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STREAMLINING AND EXPANDING THE COURT OF INTERNATIONAL TRADE'S JURISDICTION: SOME MODEST PROPOSALS

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INTRODUCTION

The *Customs Courts Act of 1980*¹ established the United States Court of International Trade (CIT) as the nation's forum for the resolution of disputes arising under the Customs and international trade laws. The CIT received a much broader jurisdictional mandate than its predecessor, the United States Customs Court, reflecting Congress' belief that traditional Customs litigation, which focused on tariff rates, would diminish in importance, and that judicial review of disputes arising under the antidumping and countervailing duty laws would constitute a significant part of the new Court's caseload.

The House Report² accompanying the *Customs Courts Act of 1980* noted that:

The majority of cases before the Customs Court traditionally involve classification and valuation issues.

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¹ Pub. L. 96-417, 96th Cong. 2d Sess., 94 Stat. 1727 (October 10, 1980) (concerning judiciary and judicial review of international trade matters).

² See H. R. REP. NO. 96-1235, 96th Cong., 2d Sess. at 17-18 (discussing the makeup of the Customs Court).

The jurisdictional statutes of the Customs Court were drafted at a time when tariff rates were an essential factor in international trade. Congress was most sensitive to this and was thus primarily concerned with establishing methods for judicial review of administrative determinations pertaining to classification and valuation of imported merchandise. While these statutes did not always recognize the principle of having a decisive impact on the rate of duty ultimately assessed, the overall statutory scheme was constructed to facilitate challenges to classification and valuation determinations.

Multilateral negotiations have led to a significant decrease in tariff duties and **consequently a diminishing importance in classification and valuation cases in the overall spectrum of international trade litigation.** In their place, other measures, such as antidumping and countervailing duty statutes, have assumed a greater importance. [emphasis added].³

Armed with expanded jurisdiction, and wielding the same legal and equitable powers as the Federal District Courts, the CIT has in the past two decades resolved a broad range of legal disputes that would have been far beyond the Customs Court's reach. In addition to hundreds of cases arising under the antidumping and countervailing duty laws, the Court has resolved contests involving facial challenges to the validity of regulations,⁴ the licensing of Customhouse brokers⁵ and other regulated entities,⁶ the pre-importation review of Customs rulings⁷ and the

³ See *American Grape Growers Alliance for Fair Trade v. United States*, 9 Ct. Int'l Trade 568, 569 (1985) (noting that CIT cases once largely consisted of questions involving classification and valuation).

⁴ See *Mast Industries, Inc. v. Regan*, 8 Ct. Int'l Trade 214, 215 (1984) (challenging interim regulations); see also *American Frozen Food Inst. v. United States*, 18 Ct. Int'l Trade 565, 566 (1994) (regarding challenge to Treasury decision 94-5). See generally *M.G. Maher & Co. v. United States*, 2002 Ct. Int'l Trade LEXIS 104, at *3 (Ct. Int'l Trade Aug. 30, 2002) (arguing 19 C.F.R. § 24.24(e) establishing a deadline of December 31, 2001 for filing Harbor Maintenance Tax refund claims is invalid).

⁵ See, e.g., *Lee v. United States*, 196 F. Supp. 2d 1351, 1354 (Ct. Int'l Trade 2002) (regarding revocation of customhouse broker's license for failure to pay penalties); see also *Shiepe v. United States*, 23 Ct. Int'l Trade 66, 68 (1999) (contesting revocation of custom broker's license for failure to file corporate documents).

⁶ See, e.g., *Pillsbury Co. v. United States*, 22 Ct. Int'l Trade 769, 771 (1998) (dealing with revocation of ESP authority and blanket waiver).

⁷ See *Bestfoods v. United States*, 260 F.3d 1320, 1322 (Fed. Cir. 2001) (seeking administrative ruling from the United States Customs Service); see also *Ross Cosmetics Distribution Centers v. United States*, 18 Ct. Int'l Trade 979, 980 (1994) (regarding

constitutionality of Harbor Maintenance Taxes imposed on certain exports.⁸ The CIT has also decided actions brought by the government under 28 U.S.C. § 1582 for the determination or collection of duties, penalties and liquidated damages.⁹ Before 1980, most of these challenges would have fallen within the jurisdiction of the Federal District Courts. In large measure, therefore, the goal of the *Customs Courts Act* to expand and diversify the CIT's supervision over Customs and trade disputes has been fulfilled.

Despite this success, however, the scope of the CIT's jurisdiction remains a matter of considerable dispute. The vagaries of the CIT's jurisdictional reach have bedeviled the Court itself, the Circuit Courts of Appeal, and even the United States Supreme Court.¹⁰ Few courts spend as much time debating the scope of their jurisdiction as does the CIT.

External factors have also changed the nature of the disputes presented to the CIT. Reduced tariffs resulting from multilateral agreements and trade preference programs have limited the number of traditional Customs valuation, classification and drawback issues decided by the Court. Changes in the way the United States Customs Service administers and enforces the customs and trade laws have also affected the way in which some disputes are presented for judicial review.

Finally, despite Congress' intent that the CIT be the exclusive forum for the resolution of customs and trade disputes, some types of cases have escaped the Court's grasp, and continue to be resolved by the Federal District Courts.

A generation has passed since the *Customs Courts Act* entered into force. Despite the Act's obvious successes, it is an

Customs' remand determination). *See generally* *Holford USA Ltd. Inc. v. United States*, 19 Ct. Int'l Trade 1486 (1995) (contesting denial of reconsideration of a ruling by the United States Customs Service).

⁸ *See* *U.S. Shoe Corp. v. United States*, 523 U.S. 360, 363 (1998) (deciding whether or not the tax is permissible); *see also* *Swisher Int'l Inc. v. United States*, 205 F.3d 1358, 1359 (Fed. Cir. 2000) (discussing the harbor Maintenance Tax).

⁹ *See* *Fujitsu Gen. Am. Inc. v. United States*, 110 F. Supp. 2d 1061, 1072 (Ct. Int'l Trade 2000) (explaining that jurisdiction of the CIT was based on 28 U.S.C. § 1582(2) & (3)).

¹⁰ *See* *K-Mart v. Cartier*, 485 U.S. 176, 182 (1988) (determining that the CIT and the Federal District Courts exercised concurrent jurisdiction over challenges to Customs regulations controlling the import of gray market goods given that the CIT has been granted exclusive jurisdiction over the matters described in 28 U.S.C. § 1581); *see also* *Vivitar Corp. v. United States*, 761 F.2d 1552, 1555 (Fed. Cir. 1985) (1986) (challenging judgment of the CIT as a matter of law).

appropriate time to consider whether improvements can be made to clarify the Court's responsibilities, solidify its role as the nation's exclusive arbiter of international trade disputes, improve the efficiency of its procedures, and ensure expanded access to justice. This task will likely not only require changes to the *Customs Courts Act* itself, but also changes to the Customs and trade laws, and the CIT's rules and procedures. This paper considers some of the ways in which the CIT's jurisdiction might be expanded and improved.

I. JUDICIAL REVIEW OF CUSTOMS DECISIONS

The *Customs Courts Act of 1980* greatly expanded the CIT's jurisdictional responsibilities,¹¹ granting the Court exclusive jurisdiction over antidumping and countervailing duty matters, worker adjustment assistance cases, certain licensing matters and a wide range of "residual" matters involving the administration and enforcement of the Customs laws.¹² Congress also provided the Court with limited jurisdiction to review certain pre-importation rulings,¹³ as well as jurisdiction over certain counterclaims, cross-claims and third-party actions.¹⁴

While the CIT's jurisdictional mandate over actions to review Customs' denial of protests remained largely unchanged, the 1980 Act gave the CIT expanded powers to wield in such cases. These included the powers to grant equitable relief,¹⁵ to enter money judgments,¹⁶ and, perhaps most significantly, to order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct

¹¹ See 145 CONG. REC. S13065 (daily ed. Oct. 22, 1999) (noting that Congress has expanded the CIT's powers).

¹² See 28 U.S.C. § 1581(c) (1980) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under § 516A of the Tariff Act of 1930."); 28 U.S.C. § 1581(d) (2003) (stating where the CIT will have power to review in civil matters); 28 U.S.C. § 1581(g) (2003) (explaining that the CIT will have power to review civil actions concerning broker license and discipline cases); 28 U.S.C. § 1581(i) (2003) (providing that the CIT will have exclusive jurisdiction in many other matters).

¹³ See 28 U.S.C. § 1581(h) (1980) (stating that the CIT will have exclusive jurisdiction in civil matters prior to importation of the goods).

¹⁴ See 28 U.S.C. § 1583 (1980) (dealing with counterclaims, cross-claims and third-party actions).

¹⁵ See 28 U.S.C. § 2643(c) (1980) (providing that the CIT may order any form of relief appropriate in civil actions).

¹⁶ See 28 U.S.C. § 2643(a) (1980) (stating that the CIT may enter money judgments).

decision.¹⁷ This latter mandate resulted in the landmark decision in *Jarvis Clark & Co. v. United States*,¹⁸ which effectively ended the infamous dual burden of proof, which had been imposed on importers challenging Customs protest decisions.¹⁹

Following the expansion of the CIT's jurisdictional mandate, and removal of the "dual" burden of proof, 28 U.S.C. § 1581(a) protest cases continued to be staples of the Court's workload throughout the 1980's and early 1990's.²⁰ Statutory amendments and court decisions expanded the relief granted successful plaintiffs in these cases, for example with respect to the payment of interest on Court-ordered duty refunds.²¹ Given the steady growth in the volume of international trade during the past two decades, plus the adoption of a "new" Customs valuation statute in 1980 and the Harmonized Tariff Schedule of the United States in 1988, one might reasonably have expected that Customs protest litigation would continue to account for a significant proportion of the Court's output. Yet in recent years, decisions in "protest" cases have represented a declining portion of the Court's teaching in published opinions.²²

Surely the decline does not reflect a lack of public interest in Customs law matters; importers and other interested parties bombard the Customs Service each year with thousands of

¹⁷ See 28 U.S.C. § 2643(b) (1980) (explaining that the court may do things necessary to reach a correct decision).

¹⁸ 733 F.2d 873, 874 (Fed. Cir. 1984) (holding that the CIT is required to decide the correctness of importer's proposed classification and the government's classification).

¹⁹ See, e.g., *W.T. Grant & Co. v. United States*, 38 C.C.P.A. 57, 60 (1950) (noting that the importer challenging a Customs' decision had the burden to prove the decision wrong by overcoming the statutory presumption of correctness and establish that its own proffered alternative was correct).

²⁰ See, e.g., *Innotech Aviation v. United States*, 21 Ct. Int'l Trade 1392, 1400 (1997) (regarding a protest after removal of the dual burden of proof).

²¹ See 19 U.S.C. § 1505(b) & (c) (describing policies with respect to collection or refund of duties, fees and interest due upon liquidation and interest); see also *Travenol Laboratories, Inc. v. United States*, 118 F.3d 749, 751 (Fed. Cir. 1997) (applying 19 U.S.C. § 1505(c) as amended).

²² Of course, many 28 U.S.C. § 1581(a) actions are disposed of through the entry of *Stipulated Judgments on Agreed Statements of Fact*, pursuant to Court of International Trade Rule 58.1. When these dispositions are taken into account, the fact is that § 1581(a) cases continue to account for the majority of the Court's dispositions, viewed in absolute number terms. But many *Stipulated Judgments* are entered in "suspended" cases, which involve the same issues of law, and/or facts, which were decided in designated "test cases." See U.S. Ct. Int'l Trade R.84. Where *Stipulated Judgments* are entered in cases other than "suspended" cases, they usually represent a settlement agreed on by the parties, rather than judicial decision-making.

requests for interpretative rulings on Customs law issues.²³ Nor does the decline reflect universal satisfaction with Customs' administrative rulings, for a high proportion of such rulings are adverse to the requester and result in, or from, administrative protests against Customs decisions. For several reasons, however, importers are apparently unwilling to carry their battles with Customs through the courthouse door.

Accordingly, one area deserving of consideration is how the CIT's governing statutes and rules might be changed to make judicial review of Customs determinations more widely available and economical to the trading public.

