa (2003).

56 15 C.F.R. pts. 730-774 (2003). Regarding the legal authority for the export control regulations, see *id.* § 730.2 (stating that the regulations were originally promulgated under the Export Administration Act of 1979, but because that act has expired, the regulations have remained in force pursuant to the International Emergency Economic Powers Act).

statutes. In practice, notwithstanding the current absence of the express limitations on judicial review in the EAA, the courts have been reluctant to review many export control actions, especially the classification of products and the denial of discretionary licenses, under traditional doctrines of judicial restraint. A review of case law in the D.C. Circuit has revealed only approximately 10 export-control cases in that court since 1983.[57] Moreover, informal inquiries by members of the Advisory Committee to government officials as well as private practitioners in the export control area indicated that both the officials and private practitioners generally believe that the existing framework for judicial review is satisfactory.

Giving the Court of International Trade jurisdiction over export control cases would be consistent with the idea of creating a comprehensive system of judicial review of agency action under statutes affecting international trade. However, given the limited scope of review and the low volume of litigation, transferring export control cases to the Court of International Trade would do little to increase the use of judicial resources at the Court of International Trade.

K. Antiboycott Cases

Current Law: The antiboycott provisions of the Export Administration Act (EAA) prohibit cooperation by U.S. corporations with the Arab boycott of Israel.[58] Enforcement is achieved by the imposition of civil penalties, with appeals of administrative enforcement actions made to the Court of Appeals for the D.C. Circuit.

Recommendation: Antiboycott cases can be considered as a second-tier candidate for assignment to the Court of International Trade, but the volume of such litigation is limited.

57 *See, e.g.*, Iran Air v. Fugleman, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (stating that the Secretary of Commerce for the Export Administration is the final arbiter of all legal questions concerning export control); *see also* United States v. Hitt, 249 F.3d 1010, 1012 (D.C. Cir. 2001) (holding time-barred the indictment of American and Chinese conspirators who issued export licenses for aircraft parts subject to export controls); Dart v. United States, 961 F.2d 284, 284 (D.C. Cir. 1992) (holding that attorneys' fees cannot be awarded for costs associated with an export-control proceeding under § 13(c) of the Export Administration Act under the Equal Access to Justice Act).

58 15 C.F.R. pt. 760 (2003).

Explanation of Recommendation: Most enforcement cases under the antiboycott law are settled at the administrative level. In the past two years, the Office of Antiboycott Compliance of the Department of Commerce has settled seventeen enforcement cases. A preliminary Lexis search of federal case law revealed fewer than twenty cases addressing the antiboycott provisions in the last twenty years. Moreover, the majority of these cases were not appeals of administrative determinations, but either focused on the constitutionality of the antiboycott provisions or the possible availability of a private right of action.

Considering the criteria discussed in the introduction to this report, there is no jurisdictional confusion in present law. Antiboycott cases are at best peripherally related to the cases currently heard in the Court of International Trade, since they could involve judicial review of civil penalties imposed by an administrative agency under a statute affecting international commerce. Finally, in view of the small volume of litigation, transferring antiboycott cases to the Court of International Trade would do little to increase the use of judicial resources at the Court.

L. Foreign Corrupt Practices Act

Current Law: The Foreign Corrupt Practices Act (FCPA)[59] addresses commercial bribery in foreign countries. Enforcement is shared by the Department of Justice and the Securities Exchange Commission, which are empowered to seek civil injunctive remedies under the statute. These cases are heard in federal district court.

Recommendation: FCPA cases can be considered as a second-tier candidate for assignment to the Court of International Trade, but the volume of such litigation is small.

Explanation of Recommendation: There are fewer than thirty published opinions dealing with the enforcement provisions of the FCPA, apparently because most defendants settle before going to trial.

The Advisory Committee's conclusions on the FCPA are substantially the same as its conclusions on the antiboycott laws.

59 15 U.S.C. §§ 78dd-1 to 78dd-3 (2000).

There is no jurisdictional confusion in present law. Antiboycott cases are at best peripherally related to the cases currently heard in the Court of International Trade, since they could involve government-initiated civil litigation against alleged violations in international commerce. In view of the small volume of litigation, transferring FCPA cases to the Court of International Trade do little to increase the use of judicial resources at the Court.