A. *Factors Limiting Customs Litigation*

Despite the expansion of import trade, several "environmental" factors have limited the apparent willingness of traders to pursue claims before the Court of International Trade. In reviewing these factors, it is fair to ask whether these changes mean that Customs issues have become less important and therefore less deserving of judicial review, or whether judicial review procedures should be changed to accommodate the new realities of import trade.

1. Lower Duty Rates

As Congress noted in 1980, multilateral trade negotiations – at that time, the "Tokyo Round" – had resulted in lower duty rates, and an expected diminution in the importance of classification and valuation cases before the CIT.²⁴ The past two decades have seen further dramatic reductions in tariff rates resulting from the "Uruguay Round" multilateral negotiations, concluded in 1994, and from the United States' adoption of numerous multilateral, bilateral and unilateral tariff elimination programs,

²³ In an *amicus curiae* brief filed with the United States Supreme Court in *United States v. Mead Corporation*, the Customs and International Trade Bar Association noted that, during the 12 month period from July 1998 to June 1999, the Customs Service issued some 12,557 rulings, 1,328 emanating from Customs Headquarters, and the balance issued by the agency's field offices, including 10,986 classification rulings. See Brief of Amicus Curiae the Customs and International Trade Bar Association at 6, *United States v. Mead Corporation*, 533 U.S. 218, 224 (2001) (No. 99-1434).

²⁴ See generally D.M. McRae and J.C. Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 A.J.I.L. 51, 73 (1983) (discussing the Tokyo Round as a multilateral treaty which gained tariff compromises).

including the North American Free Trade Agreement (NAFTA), the United States-Israel Free Trade Agreement (IFTA), the Caribbean Basin Economic Recovery Act (CBERA), the Andean Trade Preference Act (ATPA), the African Growth and Opportunity Act (AGOA), the Information Technology Agreement (ITA) and several others.²⁵ While there has been some litigation concerning whether particular goods satisfy the requirements of trade preference statutes, the overall reduction or elimination of tariffs on many goods necessarily means that tariff classification and valuation issues have waned in overall importance.²⁶ Stated simply, there are fewer “big money” Customs law issues which importers are willing to litigate—given the cost and nature of modern Customs litigation.

Any businessperson considering litigation must weigh the benefits of seeking judicial vindication of his or her rights against the costs of seeking such vindication. In this regard, “protest case” litigation before the CIT has arguably become unnecessarily complex and expensive—at least for some types of actions.

The strict time limits governing the CIT's jurisdiction mean that litigants must often file multiple lawsuits in order to secure complete relief. Administrative protests must be filed within ninety (90) days after Customs' liquidation or reliquidation of an import entry, denial of a drawback claim, or other “protestable” decision;²⁷ the litigant must file a Summons with the CIT within 180 days of the mailing of notice of denial of its protest.²⁸ Both statutory deadlines must ordinarily be satisfied before the CIT may exercise jurisdiction over the importer's protest action.²⁹

²⁵ See generally David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ.J. INT'L & COMP. LAW 7, 17-18 (1995) (providing a detailed discussion with respect to US customs and tariff laws).

²⁶ Certainly, issues that might be relevant in other Customs law contexts have lost importance in 28 U.S.C. § 1581(a) “protest” actions. Thus, for example, in *3V, Inc. v. United States*, 83 F.Supp. 2d 1351, 1353 (Ct. Int'l Trade 1999) the Court dismissed as moot a protest action that sought a judicial determination concerning which of two duty-free tariff provisions most accurately classified an imported product. See *id.* The Court ruled that the lack of a Constitutionally justiciable controversy as to which specific relief could be granted rendered the action subject to dismissal, notwithstanding that the proper classification of the merchandise at bar was the subject of a parallel Customs penalty proceeding. See *id.* at 1355.

²⁷ See 19 U.S.C. § 1514 (2003) (listing protest filing guidelines).

²⁸ See 28 U.S.C. § 2636(a)(1) (1980) (noting that without compliance an action contesting denial will be barred).

²⁹ See 28 U.S.C. § 2637(d) (1980). The CIT may waive the exhaustion of

Where an importer enters merchandise over a long period of time, or at many different ports of entry, it often must file multiple actions in the CIT in order to preserve its right to complete relief, even though the importer may only wish to litigate a single issue common to all such actions.³⁰ The filing of multiple lawsuits results in multiple filing fees, as well as costs and delays attendant in the resulting calendar and motion practice (for example, designating “test cases” pursuant to Court of International Trade Rule 84 and “suspending” actions thereunder, consolidating actions, filing motions to extend a case’s time on the Court’s Rule 83 Reserve Calendar, and seeking miscellaneous stays and extensions of time).

Costs incurred in litigating a protest case before the Court can be quite substantial. Even a simple tariff classification case can engender extensive documentary discovery, interrogatories, lay and expert depositions and other pretrial activities. This is often the case, regardless of whether a case is tried or submitted for decision on a motion for summary judgment or other dispositive motion. Pretrial discovery can be extensive and expensive even in tariff classification cases where the only question presented involves the “common meaning” of a tariff term – a matter which is presumed to be within the understanding of the Court,³¹ and

administrative remedies where appropriate, but has generally done this only where the plaintiff has demonstrated that requiring exhaustion of such remedies would be futile or inappropriate. *See* *Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998). However, the Court has consistently ruled that the time limits in protest cases are jurisdictional, and not subject to waiver or extension, so an importer who has failed to meet either of the deadlines is unsuited. *See id.*

³⁰ Importers can attempt to avoid duplicative lawsuits by asking Customs officials at ports of entry to withhold action on protests pending the CIT’s resolution of a legal issue. Customs officials may withhold action, but are under no obligation to do so. Even if an importer prevails before the CIT or the Court of Appeals for the Federal Circuit, Customs officials may delay for years before disposing of protests in accordance with the court’s decision. By contrast, where duty refunds are mandated by a court judgment, Customs officials are under a duty to implement the judgment promptly, or risk sanctions for contempt of court. *See, e.g., D&M Watch Corp. v. United States*, 795 F. Supp. 1160, 1172 (Ct. Int’l Trade 1992).

Where a protest involves certain issues which do not result from the statutory liquidation of an import entry (for example, the denial of a claim for drawback), an importer who asks Customs to delay action on protests pending the outcome of a pending lawsuit may thereby sacrifice its right to receive interest on refunds pursuant to 28 U.S.C. § 2644. *See, e.g., Hartog Foods Int’l Inc. v. United States*, 291 F.3d 789 (Fed. Cir. 2002) (finding that the statutory provision for drawback refunds, however, did not transform properly paid duties and fees into excessive monies subject to interest awards); *Novacor Chemicals Inc. v. United States*, 171 F.2d 1376 (Fed. Cir. 1999) (statutory interest under 19 U.S.C. § 1505(c) not available on drawback refunds).

³¹ The “common meaning” of a tariff term is always presumed to be a matter within

as to which the plaintiff challenging Customs' decision bears no burden of proof.³² In such cases, there is little more to do than identify the merchandise at issue before the Court, and advance purely legal arguments in aid of the Court's determination. However, the CIT's discovery rules make no distinctions between cases based on the issues involved, so parties often incur great expense in pretrial activities before even simple questions are submitted for judicial decision.

The sheer volume of ruling requests submitted to the Customs Service each year furnishes ample evidence that importers and others have a keen interest in resolving Customs law issues of interest to their companies. There is also evidence, however, that CIT procedures are perceived as cumbersome, and dissuade companies with legitimate grievances from seeking judicial review. Whether the Court can adopt streamlined procedures for the litigation of modern protest actions, without compromising litigants' rights, is a matter deserving of serious consideration.

2. Changes in Customs Practices: Post Liquidation Duty Collections

In the decades since the *Customs Courts Act of 1980* was enacted, the United States Customs Service has implemented dramatic changes in the way it carries out its duty-collection mandate. Substantial sums of contested duties are now collected outside of the traditional "liquidation and protest" procedures that provide the jurisdictional predicate for 28 U.S.C. § 1581(a) actions. Existing procedures for judicial review of Customs decisions do not account for the changes in the agency's practices.

At the time the *Customs Courts Act of 1980* came into being – and for over a century before – Customs entries were individually and actively reviewed by import specialists, appraisers, or other agency personnel, who made decisions regarding the classification, appraised value and admissibility of merchandise *before* liquidating the entry. The rule of "finality of liquidation"

judicial knowledge, although the Court may consult dictionaries, treatises and other references to aid its understanding, and may also seek advisory testimony. *See, e.g., Brookside Veneers, Inc. v. United States*, 847 F.2d 786, 788-89 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 943 (1988).

³² *See Universal Electronics, Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) (discussing burden of proof issues).

was well entrenched in Customs law. Absent actual fraud by the importer,³³ an entry was considered to be final as to both Customs and the importer, unless, within 90 days after liquidation, (1) Customs reliquidated the entry pursuant to 19 U.S.C. § 1501, or (2) the importer filed a protest pursuant to 19 U.S.C. § 1514.³⁴ The prospect of a truly “final” liquidation forced Customs officials to carefully scrutinize entries, and to identify all possible issues at the time of liquidation or reliquidation. The importer then had an opportunity to confront these issues by filing a timely protest, with assurance that it had protected its rights and embarked upon a well-established path to judicial review of Customs’ decision.

Beginning in the early 1980’s, however, Customs concluded that it lacked sufficient personnel to conduct entry-by-entry review of the dramatically expanding volume of import entries. Given workload problems, and a new statutory mandate to liquidate entries within fixed time limits,³⁵ Customs implemented a policy known variously as “automatic bypass” of liquidation, or “entry selectivity.”³⁶ Today, Customs allows the vast majority of import entries to liquidate “as entered” by the importer, without any active consideration by agency personnel.³⁷ To ensure importer compliance with applicable laws and regulations, Customs has increasingly relied on post-entry audits of importers, which are usually conducted long after the entry had been liquidated and made “final.”

However, the notion that liquidated entries are “final” as to the government after 90 days has long been laid to rest by § 592(d) of the Tariff Act of 1930,³⁸ as added by the *Customs Procedural*

³³ See 19 U.S.C. §1521 (1993) (repealed Dec. 1993). Even in cases where Customs asserted that the importer had committed actual fraud, the statutory remedy was a reliquidation of the entry, against which the importer could lodge a protest. In actions arising from such protests, Customs bore the initial burden of proving that actual fraud had occurred; the burden of establishing the correct classification, value, etc., rested with the importer. See, e.g., *A.N. Deringer, Inc. v. United States*, 59 Cust. Ct. 148, 149 (1967).

³⁴ See 19 U.S.C. § 1514(c)(3) (1999) (setting forth protest filing procedures).

³⁵ See 19 U.S.C. § 1504(d) (1996), as added by the *Customs Procedural Reform and Simplification Act of 1978* (providing six-month timeframe for liquidation of entries).

³⁶ See generally David M. Cohen, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Area Summary: International Trade Decisions of the United States Court of Appeals for the Federal Circuit During 1989*, 39 AM.U.L.REV. 1211, 1228-29 (1990) (noting the one year time frame within which Customs must work).

³⁷ See *id.* (explaining the circumstances under which the standard timeframe may be expanded).

³⁸ 19 U.S.C. § 1592(d) (2003) provides as follows:

*Reform and Simplification Act of 1978.*³⁹ § 1592(d) permits Customs officials to require the restoration of “lawful duties, taxes or fees” in cases where the agency determines that an importer or other person has failed to pay these charges as a result of a violation of the Customs laws.⁴⁰ Customs is empowered to demand the restoration of such “lawful duties” regardless of whether the claimed violation of law resulted from simple negligence, gross negligence or intentional fraud, and regardless of whether a monetary penalty was imposed for the violation.⁴¹ Initially, the courts ruled that there was no statute of limitations on an action by Customs to collect 19 U.S.C. § 1592(d) “withheld duties” from an importer; subsequently, Congress amended the Tariff Act to provide that such actions were subject to the same statute of limitations – five (5) years or longer – for actions by Customs to collect civil penalties.⁴²

Not surprisingly, § 1592(d) has become one of Customs’ most powerful tools for exacting duties from importers. In many cases, the agency’s mere threat to employ the statute has been used to coerce monies from importers who might otherwise rely on the statutory finality of liquidation. The path by which an importer may seek judicial review and recovery of monies paid pursuant to § 1592(d) is unclear; indeed, the Government asserts that no such path exists. Customs’ increasing reliance on post-liquidation duty demands, coupled with the lack of a clear path for importers to seek review of those demands, has prevented legitimate Customs law disputes from being presented to the CIT for resolution.

While 19 U.S.C. § 1592(d) states that the Customs Service “shall require”⁴³ the restoration of duties, taxes or fees, the law is

(d) Deprivation of lawful duties, taxes or fees

Notwithstanding § 514 of this title, if the United States has been deprived of lawful duties, taxes or fees as a result of a violation of sub§ (a) of this §, the Customs Service shall require that such lawful duties, taxes or fees be restored, whether or not a monetary penalty is assessed.

³⁹ See Pub L. 95-410, 95th Cong., 2d. Sess., 92 Stat. 888.

⁴⁰ See *id.* (transcribing the text of statute).

⁴¹ See Kenneth G. Weigel, *Significant New Developments Every Business Lawyer Should Know About Customs Law*, 27 INT’L LAW. 177, 187 (1993) (stating Customs may require that lawful duties be restored, regardless of whether a monetary penalty had been imposed).

⁴² See 19 U.S.C. § 1621 (2003) (imposing a statute of limitations of five years, except in the case of forfeiture where an action must be initiated within two years).

⁴³ See 19 U.S.C. § 1592(d) (2003) (stating that restoration is required “whether or not a monetary penalty is assessed”).

silent concerning how Customs should do this. The first words of the subsection make clear that Customs should require restoration “[n]otwithstanding § 1514 of this title”⁴⁴ This reference, plus the establishment of a five (5) year statute of limitations for actions to recover § 1592(d) monies, makes clear that the “finality of liquidation” of an entry will not bar the making or enforcement of a demand under § 1592(d).⁴⁵ Customs might have interpreted the mandate of § 1592(d) as requiring a new “liquidation” of the affected entries, which would presumably have permitted the importer to lodge a protest against the demand.⁴⁶ Customs did not so interpret the law, however, and its regulations merely provide that the appropriate Customs “field officer” will require the “deposit” of such duties with Customs, whether or not a monetary penalty is assessed.⁴⁷

Armed with 19 U.S.C. § 1592(d), Customs auditors and other officials have not hesitated to demand or suggest that importers pay contested duties long after entries have been liquidated and presumably made “final.” Customs personnel routinely suggest that if payment of such duties is not made voluntarily, the agency will bring a formal demand for restoration under 19 U.S.C. § 1592(d) - and that such demand will be coupled with a

⁴⁴ 19 U.S.C. § 1592(d) (2003).

⁴⁵ See Robert T. Givens & Rayburn Berry, *United States Customs Law Affecting the Movement Of Goods Into and Out of Mexico*, 23 ST. MARY'S L.J. 773, 907-08 (1993) (stating that the remedy under § 1592 voids the finality of liquidation under § 1514).

⁴⁶ In this regard, it is noteworthy that, while Customs' power to “liquidate” an entry derives from 19 U.S.C. § 1500 (directing the Customs Service to appraise, classify and determinate the rate and amount of duty applicable to entered merchandise, and then “liquidate the entry and reconciliation, if any, of such merchandise”), 19 U.S.C. § 1514 operates primarily as a *limitation* on the *finality* of the liquidation decision. The statement in 19 U.S.C. § 1592(d) that Customs' power to require restoration of monies operates “notwithstanding § 1514” could fairly be read as an exception to the “finality” of previous liquidations, and not as a direction to Customs to make an assessment of duty without regarding to the 19 U.S.C. § 1500 “liquidation” mechanism.

⁴⁷ See 19 C.F.R. § 162.79b, which provides in pertinent part that:

162.79b. Recovery of actual loss of duties, taxes or fees or actual loss of revenue

Whether or not a monetary penalty is assessed under this subpart, the appropriate Customs field officer will require the deposit of any actual loss of duties, taxes or fees resulting from a violation of § 592, Tariff Act of 1930, as amended or any actual loss of revenue resulting from a violation of § 593A, Tariff Act of 1930, as amended, notwithstanding that the liquidation of the entry to which the loss is attributable has become final.

The demand is communicated to the importer by written notice from the Customs field officer. See *id.* The regulation further provides that “Any determination of actual loss of duties, taxes or fees or actual loss of revenue under this § is subject to review upon written application to the Commissioner of Customs” but no mechanism is specified for contesting the Commissioner's determination. See *id.*

demand for monetary penalties equal to a multiple of the duties demanded.

Customs law practitioners are well aware of the delicate, and sometimes elaborate, negotiations, which often follow the conclusion of Customs audits and investigations, in which Customs officials recommend that importers pay “withheld duties” on entries which have long been liquidated and made final under 19 U.S.C. § 1514.⁴⁸ Given the current state of the law, they must necessarily counsel their clients that:

(1) payments to Customs which are determined to be “voluntary” will likely not be protestable, or recoverable in Court;

(2) there are no reported appellate decisions in which a demand for duties under § 1592(d) has been ruled to be a protestable “exaction⁴⁹,”

(3) the issuance of a formal § 1592(d) demand will likely be coupled with a demand for § 1592(a) penalties; and

(4) the only certain way to seek judicial review of a § 1592(d) demand is to refuse payment and be sued in the CIT as a defendant in a 28 U.S.C. § 1582 action to recover the duties (and often face a claim for penalties as well).⁵⁰

Not surprisingly, faced with such circumstances, importers often acquiesce in Customs’ post-liquidation duty demand, even where their positions are meritorious, and would have been raised by protest had Customs demanded the monies during the liquidation process.

The threat of substantial 19 U.S.C. § 1592(a) penalties also

⁴⁸ See generally *Investigations: Making The Right Moves*, 144 N.J.L.J. 1126 (1996) (suggesting that importers undertake affirmative duties, including internal audits and hire customs law experts to investigate the propriety of their actions).

⁴⁹ Recently, however, in *Brother Int’l Corp. v. United States*, 246 F. Supp. 2d 1318 (Ct. Int’l Trade 2003), the Court held that an importer could protest a Customs demand for withheld duties, in order to contest the agency’s failure to allow a claim for an offset with respect to the amount of duties due. The Court concluded that since the payment was not made voluntarily, and was not made as part of a settlement of Customs penalty demands, it constituted a protestable exaction. As of this writing, no final judgment has been rendered in this case, and it remains to be seen whether the government will appeal from the Court’s decision to allow the protest.

⁵⁰ See 19 U.S.C. 1514 (2003) (outlining the process for protesting decisions by the Customs Service).

motivates many importers to make "prior disclosures" to Customs of possible violations of the Customs laws involving entries which are liquidated and otherwise final, using the procedures set out in 19 U.S.C. § 1592(c)(4). A "prior disclosure" reduces or eliminates the importer's potential liability for monetary penalties.⁵¹ However, Customs' regulations require that the person making such disclosure tender any "withheld duties" as a condition of receiving "prior disclosure" treatment.⁵² Where a party seeking to make a "prior disclosure" is unsure whether its conduct constitutes a violation of law, or whether duties are due as a result of its violation, the law provides no clear path for the disclosing party to seek judicial review.

Although Customs' post-liquidation duty demands have increased markedly since the *Customs Courts Act of 1980* was enacted, the courts have not articulated a clear path whereby importers can bring suit to contest these demands. On several occasions, the Court has held that, when an importer voluntarily tenders duties for "finally liquidated" entries to Customs during an investigation, whether or not in connection with a "prior disclosure," such voluntary payment may not be protested, and the importer may not commence an action in the CIT to recover the payment.⁵³

⁵¹ See Lynn S. Baker & 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, 758 n.176 (1995) (stating that a prior disclosure encourages the reporting of violations to Customs where penalties are imposed).

⁵² See 19 C.F.R. § 162.74(c) (1984). The CIT has confirmed that, where an importer fails or refuses to deposit 19 U.S.C. § 1592(d) "withheld duties" with Customs, it may be denied the benefits of "prior disclosure" under 19 U.S.C. § 1592(c)(4). See *Pentax Corp. v. Robison*, 924 F. Supp. 193 (Ct. Int'l Trade 1996), *rev'd on other grounds*, 125 F.3d 1457 (Fed. Cir. 1997).

⁵³ See, e.g., *Tikal Distributing Corp. v. United States*, 970 F. Supp. 1056 (Ct. Int'l Trade 1997); *Shiepe v. United States*, 866 F. Supp. 1430 (Ct. Int'l Trade 1994); *Miami Free Zone Corp. v. United States*, 17 CIT 687 (1993); *Halperin Shipping Co., Inc. v. United States*, 14 Ct. Int'l Trade 438 (1990); *ITT Semiconductors v. United States*, 6 Ct. Int'l Trade 231, 236-38 (1983); *Carlingswitch v. United States*, 500 F. Supp. 223, 227 (Cust. Ct. 1980), *aff'd*, 651 F.2d 768 (C.C.P.A. 1981).

In *Tikal*, the Court suggested that if "withheld duties" were tendered under conditions where the tender was clearly involuntary, the Customs demand for payment might constitute a protestable "exaction." However, no reported decision has in fact found a 19 U.S.C. § 1592(d) demand to be such an exaction, leaving importers unsure of whether, and when, they might deposit such monies with Customs and proceed to the CIT with a reasonable confidence that their lawsuit seeking a refund of the deposited monies would be entertained.

While there is one reported decision of the CIT which suggests that a plaintiff invoked the Court's 28 U.S.C. § 1581(i) jurisdiction by protesting a demand for monies made at the

Judicial frustration over the lack of importer-initiated remedies to challenge post-liquidation Customs demands was evident in *Bridalane Fashions, Inc. v. United States*,⁵⁴ a case in which an importer was asked to deposit withheld duties as a condition of receiving “prior disclosure” treatment for marking violations.⁵⁵ The importer did not believe that the duties demanded were subject to a demand for restoration under 19 U.S.C. § 1592(d), but feared that, if it “voluntarily” deposited the monies with Customs, it would lose the right to initiate a lawsuit to seek their recovery. The importer then invoked the CIT’s 28 U.S.C. § 1581(i) residual jurisdiction, seeking to deposit the disputed monies with the Court pending resolution of the underlying legal issue. The *Bridalane Court* admitted this was a valid concern (“... it also remains a possibility that if the duties were received by Customs, 28 U.S.C. § 1581(a) jurisdiction [to hear a protest against an exaction of monies] were not available, and Customs were found to be wrong in requiring the duties, they could not be recovered”),⁵⁶ and asserted jurisdiction over the case. The Court noted that the issue of whether and how it could assume jurisdiction over challenges to post-liquidation duty assessments was in “considerable turmoil,” and attributed this difficulty in part to “Customs’ lack of clear regulatory procedures and timetables for protesting post-disclosure exactions of duties under 19 U.S.C. § 1592.”⁵⁷ The *Bridalane* court’s criticism would be equally valid if applied to all Customs post-liquidation duty demands, whether or not a “prior disclosure” is involved.

conclusion of a Customs audit, [*Princess Cruises, Inc. v. United States*, 22 Ct. Int’l Trade 498 (1998), *rev’d on other grounds* 201 F.3d 1361 (Fed. Cir. 2000)], the basis for the Court’s assertion of jurisdiction in the case was not articulated clearly enough to provide a blueprint for potential litigants. Moreover, the sums demanded in that case [Harbor Maintenance Tax and fees on passenger carriage] are not of the kind covered by 19 U.S.C. § 1500 entry liquidations, so the case furnishes little guidance for firms concerned with import duties. *See id.* at 500.