M. "Section 201" and "Section 301" Cases

Current Law: Section 201 of the Trade Act of 1974 ("Section 201")[60] authorizes the President, if the United States International Trade Commission determines an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the competing domestic industry, to establish temporary import restrictions designed to facilitate efforts by the domestic industry to make a positive adjustment to import competition. Section 301 of the Trade Act of 1974 ("Section 301")[61] provides a remedy administered by the U.S. Trade Representative where the rights of the United States under any trade agreement are being denied, or an act, policy, or practice of a foreign country violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or is unjustifiable and burdens or restricts United States commerce.

Recommendation: The Court of International Trade has jurisdiction to conduct judicial review arising from "Section 201" cases. To the extent "Section 301" cases result in the imposition of duties or quantitative restrictions on imports, the Court of International Trade would also have jurisdiction. However, the scope and standard of judicial review is highly limited because the decisions and actions under the statutes are considered to be matters committed to agency discretion. Members of the Committee felt that there may be considerations warranting a

60 19 U.S.C. §§ 2251-2254 (2003). *See generally* MICHAEL K. YOUNG, UNITED STATES TRADE LAW AND POLICY 37-46 (2001) (explaining the purpose and operation of Section 201).

61 19 U.S.C. §§2411-2420 (2003). *See generally* YOUNG, *supra* note 60, at 85-114 (explaining the purpose and operation of Section 301 and its progeny).

change in the standard of review, but this issue is separate from jurisdiction.

N. Direct Right Of Action In Antidumping Cases

Current Law: The Antidumping Act of 1916,[62] provides a private right of action against dumping done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States. Any such litigation is conducted in federal district courts.

Recommendation: The Antidumping Act of 1916[63] should not be considered for jurisdiction of the Court of International Trade. In September 2000, the World Trade Organization's Dispute Settlement Body adopted a decision that the Antidumping Act of 1916 is inconsistent with WTO obligations[64] and, as a result, the statute is expected to be repealed in the immediate future.

O. "Small Claims" In Customs Litigation

Current Law: Under the current jurisdictional statutes of the Court of International Trade, there is no provision relating to the amount in controversy and no separate jurisdictional grant for "small claims." The Advisory Committee received a suggestion that a separate "small claims" procedure would be useful for litigation of customs claims in which the costs associated with full-scale discovery and motion practice would be prohibitively large in relation to the amount in issue.

Recommendation: It is unnecessary to create a separate jurisdictional grant for small claims in customs litigation.

Explanation of Recommendation: The Advisory Committee noted that the concept of "small claims" in customs litigation creates a difficulty because the amount in controversy in any single import entry may be small, but under the "Test Case" and "Suspension" procedure the aggregate amount in a series of related cases may be substantial. However, assuming that

62 15 U.S.C. § 72 (2003).

63 *Id.*

64 *United States - Anti-dumping Act of 1916*, WT/DS136/AB/R & WT/DS162/AB/R, AB-2000-5 & AB-2000-6, 2000 WTO DS LEXIS 37 (WTO Appellate Body 2000).

"small claims" can be defined and that it is desirable to create a separate procedure for such cases, the Advisory Committee felt that the procedure could be created under the Rules of the Court. The suggested rule would involve, by analogy to the "Test Case" procedure, allowing a party to move to have its case designated a "Small Claim" with simplified procedures. Alternatively, it might be possible to limit the litigation cost as warranted on a case-by-case basis by a case management order under Rule 16[65] or a protective order under Rule 26 of the Rules of the Court.[66]

P. Carriage of Goods on the Sea Act

Current Law: The Carriage of Goods on the Sea Act (COGSA)[67] provides statutory standards of liability of shippers for damage to cargo. The statute is not directly enforced by a federal agency. Instead, COGSA issues generally arise in the course of a private lawsuit, in which the issues may range from questions of liability under the statute to the enforceability of a choice of law provision.

Since COGSA is a substantive rather than a jurisdictional statute, cases raising COGSA issues could be heard in federal district court under federal question or diversity jurisdiction.

Recommendation: The Advisory Committee does not recommend giving the Court of International Trade jurisdiction in COGSA cases.

Explanation of Recommendation: Although COGSA cases may be said to involve "international trade" in the broad sense, they do not involve judicial review of agency action and do not involve the customs and regulatory-type statutes under which litigation in the Court of International Trade arises. There has been no jurisdictional confusion or potential overlap with the Court of International Trade's jurisdiction. Giving the Court of International Trade jurisdiction in such cases would not be supported by the principles of jurisdictional clarity, judicial

65 USCIT R. 16 (setting forth rules for pretrial procedures).

66 USCIT R. 26(c) (stating that a party may move for a protective order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.").