⁵⁴ 32 F.Supp.2d 466 (1998). In this case, plaintiff imported wedding gowns into the US, which he had designated were made in Canada. *See id.* at 467. Plaintiff took advantage of reduced duty rates under NAFTA, but the gowns had in fact been made in the Far East. *See id.*

⁵⁵ *See United States v. Yuchius Morality Co., Ltd.*, 2002 Ct. Int’l Trade LEXIS 123, at *29 (citing *Bridalane* for the proposition that it is unclear whether the law supports defendant Yuchius’ position that by paying a duty amount which it believed was greater than owed, refusal by the IRS to later offer a refund would not have been protestable).

⁵⁶ *Bridalane Fashions, Inc.*, 32 F.Supp.2d at 471 (asserting that Congress conferred jurisdiction upon the court by either 28 U.S.C. § 1581(i) or § 1581(a)).

⁵⁷ *Id.* at 470 (stating that deciding issues of prior disclosure and recovery of duties are at the heart of the court’s jurisdictional powers).

More than two decades after the *Customs Courts Act of 1980*, therefore, the only certain way for an importer to secure judicial review of Customs post-liquidation duty demands is to defend an action by Customs seeking recovery of the contested duties in an action falling under the CIT's 28 U.S.C. § 1582 jurisdiction.⁵⁸ Since a Customs lawsuit seeking restoration of withheld duties will typically be coupled with a demand for much greater monetary penalties, importers will frequently feel compelled to accede to the government's "withheld duty" demands, rather than expose themselves to potential additional liability for penalties, and costs of litigating penalty-related issues of culpability.

Since many of the issues underlying post-liquidation duty demands are representative of those which might otherwise be raised by protest – the classification or appraised value of merchandise, for example – the lack of a clear path to judicial review of post-liquidation duty demands limits the number of instances where the CIT is called upon to consider Customs law disputes. Moreover, since these post-liquidation disputes may involve several years' worth of import transactions, they often represent the Customs disputes where the economic stakes are highest.

3. Judicial Deference to Agency Regulations and Rulings

Recent decades have brought a sharp increase in the issuance of Customs interpretative regulations, as well as published Customs Service rulings interpreting and administering the Customs laws. These trends have significantly changed the way in which Customs disputes wind their way to the CIT. The United States Supreme Court's decisions in *United States v. Haggart Apparel, Inc.*,⁵⁹ and *United States v. Mead Corporation*,⁶⁰ obligating the courts to accord deference to these administrative pronouncements, may dissuade importers from pursuing judicial review of Customs issues in the future.

⁵⁸ The Courts have at least suggested that, in 28 U.S.C. § 1582 actions to recover penalties and withheld duties; importers can raise claims of "offset" with respect to the specific entries covered by the government's complaint. See *United States v. Menard, Inc.*, 64 F.3d 678 (Fed. Cir. 1995).

⁵⁹ 526 U.S. 380, 391 (1999) (stating that courts can give these regulations deference without impairing the court's authority to decide questions of fact).

⁶⁰ 533 U.S. 218, 227 (2001) (stating that when Congress delegates authority to an agency, its regulations generally bind the courts).

Before the 1970's, a high proportion of Customs issues presented to the courts emanated directly from ports of entry, following the denial of importers' protests. Customs Headquarters review of protested issues was limited to selected cases, and was largely invisible from the courts' perspective. While Customs decisions were presumed to be correct, this presumption carried little evidentiary weight, and the Courts did not accord any deference to the agency's legal views, whether those views were recorded in regulations or administrative rulings. The CIT and Federal Circuit were viewed by the importing public as having an expertise in Customs matters at least equal to that of the agency. As a result of the *Haggar* decision and, to a lesser extent, the *Mead* case, the importing public now perceives that the Court's expertise has in some way been subordinated to the will of Customs.⁶¹

In *Haggar*, the Supreme Court ruled that, despite their specialized focus and presumed expertise, the customs courts (the CIT and the Federal Circuit) were required to defer to Customs' interpretative regulations. The degree of deference was that specified in *Chevron USA Inc. v. National Resources Defense Council*,⁶² which requires a reviewing court to defer to an agency interpretation so long as it is "reasonable," and does not conflict with the clearly expressed intent of Congress. This requirement of deference has provoked angry criticism from at least one judge of the CIT.⁶³ It undoubtedly weakens the value of the CIT's expertise in Customs matters and arguably diminishes the need for a specialized Federal Court to handle Customs matters. Importers are keenly aware that the *Haggar* decision may limit their chances of prevailing before the CIT in cases where Customs has elected to codify its interpretation of law in a regulation.⁶⁴

⁶¹ See Donna M. Lach, *The Gray Market and the Customs Regulation - Is the Controversy Really Over After K-Mart Corp v. Cartier, Inc.?*, 65 CHI.-KENT L. REV. 221, 246 (1989) (stating that Customs has received criticism because of their lack of expertise in antitrust law).

⁶² 467 U.S. 837 (1984).

⁶³ See *Levi Strauss & Co. v. United States*, 133 F. Supp. 2d 693, 694 (Ct. Int'l. Trade 2001) ("Thus an agency employee, who may have little or no background in the law, is now both the enforcer and interpreter of the law.").

⁶⁴ See *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1348 (Fed. Cir. 2001) (rejecting the importer's argument and affirming the Court of International Trade's holding that a dumping margin rate calculation should reflect use of a single importer or multiple importers).

The more recent Supreme Court decision in *Mead* could also dissuade importers from initiating Customs litigation in the CIT. In *Mead*, the Supreme Court declined to accord *Chevron*-type deference to Customs interpretative rulings, but held that such rulings should be accorded judicial “respect” under the doctrine of *Skidmore v. Swift & Co.*⁶⁵ [courts should accord agency interpretations “respect...but only to the extent those interpretations have the ‘power to persuade’”].⁶⁶ This lesser degree of deference does not measurably diminish the CIT’s scope or standard of review – it merely articulates the unexceptional rule that a persuasive interpretation by an agency (or any other litigant) should receive careful judicial consideration. Still, because importers make such extensive use of Customs’ “rulings” program, the fact that the Supreme Court has required *any* deference to agency rulings may lead importers to believe that it will be difficult to convince courts to reach different conclusions.

It is perhaps too early to say whether the *Haggar* and *Mead* rulings will have a quantifiable impact on the number of 28 U.S.C. § 1581(a) actions filed in the CIT. However, the importing public’s perception is that the decisions will diminish the courts’ power to overturn Customs protest decisions, and may dissuade importers from turning to the courts for assistance.

B. Reforming and Expanding Judicial Review of Customs Service Decisions

In some ways, the regulatory framework established by the *Tariff Act of 1930* and the jurisdictional scheme set out by the *Customs Courts Act of 1980* no longer reflect how many Customs law controversies develop today. A generation after the 1980 Act “modernized” the practice of Customs law, it is fair to ask how laws and court rules might be amended to promote the more widespread and efficient litigation of Customs cases.

Some of the suggestions set out herein would require Congress to amend the laws governing the activities of the Customs authorities and the courts; other changes might be implemented

⁶⁵ 323 U.S. 134 (1944).

⁶⁶ *See id.* at 140 (explaining that the power to persuade depends on the “thoroughness evident in its consideration, the validity of its reasoning [and] its consistency with earlier and later pronouncements”).

by regulation, or by changes to court rules. Obviously, there are several alternatives which might achieve broader access to judicial review of Customs matters; the observations and proposals set out below are intended solely as a starting point, to stimulate discussion among the bench, bar and international trading community.

1. Simplified Procedures for Certain Customs Litigation

Lower duty rates, coupled with the need for importers to file repetitive actions in order to litigate Customs issues, have reduced the number of instances where it is cost-effective to litigate these issues before the Court of International Trade. Absent negotiated settlements, however, the CIT's rules currently recognize a single form of action in Customs cases, and require that these cases be tried, or submitted for decision upon a dispositive motion (typically a Rule 56 *Motion for Summary Judgment*). Either way, plaintiffs must usually conduct lengthy and expensive discovery before framing a Customs case for judicial determination, following strict rules of evidence.

In years past, recommendations have surfaced for the establishment of a CIT "Small Claims" part, using simplified procedures, to handle certain Customs cases. These recommendations have generally been rejected, typically on the ground that a given case involving a small amount of duties might involve an issue having a greater nationwide impact. This rationale, however, hardly seems applicable to classification cases, where CIT decisions have no *res judicata* effect, even on subsequent cases involving the same issues and identical merchandise.⁶⁷ Moreover, the government routinely settles cases pursuant to Rule 58.1-*Stipulated Judgments on Agreed Statements of Fact*, which are available for public inspection, but which have no precedential value.

It is not suggested here that the CIT establish a "Small Claims" part. However, the Court should give serious consideration to amending its Rules to provide litigants with an option of submitting protested Customs matters, particularly

⁶⁷ See, e.g., *United States v. Stone & Downer, Inc.*, 274 U.S. 225, 233-34 (1927) (noting that fact finding and issue adjudication by the Court of Customs Appeals are not *res judicata* on subsequent importation disputes with identical facts and similar issues).

classification cases, for decision on the basis of simplified procedures – featuring limited discovery, and informal, on the record hearings in lieu of trials, for example. Litigants submitting their cases for decision under such procedures would stipulate that the decisions rendered therein would affect only the specific transactions covered thereby, and would have no *stare decisis* or other precedential value. Litigants would also waive their right to appeal from the decision rendered under such procedures—either absolutely, or for all issues except purely legal ones.⁶⁸

Most other countries that provide specialized judicial review of Customs determinations do not provide for a full-blown trial of such issues in the first instance. In Canada, for example, the *Canadian International Trade Tribunal (CITT)*, a quasi-judicial body, decides a wide range of classification, appraisement and other Customs appeals on the basis of information developed in hearings which are not trial-type hearings, and which are not conducted according to strict rules of evidence. The CITT's decisions may be appealed to Canada's Federal Courts, which apply a sliding scale of deference in reviewing the Tribunal's determinations. In The Netherlands, Customs appeals were formerly lodged with the *Tariff Commission*, a specialized tax court, which did not require the parties to follow strict rules of evidence in presenting their cases. While the *Tariff Commission* has recently been integrated into the High Court of Amsterdam (Customs Chamber), the Court still uses relatively informal procedures to review Customs matters.⁶⁹ In England, Customs determinations are first appealed to *VAT and Duties Appeals Tribunals*, which conduct quasi-judicial inquiries before rendering decisions (which may be appealed in national courts). In India, Customs matters are decided by the specialized

⁶⁸ Due to *de novo* determination of legal issues in the Federal Circuit, the absence of a fully developed factual record is less likely to impede appellate review of such issues. *But see* Berkley v. United States, 287 F.3d 1076, 1092 (Fed. Cir. 2002) (Dyk, J. dissenting) (reiterating that less developed factual records may lead to sweeping decisions by the courts).

⁶⁹ Of course, in the European Union, national courts may refer specific issues in Customs cases for decision by the European Court of Justice in Luxembourg. *See* Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 AM. J. COMP. L. 421, 431 (1996) (explaining a customs conflict in French national court that was sent to the European Court of Justice for resolution).

Customs, Excise and Gold Appeals Tribunal (CEGAT), whose procedures are neither as formalized nor as detailed as trial procedures in the CIT.

Establishment of a quasi-judicial body to hear Customs cases would of course require Congressional action. However, there are no apparent barriers that would prevent the CIT from amending its rules to adopt optional procedures for the resolution of Customs cases in simplified proceedings. Such procedures could standardize and limit discovery in Customs cases, and provide for less formal hearings to educate the Court regarding the nature of the merchandise or transactions at issue. The Court's decisions in cases submitted for decision on simplified procedures would be made available to the public, but would have no *res judicata* or *stare decisis* effect and would not be citable as precedent. It is likely that the majority of tariff classification actions, for example, would be susceptible to decision using simplified procedures.

Litigants would be free to pursue full-scale litigation in Customs cases in lieu of using simplified procedures, but the Court's rules could impose fee-shifting to parties who unsuccessfully pursue such litigation, at least to the extent discovery and other procedures in full-scale litigation exceed those provided under "simplified" procedural rules.

The short statutes of limitations in Customs cases also engender substantial motion and calendar practice, which drain the resources of the Court. The need for importers to file repetitive lawsuits limits the overall efficiency of the process. In this regard, Congress might consider authorizing procedures which would allow importers and Customs to contractually agree that, once an issue has been framed for CIT determination, the importer need not file further protests and lawsuits in order to preserve its rights of judicial review. The Netherlands and other European Union countries utilize these types of contractual arrangements; they allow tribunals to devote their energies to resolving contested issues of law and fact, rather than in managing the way the parties formulate their dispute.

The adoption of simplified procedures for the disposition of certain Customs cases might make the Court more accessible for importers engaged in Customs disputes, and would further the mandate in Court of International Trade Rule 1 that actions be

resolved in a manner which is speedy, just and efficient.

Another change which would promote equity in Customs litigation would be an amendment to § 514(a) of the Tariff Act to extend, from 90 days to as much as three (3) years, the time in which a Customs decision may be protested.⁷⁰ Such an amendment would result in fewer (though larger) protests, and presumably would eliminate the need for the filing of repetitive cases in the CIT. It would also provide a vehicle for promoting greater consolidation of claims presented to the court in Customs matters. A three-year protest period may seem long, but is consistent with the time allowed under the laws of Canada, the European Union, and many other countries for challenging Customs determinations. A longer protest period could also promote equity in Customs matters, by giving importers time to evaluate Customs issues more commensurate with that enjoyed by Customs under 19 U.S.C. § 1592(d).

2. Litigation of Post-Liquidation Customs Assessments

As the Court of International Trade noted in *Bridalane Fashions, Inc. v. United States*, there is “considerable turmoil” regarding whether and how the Court may exercise jurisdiction over post-liquidation duty demands and tenders.⁷¹ Clarification of this issue would do much to remove the confusion concerning the Court’s ability to consider many of the most contentious issues, which arise in modern Customs practice.

The simplest way to resolve this issue would be for Congress to amend §§ 514 and 592(d) of Tariff Act the to provide explicitly that importers may protest (1) Customs demands for duties, taxes and fees made in connection with Customs audits, and (2) demands for “lawful duties, taxes and fees” made pursuant to § 1592(d). Such explicit legislative clarification would provide helpful guidance to both industry and the Court, and would do much to eliminate the coercive and threatening atmosphere that currently surrounds many post-liquidation Customs assessments. It would also provide for the resolution of Customs law issues, at the importer’s option, in a CIT action not

⁷⁰ See 19 U.S.C. § 1514(a) (2003) (stating that decisions of the Customs Service are final and conclusive unless protest is filed in accordance with § 1514(c)(3)).

⁷¹ See *id.* at 470 (suggesting that jurisdictional issues remain with regard to duty recovery cases and penalties under 19 U.S.C. § 1592 (2003)).

necessarily tainted by penalty issues.⁷²

Of course, the path to importer-initiated judicial review in such cases may yet be illuminated by judicial decisions interpreting existing law. The CIT's decisions in *Tikal* and *Bridalane* indicate that importer-initiated judicial review may be available in cases where post-liquidation payment of duties is made involuntarily, pursuant to a Customs "exaction." However, the current circumstances which dissuade importers from challenging post-liquidation duty assessments could mean that it would take many years before a comprehensive body of case law is developed to guide importers in determining when post-liquidation payments are "involuntary," and protestable.⁷³

A Congressional solution to this problem is likely to be the swiftest and surest. Absent an amendment to the law, however, the Court should, at the earliest possible opportunity, articulate the principles governing judicial review of post-liquidation assessments.

3. Judicial Review of Customs Rulings

A majority of Customs issues presented to the CIT today has been preceded by Customs rulings. While the CIT continues to review 28 U.S.C. § 1581(a) cases *de novo*, on the basis of a record made before the Court, the requirement of deference imposed by the Supreme Court's *Mead* decision means that Customs rulings will inevitably be injected into, and reviewed by, the CIT.

At present, the CIT conducts direct review of Customs rulings only in cases brought pursuant to its 28 U.S.C. § 1581(h) jurisdiction. Section 1581(h) permits the Court to conduct pre-

⁷² Presumably, in some importer-initiated actions challenging post-liquidation assessments, the Customs Service could assert its claims for 19 U.S.C. § 1592 penalties as counterclaims.

In other cases, however, it might be advisable for penalty claims to be heard separately from the issues surrounding post-liquidation duty demands, particularly since some penalty cases may be heard by juries, whereas jury trial is usually unavailable in ordinary Customs actions. See, e.g., *Washington Int'l Insurance Co. v. United States*, 678 F. Supp. 902, 917 (Ct. Int'l Trade 1988) (Re, C.J., dissenting) (arguing against a right to jury trial in disputes over customs duties against the United States).

⁷³ For example, it is questionable whether the government would ever concede a payment to be involuntary if made during the course of a Customs audit, if no Customs penalty proceeding had been initiated. See generally Daniel L. Fulkerson, *Fundamentals of Importing and the Customs Modernization Act*, 5 TULSA J. COMP. & INT'L. L. 335, 351 (1998) (discussing penalties that may be imposed for infractions by an importer during a Customs audit).

importation review of Customs rulings in cases where the importer demonstrates that it would suffer irreparable harm if forced to pursue traditional post-importation judicial review. The record for review is limited to the record developed before the agency. The CIT conducts its review on a deferential basis, upholding the ruling unless it is found to be arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. In § 1581(h) cases, the Court is limited to issuing declaratory judgments, although one recent decision suggests that, in appropriate cases, the Court may apply its decision to specific import transactions.⁷⁴

In some cases where a Customs ruling has previously been issued, a litigant who has already imported merchandise may be interested solely in challenging Customs' conclusions of law. In such cases, the standard and scope of review of 28 U.S.C. § 1581(h) cases might be employed, at the importer's election, in resolving cases brought under 28 U.S.C. § 1581(a). An amendment to the Court's governing statutes might be considered to allow for the resolution of certain "protest" disputes, at the parties' election, according to § 1581(h) standards and procedures. The presence of actual protested Customs decisions, which will be affected by the outcome of the case, will satisfy concerns that there be an actual "case or controversy" to be resolved by the Court.

C. Specific Recommendations for Change

1. Extend the Protest Period from the Current 90 Days to Three (3) Years

Under current law, an importer dissatisfied with decisions of the Customs Service can protest the liquidation of an entry within 90 days of the date of such liquidation.⁷⁵ The Customs Service has the same 90-day period within which to recall an entry through reliquidation.⁷⁶ On its face therefore, the Tariff Act

⁷⁴ See *Heartland By-Products Inc. v. United States*, 223 F. Supp. 2d. 1317, 1333 (Ct. Int'l. Trade 2002) (discussing the application and binding nature of an adjudication pursuant to 19 U.S.C. 1581(h) (2003)).

⁷⁵ See 19 U.S.C. § 1514(a) (2003) (offering the updated Tariff Act incorporating all amendments from 2003 to the present).

⁷⁶ See 19 U.S.C. § 1501 (2003) (stating that the Customs Service may reliquidate a

equally balances the rights of importers and government.

In many ways, however, the government enjoys a distinct advantage over the importer in its ability to extend its reach backward and either to withhold action on entries with a view to a duty increase, or to assess a additional duties without a clear corresponding right of challenge by the importer. Under § 504 of the Tariff Act, *as amended*, the Customs Service can extend the liquidation of an entry for up to a total of four years if it believes that it lacks sufficient information to appraise or classify.⁷⁷ As a practical matter, therefore, if the government believes that additional facts may lead to an increase in duties assessed, it can extend the liquidation period and thus expand the universe of entries against which any advancement in rate or value would apply. The importer has no automatic right to block such an extension or compel a prompt liquidation.

Second, and more importantly, § 592(d) of the Tariff Act, *as amended*, authorizes the Customs Service to collect duties due on entries which are the subject of a penalty proceeding, even if the 90-day period within which to recall or reliquidate an entry has lapsed.⁷⁸ The statute of limitations in penalty proceedings, absent a showing of fraud, is five years from the date of entry,⁷⁹ effectively granting Customs the right to increase duties for five years under § 1592(d) on liquidated entries, without affording the importer the right to challenge the assessment outside of the penalty framework. A similar grant under § 1593a(d) is vested in Customs in demanding the return of drawback refunds on liquidated drawback entries without a right of judicial review.⁸⁰

To re-establish equity in duty assessments, Congress should amend 19 U.S.C. § 1514(a) to extend from 90 days to three (3) years, the time in which the liquidation of a Customs entry or drawback claim may be protested. A three-year protest period would have the following advantages:

liquidation or reliquidation claim within ninety days from the date of notice of liquidation).

⁷⁷ See 19 U.S.C. § 1504 (2003) (incorporating amendments from 1984, 1993, 1994 and 1996).

⁷⁸ See 19 U.S.C. § 1592(d) (2003) (including amendments from 1935, 1978, 1980, 1993, 1996 and 1999).

⁷⁹ See 19 U.S.C. § 1621 (2003) (explaining that the five year statute of limitations begins when the alleged offense is discovered).

⁸⁰ See 19 U.S.C. § 1593a(d) (2003) (requiring duties and taxes to be restored to the United States).

- it more closely aligns the importer's right to protest with the Customs Service's right to withhold liquidation in contemplation of a possible rate or value advance;
- it more closely aligns the right to challenge Customs' duty assessments with the right to challenge assessments under Federal income tax law;
- it parallels the time period established by the United States' principal trading partners, notably Canada and the European Union, for importers' challenges to duty assessments;
- it will not require any changes in Customs current record keeping retention rules, which, in most cases, require importers to maintain records of import transactions for at least five years;⁸¹
- it more closely approximates the current government right to assess back duties under both the penalty statute and the drawback penalty statute;
- it will reduce the number of cases in which Customs will institute or threaten to institute proceedings under 19 U.S.C. §§ 1592 or 1593 for the actual purpose of simply collecting duties otherwise time-barred by the reliquidation limit set out in 19 U.S.C. § 1501.

Extending the period for protesting Customs liquidations would promote equity in the duty assessment system and expand access to justice for importers wishing to challenge Customs assessments. It would also limit repetitive paperwork, since importers would not be required to file as many different Customs protests or CIT summonses raising identical claims.

Expanded protest and reliquidation periods would not seriously disadvantage Customs sureties, since under current practice, sureties are generally liable for withheld duty assessments made against their principals pursuant to 19 U.S.C. § 1592(d), and Customs frequently asks sureties to waive applicable statutes of limitations regarding such claims.

⁸¹ See 19 U.S.C. § 1508 (outlining the record keeping requirement imposed on importers).

Granting sureties a three-year period to protest Customs' bond demands would presumably offset any prejudice to sureties resulting from a longer reliquidation period.

Since one goal of reform would be to promote equity in the duty assessment system, it would be appropriate to extend the government's statutory period to reliquidate an entry under 19 U.S.C. § 1501 from the current 90 days to three years. While at first blush, this might seem to disadvantage importers, the fact is that when Customs believes that a retroactive duty assessment should be made, it frequently proceeds against the importer under 28 U.S.C. § 1592(d), which is subject to a five year statute of limitations.

II. AMEND 19 U.S.C. § 1514(A)(3) TO DEFINE AS PROTESTABLE
"EXACTIONS" CUSTOMS' DEMANDS FOR WITHHELD DUTIES OR
OVERCLAIMED DRAWBACK UNDER 19 U.S.C. §§ 1592(D) AND
1593A(D); EXTEND THE DEFINITION OF "CHARGE" TO INCLUDE
VOLUNTARY TENDERS OF DUTIES MADE DURING 19 U.S.C. § 1592
AND 1593 INVESTIGATIONS OR PROCEEDINGS

*A. Demands for the Payment of "Withheld Duties" under 19
U.S.C. § 1592(d) or Overclaimed Drawback Under 19 U.S.C.
§ 1593*

When subsection (d) to 19 U.S.C. § 1592 was added by the *Customs Procedural Reform and Simplification Act of 1978*, it was intended only as the formal mechanism for allowing Customs to recover duties negligently or intentionally underpaid by virtue of acts, statements or omissions which violated the proscription of 19 U.S.C. § 1592(a). It was intended to preclude importers from raising the 90-day reliquidation period of 19 U.S.C. § 1501 as a defense to duty assessments in such actions. § 1592 (d) was clearly intended to be an ancillary remedy in a larger penalty proceeding.