67 46 App. U.S.C. §§ 1300-1315 (2003). The statute provides that "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act." *Id.* § 1300.

expertise, jurisdictional comprehensiveness, or decisional uniformity discussed in the introduction to this report.

Q. Foreign Sovereign Immunities Act

Current Law: Under 28 U.S.C. § 1330, federal district courts have jurisdiction of a non-jury civil action against a foreign state as to any claim *in personam* with respect to which the foreign state is not entitled to sovereign immunity. Under 28 U.S.C. § 1605, a foreign state is not immune from jurisdiction in several enumerated classes of cases.

Recommendation: The Advisory Committee does not recommend giving the Court of International Trade jurisdiction in Foreign Sovereign Immunity Act cases.

Explanation of Recommendation: The types of cases that arise under the Foreign Sovereign Immunities Act do not involve judicial review of U.S. departments and agencies under the U.S. public law of customs and international trade. Rather, they can involve, for example, commercial disputes such as alleged breach of contract by a state-trading company or tort claims based on automobile accidents involving foreign officials in the United States. There has been no jurisdictional confusion or potential overlap with the Court of International Trade's jurisdiction. Thus, giving the Court of International Trade jurisdiction in such cases would not be supported by the principles of jurisdictional clarity, judicial expertise, jurisdictional comprehensiveness, or decisional uniformity discussed in the introduction to this report.

R. Freedom of Information Act Cases

Current Law: Under the Freedom of Information Act[68] federal district courts have jurisdiction to review denials of requests for agency records and to order the production of any agency records improperly withheld from the complainant. The Advisory Committee considered whether it would be desirable to give the Court of International Trade jurisdiction under the Freedom of Information Act with respect to the records of agencies subject to review by the Court of International Trade, such as the Customs

68 5 U.S.C. § 552 (a)(4)(B) (2003) (providing that a district court "has jurisdiction to enjoin [an] agency from withholding agency records and to order the protection of any agency records improperly withheld from the complainant.").

Service, the Commerce Department's International Trade Administration, and the International Trade Commission.

Recommendation: The Advisory Committee does not recommend giving the Court of International Trade jurisdiction in Freedom of Information Act cases.

Explanation of Recommendation: Giving the Court of International Trade jurisdiction in Freedom of Information Act cases would not be supported by the principles of jurisdictional clarity, judicial expertise, or jurisdictional comprehensiveness. Many Freedom of Information Act cases relate to personnel matters, rather than the types of disputes over the taxation or regulation of import transactions heard in the Court of International Trade.

S. Federal Maritime Commission Cases

Current Law: The Federal Maritime Commission ("FMC") is an independent commission that oversees common carriers and related maritime issues. Its duties include the monitoring of rates, the ability to make rules and regulations under the Merchant Marine Act of 1920,[69] and the assessment of penalties for violations of the Shipping Act of 1984.[70] The FMC has independent investigative powers triggered on its own initiative or by the filing of a complaint, and it has the authority to impose civil fines. Appeals of final FMC orders and regulations are made to a federal court of appeals.

Recommendation: The Advisory Committee does not recommend giving the Court of International Trade jurisdiction in FMC cases.

Explanation of Recommendation: There is no jurisdictional confusion in present law. Although FMC cases involve judicial review of an administrative agency whose decisions have an "international" or "transnational" application, there is no real overlap with the areas of law currently heard in the Court of International Trade. Since the FMC's administrative procedures are sufficiently formal to support appellate-level review, there

69 46 App. U.S.C. §§ 861-889 (2003).

70 46 App. U.S.C. §§ 1701-1719 (2003). The purposes of the Act include establishing a regulatory process for the transportation of goods by water in the foreign commerce of the United States and providing an "efficient and economic transportation system in the ocean commerce of the United States." *Id.* § 1701.

does not appear to be a genuine need for judicial review in a trial court such as the Court of International Trade. Finally, a preliminary Lexis search of case law shows that, between 1997 and 2000, there were approximately fifteen appellate-level decisions in FMC cases. Transferring these cases to the Court of International Trade would do little to increase the use of judicial resources at the Court.