In recent years, however, the Customs Service has increasingly converted this ancillary remedy to a primary one. Customs import specialists, auditors and agents routinely raise the spectra of a 19 U.S.C. § 1592 proceeding in order to exact from importers additional duties relating to entries which have long

been liquidated and final.⁸² Faced with the possibility of penalty assessments equal to a *multiple* of the duties in question (not to mention the legal and personal costs associated with defending themselves against penalty claims), importers frequently capitulate and “voluntarily” pay the otherwise time-barred duties. Consequently, Customs uses 19 U.S.C. § 1592(d), an enforcement statute, both as a means for redress and a method of collecting duties not otherwise collectable. An importer faced with the choice of paying, for example, \$100,000 in questionable duties on long-liquidated entries, or facing multi-million dollar penalty proceedings, will almost always pay the duties, simply as a business decision. In many cases, the cost of defending even an ill-founded penalty claim is likely to approach or exceed the duty amount demanded. Moreover, the businessperson avoids the need to explain a large government penalty assessment to shareholders, lenders and regulators.

In this way, 19 U.S.C. § 1592(d) is often used to exact (some might say extort) questionable duties from importers, often in cases where the only issues presented are routine questions of tariff classification, appraisement or rules of origin—issues which ordinarily would (could and should) be resolved by the CIT in 28 U.S.C. § 1581(a) “protest” actions. The current system not only blocks importers’ access to justice, but prevents the CIT from creating a body of substantive legal precedent for the guidance of importers and Customs officers in future cases.

Amending 19 U.S.C. § 1514(a) to provide for the filing of a protest against demands for payments under 19 U.S.C. §§ 1592(d) and 1593(d) would eliminate such potential Federal overreaching, ensure that these contested issues can be judicially reviewed, and restore equity to the Customs administration process.

⁸² In some cases, Customs does not even make explicit reference to 19 U.S.C. § 1592, but demands duties from importers based upon the simple assertion that Customs has the right to proceed retroactively for a five-year period. See *United States v. Almany*, 22 Ct. Int’l Trade 490, 497 (noting that the government has five years in which to initiate a case under 1592). Indeed, it has been the authors’ experience that Customs auditors routinely propose five-year retroactive assessments of duty against importers blissfully unaware that, as a technical matter, the initiation of a 19 U.S.C. § 1592 claim, and a finding that 19 U.S.C. § 1592(a) has been violated, are statutory prerequisites to such assessments.

B. Demands for "Voluntary" Payments

In many cases, Customs does not even need to proceed to a formal demand for duties under 19 U.S.C. §§ 1592 or 1593; the *threat* of such assessments, usually combined with the threatened assessment of a penalty, causes many importers or drawback claimants to "voluntarily" tender amounts demanded by Customs during the course of Customs audits, or during routine dealings with the Customs Service. As noted above, there is no clear mechanism whereby importers can seek recovery of these sums, unless they can prove that the sums were involuntarily "exacted."⁸³ The involuntary nature of a payment is likely to be difficult to prove, especially when the payment is made before formal proceedings for the assessment of withheld duties or overpaid drawback are even commenced.

As a substantive matter, however, the payment of duties pursuant to a formal demand is no different than the payment of duties under threat of such a demand. Both types of payment should engender a right of judicial review.

One way to avoid an inequity is to amend § 514 the Tariff Act to identify the payment of duties after the period for reliquidation of an entry or claim as a protestable "charge." This would ensure that importers making such payments are guaranteed a right to judicial review of legal issues raised by Customs (which often are raised years after import entries are liquidated and made final, usually in the course of post-liquidation Customs audits). Customs should embrace such a change to the Tariff Act, since it would provide importers with an additional incentive to self-disclose potential legal violations in cases where the law is less than settled, and provide importers with additional incentives to cooperate fully in Customs investigations. It would also allow for a proper focus on the merits of particular claims or transactions, rather than the gamesmanship and maneuvering which are currently major focuses of post-liquidation duty claim scenarios.

C. Amend the CIT's Governing Statutes and Rules to Streamline

⁸³ Under current law, duties voluntarily tendered even if to avoid or mitigate penalties are not considered "charges" and are not protestable. See *Carlingswitch Inc. v. United States*, 68 C.C.P.A. 49, 55 (1980).

“Protest” Litigation under 28 U.S.C. § 1581(a)

As discussed above, one result of the current short statute of limitations for filing protests is importers must file repetitive protests against identical Customs decisions, and, upon denials of those protests, file multiple CIT actions under 28 U.S.C. § 1581(a) in order to completely litigate a single issue.⁸⁴ As a result, the CIT devotes an inordinate amount of effort to helping the parties to a lawsuit define the scope of their dispute. The multiplicity of actions involving common questions of law or fact thrusts upon litigants certain procedural choices, which are unique to the CIT concerning *how* their cases should be litigated – under the CIT’s unique “Test case/suspension” procedure,⁸⁵ under “consolidation” procedures,⁸⁶ or as “standalone” litigation. Moreover, the litigant must justify to the Court its choice of procedures.⁸⁷ As a result, extensive docketing and case-tracking requirements, and motion practice in 28 U.S.C. § 1581(a) cases burden the Court.

The requirement that separate protests and lawsuits be filed for every single Customs entry affected by an issue, even after the importer has made clear its intent to litigate the issue, creates additional work for Customs, the business community, and ultimately, the CIT. This may include, for example, motions to dismiss actions in whole or in part based upon failure to file protests or summonses timely. While it might be argued that these formalities are required as a condition of the government’s waiver of sovereign immunity in Customs cases, the formalities are arcane, and do not appear to confer a significant benefit on anyone. They have produced a cumbersome process of action on protests by rote, multiple court cases covering identical issues; suspension and suspension disposition calendars; stipulations, decisions and judgments and motions related to calendar maintenance. In effect, the Court is as much managing entries

⁸⁴ This is especially true when merchandise subject to a common legal issue is entered at different United States ports of entry. See *Florex v. United States*, 13 Ct. Int’l Trade 28, 38 (discussing competition between products and ports of entry). Liquidation and protest decisions typically move at different velocities through the Customs apparatus at different ports of entry.

⁸⁵ See USCIT R.84-1(b) (defining the “test case”).

⁸⁶ See USCIT R.42 (discussing the options for consolidations of separate actions).

⁸⁷ See, e.g., *Totes, Inc. v. United States*, 16 Ct. Int’l Trade 706, 708 (1992) (upholding choice of “test case” procedure instead of consolidation).

as it is managing issues and deciding cases. The time has come to consider streamlined procedures for filing Customs cases in the CIT.

There are several ways to address this problem and streamline the process. One way would be to amend § 504 of the Tariff Act of 1930 to give the importer the right to demand the automatic suspension of the entry liquidation period for an indefinite time by certifying to Customs that proper liquidation of an entry requires a resolution of an issue then before the CIT.⁸⁸ Liquidation of the entry would remain suspended until a specified time after the issue before the Court is finally decided.

Under this procedure, the CIT could devote its energies to resolving substantive issues of legal interpretation, with a minimum of "housekeeping." Every Customs case would effectively become a "test case." Once a substantive legal issue has been resolved, the Court's involvement with other entries affected by the decision would be nonexistent, or would be a limitation to resolving disputes about whether the Court's decision actually resolves issues affecting the "certified" entries in question.

Another way to handle this matter would be to eliminate the requirement that separate protests and summonses be filed with respect to each entry affected by an issue in litigation before the Court. For instance, once an importer files a timely summons involving merchandise affected by a given legal issue, it could then notify the Court in writing of additional liquidated entries affected by the issue being litigated. The Court could then create an "association file" of such entries, whose liquidation would be deemed not to be final until the judicial resolution of the issue is finalized. It is likely that an "association file" procedure would be limited to entries made by the litigant in the CIT action, while an "automatic suspension" provision could more readily be exercised by parties other than the plaintiff.

Procedures for bringing Customs actions before the CIT have changed little in the past century. Given increased trade volumes, and an explosion in the growth of consumption entry filing, it is now appropriate for bench and bar to consider

⁸⁸ See 19 U.S.C. § 1504 (stating that the merchandise will be liquidated within one year from several possible events).

methods for streamlining the process of bring Customs actions before the CIT in an efficient way which allows litigants to protect their legal rights, while allowing the Court to shed some of the clerical "housekeeping" chores which now consume much of its attention.⁸⁹

Regardless of how the streamlining is achieved, it is now appropriate for bench and bar to consider ways to improve the efficiency of the CIT's operations in Customs cases, and to help free the Court's resources to enable it to concentrate its efforts on substantive Customs issues.

III. CIT JURISDICTION OVER CUSTOMS SEIZURES

Recently, the Court of International Trade appointed an *Advisory Committee on Jurisdiction*, which was tasked with considering possible additions to the Court's national jurisdiction over Customs and Trade matters. The Advisory Committee's *Report* suggested that the CIT seek expanded jurisdiction over certain types of cases,⁹⁰ while suggesting that other types of

⁸⁹ In the ongoing legal challenges to the Harbor Maintenance Tax (HMT) on exports, 28 U.S.C. § 2644, many exporters filed actions under 28 U.S.C. § 1581(i), seeking recovery of export HMTs paid within two years prior to the commencement of the action [the statute of limitations applicable to such cases]. See *Swisher Int'l, Inc. v. United States*, 178 F. Supp. 2d 1354, 1358 (Ct. Int'l Trade 2001) (finding one clause of the HMT unconstitutional). In most cases, the relief granted in these cases was both backward- and forward-looking, encompassing tax payments made within the two years prior to the filing of the suit, plus tax payments made after the filing of the suit.

⁹⁰ See *Report of the United States Court of International Trade Advisory Committee on Jurisdiction* [hereinafter "Advisory Committee Report"]. Among the areas where the Advisory Committee Report suggested the assignment of subject matter jurisdiction to the CIT were:

- Seizures of merchandise by the United States Customs Service under the Tariff Act of 1930 or another provision of law codified in Title 19 of the United States Code, the Trading With the Enemy Act, 50 U.S.C. App. § 1 et seq. (1917), and the Espionage Act, 22 U.S.C § 401 (1917);
- Cases involving Customs' seizure of goods for violation of intellectual property rights;
- Judicial enforcement of Customs Service summonses issued pursuant to 19 U.S.C. § 1510;
- Importer-initiated actions seeking judicial review of penalty determinations, see *Trayco, Inc. v. United States*, 994 F.2d 832 (Fed. Cir. 1993); *Commodities Export Co. v. United States Customs Service*, 888 F.2d 431 (6th Cir. 1989);
- Expanded jurisdiction over challenges to Customs rulings;
- State law violations of United States obligations under the World Trade Organization (WTO) agreements [19 U.S.C. § 3512(b)(2) (1994)];
- Actions by importers against licensed Customhouse brokers for alleged malpractice;
- Lawsuits by sureties against importers under Customs bonds;
- Export control and antiboycott cases (although the a Advisory Committee report

trade-related cases were not appropriately included in the Court's jurisdictional grant.⁹¹

The topic of Customs seizures that might be brought under the CIT's jurisdiction bears additional discussion. At present, the CIT's jurisdiction over goods, which become the subject of Customs seizures, is utterly dependent on the status of particular merchandise at the time the Court's jurisdiction is invoked. If goods are excluded from United States commerce, a protest may be filed against such exclusions (including a demand for redelivery). However, once Customs has seized the goods, the CIT lacks the ability to review the seizure, which then rests with the Federal District Courts in the district where the seizure took place.⁹² The dichotomy lacks sense, however, since the substantive issues are likely to be similar or identical whether Customs acts against the goods by means of exclusion or seizure.

One sensible way to resolve the matter is to give the CIT exclusive jurisdiction over actions to condemn and forfeit seized merchandise entered under cover of formal or informal consumption entries.⁹³ The CIT has expertise in issues involving the importation and regulation of commercial goods. Other types of seizures are also appropriate candidates for exclusive CIT jurisdiction.

A. *Specific Recommendations for CIT Jurisdiction over Seizures and Enforcement Matters*

This article sets out a comparison of provisions under Federal law allowing for the seizure of commercial goods and currency for

noted that such cases were rare);

- Foreign Corrupt Practice Act (FCPA) cases.

⁹¹ See Advisory Committee Report. Among the actions which the Advisory Committee deemed unsuitable for the CIT were: private rights of action under the Antidumping Act of 1916; cases arising under the Carriage of Goods by Seal Act; cases arising under the Foreign Sovereign Immunities Act; Federal Maritime Cases; and Freedom of Information Act (FOIA). See *id.*

⁹² See, e.g., *International Maven Inc. v. McCauley*, 12 Ct. Int'l Trade 55 (1988) (holding the CIT lacks jurisdiction where goods have been seized before exclusion is protested); *Milin Industries, Inc. v. United States*, 12 Ct. Int'l Trade 658 (1988) (finding the CIT has jurisdiction over exclusion protest filed before goods were seized).

⁹³ Due process considerations may require that jurisdiction over noncommercial seizures (i.e., seizure of undeclared controlled substances, seizures of conveyances carrying controlled substances) remain with the local Federal District Courts in the district where the noncommercial seizures took place. See *CDCOM (USA) Int'l v. United States*, 21 Ct. Int'l Trade 435, 438 (1997) (discussing jurisdictional issues with regards to the location of the seizure).

violation of law. A substantial number of these laws deal with the seizure of goods moving in international trade. There are ample reasons to confer on the CIT jurisdiction over actions dealing with seizures under the import and export laws.

1. Export Related Laws

As noted above, the CIT has jurisdiction over seized goods only to the extent that Customs' exclusion of merchandise has been protested before the seizure has been affected. All other export related issues are handled by the U.S. District Court. This jurisdiction extends only to imports, although Federal law provides a variety of statutes that justify the seizure of exported goods for various legal violations.

If the Court of International Trade is to live up to its mandate of resolving trade issues, there is no reason why its jurisdiction should not include responsibility of the full array of export as well as import matters. Similarly, in an increasingly electronic world, there is no reason why the Court should not deal in some electronic-based trade as well as goods-based trade. Toward that end, serious consideration should be given to vesting the CIT with subject matter jurisdiction over the following classes of export-related matters:

The denial of export licenses by any agency of government, challenges to the export classification of an article, or the delay in or refusal to act on a license application;

The denial of export privileges for persons (including juridical persons) subject to the jurisdiction of the United States;

All civil fines, penalties or forfeitures arising for violation of the laws governing bulk cash export of currency or the failure to declare currency at the time of exportation within title 31 of the U.S. Code;

All civil fines, penalties and forfeitures from violations of the Export Administration Act, the Trading with the Enemy Act, the International Trafficking in Arms Act, the Espionage Act and the International Emergency Economic Powers Act and any of the regulations implementing any of these laws.

Civil fines, penalties or forfeitures arising under laws limiting trade with countries supporting international terrorism.

2. Import Related Laws

Section 592 of the Tariff Act of 1930, *as amended*, is the enforcement statute most frequently invoked against commercial importers,⁹⁴ but there are numerous other import statutes over which Federal District Courts continue to exercise exclusive jurisdiction. However, the subject matter which these statutes deal with suggest that their enforcement and administration could benefit from the use of the specialized expertise of the CIT. Consideration should be given to conferring exclusive jurisdiction on the CIT of matters arising under the following import-related laws:

All civil fines, penalties and forfeitures, including seizures, arising under any alleged violation of any import provision within title 19 of the U.S. Code, other than those related to narcotics offenses; and

All civil fines, penalties or forfeitures arising for violation of the laws governing bulk cash smuggling, or false declaration at entry, or failure to declare at entry currency within 19 U.S.C. Title 31.

3. Electronic international movement of funds

Logic also suggests that consideration be given to vesting the CIT with exclusive jurisdiction over various emerging areas of electronic commerce, including all civil fines, penalties and forfeitures arising for violation of laws governing the international wire transfer of funds within title 31 of the U.S. Code.

These suggestions should be taken as a starting point for a discussion by bench, bar and legislature of ways to effectively extend the jurisdiction of the CIT to enable it to fulfill its mission as the exclusive arbiter of United States customs and trade laws.

⁹⁴ See 19 U.S.C. § 1592 (2003) (putting forth penalties for fraud, negligence, and gross negligence).

IV. CONCLUSION

In the generation since the *Customs Courts Act of 1980* entered into force, there have been few changes to the statutes governing judicial review of Customs decisions. During that time, however, Customs administrative practices have undergone substantial, if not revolutionary change. The CIT's governing statutes no longer adequately address many of the procedural scenarios under which Customs law disputes arise. This fact, combined with the decline in United States tariff rates, has resulted in a reduction of Customs litigation in the CIT.

Constitutional considerations of due process require that each taxpayer be given the opportunity to challenge tax and duty assessments before an impartial decision maker.⁹⁵ This right is not defined or circumscribed by the size of the assessment. In Customs duty cases, the CIT is that impartial decision maker. The Court's procedures should reflect the nature of the cases it is charged with deciding, while ensuring the broadest possible access to judicial review of Customs decisions.

In addition, it is clear that the CIT's jurisdictional mandate only covers a small portion of the enforcement actions that can potentially arise under the Customs, trade and related laws. This caution probably reflects the fact that, prior to the *Customs Courts Act of 1980*, the CIT's predecessor only had jurisdiction of actions commenced by importers and others *against* the government, and not actions brought by the government to enforce the laws. Two decades of CIT experience with civil Customs penalty actions under 19 U.S.C. § 1592 has demonstrated that the CIT is an appropriate and capable forum for handling such enforcement matters.

Bringing about the changes needed to truly "modernize" Customs litigation will likely require some combination of legislative action and amendments to the CIT's rules and procedures. As noted above, there are several alternative ways in which broader and more equitable review of Customs decisions can be sought. But a generation has passed since the CIT's governing statute was enacted, and the time has come for the

⁹⁵ See, e.g., *Nickey v. Mississippi*, 292 U.S. 393, 396 (1934) ("[i]t is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable").

bench, bar and international trading community to undertake a concerted effort to outline the future of Customs litigation in the United States Court of International Trade.

APPENDIX

PART I

ENFORCEMENT STATUTES MOST FREQUENTLY INVOKED FOR VIOLATION OF INTERNATIONAL TRADE LAWS

Citation	Description	Elements of the Statute	Punishment, Fine, Penalty
18 USC §542	Entry of goods by means of false statements.	Prohibits entry or attempted entry of merchandise by means of false statement made without reasonable cause to believe its truth, whether or not the U.S. is or may be deprived of duties; Prohibits willful act or omission by which the U.S. is or may be deprived of duties.	Two years imprisonment plus unspecified fine; Criminal resolution does not relieve importer from forfeiture.
18 USC §545	Smuggling.	Prohibits the smuggling or clandestine entry of merchandise into the U.S., knowingly, willfully and with intent to defraud; Prohibits introduction of merchandise which should have been invoiced; prohibits attempts to pass false or fraudulent invoices or documents; or Prohibits fraudulent or knowing importation into the U.S. contrary to law.	Five years imprisonment, unspecified fine, forfeiture of smuggled product.
Section 371, USA Patriot Act of 2001, 31 USC §5332	Bulk cash smuggling.	Prohibits the concealment of more than \$10,000 in any conveyance, luggage, merchandise or container, with intent to avoid currency reporting requirement of 31 USC §5316;	Five years imprisonment; Forfeiture of currency; Personal money judgment if restitution unavailable; Civil forfeiture;

		Prohibits transfer or transport from a place within U.S. to a place outside U.S. or from a place outside U.S. to a place inside U.S.	Seizure of container or conveyances used to conceal or facilitate the concealment.
31 USC §5316	Reports on exporting or importing of monetary instruments.	Requires persons transporting in excess of \$10,000 at one time to report such imports or exports at the time of entry or exit.	Willful violation of 31 USC §5316 punishable by 5 years imprisonment plus \$250,000 fine (31 USC §5322); Willful violation of §5316 while violating another law as part of a pattern of illegal activity \$500,000 plus 10 years; Civil penalties of forfeiture, to be reduced by the amount of criminal fine. If report not filed, civil penalty equal to money traceable to the instrument and penalty equal to the amount of money traceable to the instrument. 31 USC §5317 and 5321.
18 USC §2318	Trafficking in counterfeit labels for phonorecords, computer programs, motion pictures and audio visual works.	Prohibits trafficking in such products which requires a showing that: Offense was committed within the maritime or aircraft jurisdiction of the U.S.; mail or interstate facility was used; counterfeit article was affixed to or enclosed in copyright material; in the case of documentation for computers, that original documentation was copyrighted.	Unspecified fines; plus imprisonment of five years, or both. Forfeiture or destruction of counterfeit labels.
50 USC §2410	Violations of the U.S. Export Control Regulations.	Prohibits: (a) Knowing violations or conspiracies or attempts to knowingly violate the provisions of the Export Administration Act (EAA);	(a) Five years imprisonment plus the greater of five times the value of the export, or \$50,000.

		<p>(b)(1) Willful violations or attempts to violate EAA;</p> <p>(2) Willful failure of licensee to report misuse of export technology to a controlled country;</p> <p>(3) Possession with intent to export in violation of EAA;</p> <p>(4) Actions taken with intent to evade provisions of EAA or of licenses issued pursuant to EAA.</p>	<p>(b)(1) Corporation. The greater of five times the value of the export or \$1,000,000.</p> <p>(b)(1) Individual. \$250,000 plus 10 years imprisonment.</p> <p>(b)(2) Corporation. (Same as (b)(1).)</p> <p>(b)(2) Individual. \$250,000 plus 5 years.</p> <p>(b)(3) varies depending upon the nature of the control.</p> <p>(b)(4) varies depending upon the nature of the control</p>
22 USC §2780	[Arms Export] Transactions with countries supporting international terrorism - prohibited acts.	<p>(a) Certain actions prohibited by U.S. Government;</p> <p>(b) Prohibited transactions by U.S. Persons.</p> <ol style="list-style-type: none"> 1. Exporting munitions to any specifically designated country; 2. Selling, leasing, loaning, granting or otherwise providing munitions to a country or to a person acting on behalf of such government; 3. Extends liability to foreign subsidiaries of U.S. corporations; 4. Extends to actions taken outside of the U.S. by U.S. persons. 	<p>(b) Criminal: \$1,000,000 or ten years imprisonment, or both.</p> <p>Civil: Penalties as provided under the Export Administration Act [50 U.S.C. §2410] but not to exceed \$500,000 per offense.</p>
19 USC §1304	Marking of imported articles to indicate foreign origin.	Every article of foreign origin must be marked conspicuously legibly, indelibly and permanently to indicate to the ultimate purchaser in the United States the foreign country of origin	<p>Civil: 10% additional duty,</p> <p>Criminal (requires proof of intent to conceal information): First offense: \$100,000 or one year; Second or subsequent: \$250,000 or one year.</p>
19 USC §1307	Convict-made goods, impor-	Prohibits entry of goods manufactured by convict,	Seizure of goods. No other fine or penalty

	tation prohibited.	forced or under indentured labor.	specified.
19 USC §1436	Penalties for violations of arrival, reporting, entry, and clearance requirements.	Prohibits entry of vessels without production of manifest; requires notice of arrival and permission to depart and discharge; requires vessels to make entry within 24 hrs. of arrival.	Civil: \$5,000 for first violation; \$10,000 for second and subsequent violation; Criminal: Requires proof of intentional failure. \$2,000 plus 1 year; importation of prohibited merchandise carries additional fine of \$10,000 or five years.
19 USC § 1453	Lading and unloading goods without a permit.	Prohibits the unloading of imported merchandise from any vessel, vehicle or aircraft without permission.	Penalty equal to the value of merchandise illegally unladen, plus forfeiture of vessel or vehicle if the value of the goods unladen exceeds \$500.
19 USC §1454	Unloading of passengers without a permit.	Prohibits the unloading of arriving passengers without permit.	Penalty equal to \$1000 for the first passenger unladen, plus \$500 for each passenger thereafter.
19 USC §1455	Customs inspectors boarding or discharging.	Prohibits officer, master, crew or agent from interfering with Customs inspector.	\$500 fine.
19 USC §1459	Reporting arrivals; individuals.	Requires arriving passengers to report arrival to the U.S. promptly and to present ID upon arrival.	Civil: Failure to report or present valid ID. First offense: \$5,000. Second and Subsequent: \$10,000. Criminal: Intentional failure to report; presentation of false, altered or fraudulent document; \$5,000 plus one year imprisonment.
19 USC §1462	Requirement to submit to baggage examination upon demand.	Requires person who is requested, to comply with demand for inspection by presenting baggage.	Civil: If prohibited merchandise is found, authorizes the seizure and forfeiture of the prohibited goods plus contents of the container plus vehicle.
19 USC §1464	Penalties in connection with sealed	Prohibits failure to proceed promptly to the port of destination; unloading of mer-	Criminal: \$1000 fine plus five years imprisonment.

	vessels and vehicles.	chandise other than at the port of destination; illegal disposal of merchandise by the vessel master.	
19 USC §1497	Failure to declare.	Article is not declared if: is not included in the declaration, and is not mentioned before examination of the baggage begins, either in writing or orally.	Civil: Goods not declared are subject to forfeiture; If the article is a controlled substance, \$500 or ten times the value of the substance, whichever is the greater; If the article is not a controlled substance, then the value of the article not declared.
19 USC §1509	Recordkeeping - failure to maintain and produce records.	Requires importers and others to keep, maintain and produce upon demand records related to the importation of merchandise.	Willful failure to produce documents demanded, \$100,000 per entry or 75% of value of the merchandise, whichever is less; Negligent failure to produce documents demanded, a penalty equal to \$10,000 per entry, or 40% of value, whichever is less; plus, right to advance rate of duty; denial of preferences. Certain concessions for existing recordkeeping compliance program; penalties not exclusive.
19 USC §1526	Importation of merchandise bearing American trademark.	Prohibits importation of merchandise, or its packaging, bearing trademark owned by U.S. person and registered with U.S. Patent and Trademark Office; Prohibits importation of goods bearing counterfeit marks; Prohibits aiding and abetting; financial or other assistance	Civil remedies: For infringing goods: Seizure and forfeiture, injunction and damages. For counterfeit goods: Seizure and forfeiture; For aiders and abettors: First offense: Penalty equal value of bona fide merchandise; Second offense:

			Penalty equal to twice the value of bona fide merchandise.
19 USC §1584	Penalties for false manifests.	Requires vessel master to produce manifest to Customs upon demand; requires that goods unladen match manifest; imposes penalties for entry and unloading unmanifested merchandise.	<p>Failure to produce manifest upon demand: \$1,000.</p> <p>Unloading of unmanifested merchandise: lesser of \$10,000 or the value of the unmanifested merchandise;</p> <p>Penalty for manifested but not found merchandise: \$1,000.</p> <p>Exceptions for non-negligent loss of manifest or clerical errors;</p> <p>Special rules for unmanifested narcotics and wines and spirits.</p>
19 USC §1586	Unlawful unloading and transshipment of merchandise.	<p>(a) Prohibits unloading of merchandise from hovering vessel or from a vessel in foreign commerce without permission to unload;</p> <p>(b) Prohibits unloading of prohibited merchandise including wines and spirits from a vessel in foreign commerce or from a hovering vessel for purposes of unlawful entry;</p> <p>(c) Prohibits transshipments of prohibited merchandise from foreign or hovering vessel to U.S. vessel of prohibited merchandise;</p> <p>(d) Liability for master of the receiving vessel;</p> <p>(e) Liability for aiders and abettors of transshipment;</p> <p>(f) Special exception for unloading because of accident or distress.</p>	<p>Penalty: Twice the value of the merchandise, but not less than \$10,000. Plus forfeiture of vessel.</p> <p>(b) same as (a)</p> <p>(c) same as (a)</p> <p>(d) same as (a)</p> <p>(e) 15 years imprisonment</p> <p>(f) no penalty.</p>
19 USC §1590	Aviation smuggling.	(a) Prohibits pilot or other person on board an aircraft	<p>Penalties:</p> <p>Civil: twice the value of</p>

		<p>to possess or to transport merchandise knowing it will be introduced contrary to law;</p> <p>(b) Prohibits transfer of merchandise between vessel and aircraft without permission;</p>	<p>the merchandise, but not less than \$10,000; Criminal:</p> <p>If unlawfully entered merchandise is not a controlled substance: \$10,000 plus five years;</p> <p>If unlawfully entered merchandise is a controlled substance: \$250,000 plus 20 years;</p> <p>Seizure and forfeiture of aircraft, if other than common carrier.</p>
19 USC §1592	Penalties for fraud, gross negligence and negligence.	<p>Prohibits:</p> <p>(a) Entry or attempted entry of merchandise into the U.S. by means of false statements on documents or electronically transmitted data; prohibits material omissions;</p> <p>Exceptions for clerical errors, including errors repeated in electronic systems, if not a pattern of negligent conduct;</p> <p>Authorizes reduced penalties for prior disclosure of violations with special rules for prior disclosure of NAFTA misstatements.</p>	<p>Penalties: Negligent presentation or preparation of documents: Twice revenue lost or, if no revenue lost, then 20% of the value of the merchandise;</p> <p>Gross negligence: Four times revenue lost or, if no revenue lost, then 40% of value of the merchandise;</p> <p>Fraud: Penalty equal to value of the merchandise.</p> <p>Prior disclosure: (disclosure made before or without the knowledge of the commencement of the investigation):</p> <p>Of negligence and gross negligence: interest on duties underpaid.</p> <p>Of fraud: penalty equal to the duties underpaid.</p> <p>Government has right to restoration of lost duties;</p> <p>No liability for importer who makes false NAFTA claim based on information given to importer from Certificate of Origin. Statute applies to exports of goods falsely certified as NAFTA</p>

			eligible.
19 USC §1592a	Special Penalty Provisions for Textile Violations.	<p>(a) Authorizes, but does not require, the Secretary of Treasury to publish list of foreign entities cited under section 1592 for providing false documents related to textile shipments and their country of origin;</p> <p>(b) Authorizes, but does not require, President to publish a list of countries failing to cooperate with U.S. in ceasing violations of (a) above;</p>	<p>(a) Places affirmative obligation on an importer from such entities to establish that accompanying documentation of future shipments are valid.</p> <p>(b) Places affirmative obligation on an importer of goods from such country to demonstrate exercise of reasonable care in ascertaining the true country of origin of the textiles in question.</p>
19USC §1593a	Penalties for false drawback claims.	<p>Prohibits:</p> <p>(a) seeking payment or credit to any person of any drawback claim by means of false statements on documents or electronically transmitted data; or material omissions.</p> <p>Exceptions for clerical errors, including errors repeated in electronic systems, if not a pattern of negligent conduct.</p> <p>Authorizes reduced penalties for prior disclosure of violations;</p> <p>Requires approval of Customs Headquarters to allege fraud.</p>	<p>Penalty:</p> <p>Fraud: Three times revenue lost; Negligence - First offense 20% of revenue lost; Second offense: 50% of revenue lost; Third and subsequent offense: 100% of revenue lost.</p> <p>Prior disclosure: Fraud - 100% of lost revenue; Negligence - interest of funds refunded.</p> <p>(d) Government has right to restoration of proceeds. Special rules for compliant record keepers.</p>
19 USC §1595a	Forfeitures and other penalties.	<p>(a) Permits but does not require the seizure of vessels, vehicles and aircraft etc. used in the illegal importation of merchandise;</p> <p>(b) Treats persons directing, assisting or in any way concerned with the unlawful importation as one liable to a penalty equal to the value of the merchandise illegally entered;</p>	

		<p>(c) Requires the seizure of: stolen, smuggled or clandestinely entered merchandise; controlled substances imported in violation of law; contraband; explosives. Permits but does not require the seizure of: merchandise subject to restriction; merchandise entered without required license or permit; merchandise entered in violation of trademarks; merchandise containing trade dress in violation of court order; merchandise intentionally mis-marked to indicate country of origin, or for which importer has committed previous marking violations; Prohibits the seizure of: merchandise subject to allegations of violations of law for classification and valuation purposes only.</p>	
19 USC §1617	Compromise of claims by the Secretary of Treasury.	Authorizes the Secretary of Treasury to compromise claims arising under the Customs laws, following the issuance of a report by Customs or the U.S. Attorney	
19 USC §1618	Remission or mitigation of penalties.	Authorizes the person charged with violation of the Customs laws to file with the Secretary of Treasury, Commissioner of Customs or the Commandant of the Coast Guard, depending upon the nature of the offense, a petition for relief from forfeiture. Au-	

		thorizes such person to remit or mitigate such a penalty.	
19 USC §1619	Award of compensation to informers.	Authorizes payment of reward for an informer, who is not an employee of the U.S., equal to 25% of net amount of fine, penalty or forfeiture collected, not to exceed \$250,000; or 25% of appraised value of merchandise seized but not sold.	
19 USC §1621	Statute of limitations.	(a) Causes of action under the Customs laws must be commenced within five years from the date of discovery of the offense, <i>except</i> if an action is commenced either under section 1592 and 1593a alleging negligence or gross negligence, must be commenced within five years from the date of the violation;(b) Absence from the U.S. tolls the statute.	

PART II

FORFEITURE AND NARCOTICS OFFENSES

Citation	Description	Elements of the Statute	Penalty
21 USC §§853; 870	Criminal Forfeiture	Requires that any person convicted of a violation of Subchapters I or II of Chapter 13, Title 21 shall forfeit the following property to the United States	<ol style="list-style-type: none"> 1. Property constituting or derived from any of the proceeds the person obtained directly or indirectly as a result of such violation; 2. Any of the person's property used, or intended to be used, in any manner or part, to commit or facilitate the commission of such violation;

			3. In the case of a person convicted of engaging in a continuing criminal enterprise in violation of §848 of title 21, the person shall forfeit, in addition to property described in paragraph 1 and 2, above, any of his interest in, claims against, and property or contractual rights or a source of control over the continuing criminal enterprise.
21 USC §853(I)	Mitigation	The Attorney General shall have the right with respect to property ordered forfeited under this section, to	(1) Grant petitions for mitigation or remission of forfeiture.
21 USC §853(p)	Substituted property	If property subject to forfeiture, by reason of any act of the defendant, 1. Cannot be located; 2. Has sold, transferred or deposited with a third party; 3. Has been placed beyond the jurisdiction of the Court; 4. Has been substantially diminished in value; 5. Has been commingled with property that cannot be divided without difficulty	The court shall order forfeiture of other property of the defendant up to the value of the property identified in paragraphs 1-5
21 USC §881	Forfeitures	The following are subject to forfeiture and no property right shall exist in them	1. All controlled substances which have been manufactured, distributed, dispensed or acquired in violation of this subchapter; 2. Raw materials used in the production of controlled substances; 3. Property used as a container for such substances; 4. Conveyances, including aircraft, vessels and

		<p>vehicles to transport or facilitate the transportation, sale, receipt, possession, or concealment of such property;</p> <p>A. Common carriers excluded unless the owner was a consenting party to the violation;</p> <p>B. No conveyance shall be forfeited if the violation was performed by any person other than the owner, when the conveyance was unlawfully in the possession of the person other than the owner in violation of criminal law;</p> <p>C. No forfeiture to the extent of an interest of an owner by reason of any act or omission established by that owner to have been committed without knowledge or consent of the owner.</p> <p>5. Books records, formula, data, microfilm, etc. to be used in violation of the subchapter;</p> <p>6. Money, negotiable instruments, securities, intended to be used in exchange for the controlled substances;</p> <p>7. All real property used to commit or facilitate a violation of the subchapter;</p> <p>8. All controlled substances possessed in violation of the subchapter;</p> <p>9. All chemicals, drug manufacturing equipment, tableting machines encapsulating machines, used to dispense or distribute drugs in violation</p>
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			of subchapter I or II of Chapter 13, Title 21. 10. All drug paraphernalia; 11. Any concealed firearm.
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