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Historical Retrospective and the Future Role and Jurisdiction of the U.S. Supreme Court of International Trade Bar Association

Stephen M. DeLuca

HISTORICAL RETROSPECTIVE AND THE FUTURE ROLE AND JURISDICTION OF THE U.S. COURT OF INTERNATIONAL TRADE IN THE NEW MILLENNIUM

Stephen M. De Luca, Esq.[*]

I. INTRODUCTION

The opening Plenary Session of the Eleventh Judicial Conference of the United States Court of International Trade ("CIT") addressed the CIT's likely future role and jurisdiction in the interpretation and enforcement of international trade relations in the new millennium.

The purpose of this paper is to provide a historical retrospective on the CIT and its predecessors and the laws which they interpret and enforce. It also will provide a general overview of the institutions and international trade agreements which govern the determination and collection of customs duties and the use of domestic and international remedies to ameliorate unfair foreign trade practices. It introduces subjects concerning the impact on the CIT's jurisdiction and standard of review. The paper addresses the CIT's role within the U.S. government and among other international trade dispute settlement systems, as well as the role of decisions by the Supreme Court of the United States, dispute settlement panels and appellate bodies of the North American Free Trade Agreement ("NAFTA") and the World Trade Organization ("WTO"). Moreover, it will address the impact that NAFTA and WTO agreements have had on the reduction of customs duties and the now more limited discretion that national governments and their agencies have in the development of trade laws and regu-

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* The author is an attorney in the United States Department of Commerce, Office of the Chief Counsel for Import Administration, Washington, D.C. He has served as a judicial law clerk to the Honorable Thomas J. Aquilino, Jr., of the United States Court of International Trade, and has worked as an associate of Middlebrooks & Shapiro, P.C. in New Jersey. Mr. DeLuca has a J.D. from Pace University School of Law, an LL.M, with distinction, from Tulane Law School, and is currently in the S.J.D. program at Tulane Law School. Mr. DeLuca has had numerous speaking engagements and has authored several articles on international law, international trade relations and dispute settlement.

lations, and their interpretation and enforcement. Thus, the question posed is whether there will be a much reduced substantive role for the CIT to play with respect to international trade relations.

II. HISTORY OF THE CIT AND ITS PREDECESSORS

The First Congress of the United States, in only the second of its legislative pronouncements, passed the Tariff Act of July 14, 1789. Its purposes were stated to be "for the support of government, for the discharge of the debts of the United States, and for the encouragement and protection of manufactures."[1] It set forth tariff schedules and imposed duties on numerous imported goods which were collected by customs officers at each of the ports of entry throughout the United States. The July 14, 1789 Act was amended by the Act of July 31, 1789, and the Tariff Act of March 2, 1799.[2]

At that time, there was no judicial body or administrative agency with jurisdiction to review decisions of the collector with respect to customs duties. However, in one of its earlier decisions, the Supreme Court of the United States found that importers had a right of action in assumpsit under the common law to recover excess duties from the collectors personally, because of erroneous classification determinations.[3] This decision was based in principal part upon the decision from Lord Mansfield in *Campbell v. Hall*.[4] In 1833, Congress enacted the Tariff Act of March 2, 1833, giving federal courts original jurisdiction of disputes over determinations of customs officers.[5]

When customs collectors began to hoard contested duties, Congress enacted the Act of March 3, 1839, requiring collectors to turn over disputed customs payments to the Treasury of the United States and the Secretary of the Treasury to refund duties found to be erroneously collected.[6] The Supreme Court then determined, in *Cary v. Curtis*, that this Act eliminated the common law right of assumpsit, thus leaving the resolution

1. Tariff Act of July 14, 1789, 1 Stat. 24 (repealed 1789).
2. Act of July 31, 1789, ch. 5, 1 Stat. 29; Tariff Act of 1799, ch. 22, 1 Stat. 627.
3. *See* Elliot v. Swartwout, 35 U.S. (10 Pet.) 137, 158 (1836).
4. 98 Eng. Rep. 1045 (K.B. 1774).
5. Tariff Act of 1833, ch. 57, § 2, 4 Stat. 632.
6. Act of March 3, 1839, ch. 82, § 45, 5 Stat. 339.

of customs disputes within the sole discretion of the Secretary of the Treasury.[7] Six days later, however, a bill was introduced in the U.S. Senate to restore this right against the collector.[8] Thirty days later, Congress passed the Act of February 26, 1845, which not only restored this right to challenge such determinations, but provided a statutory right to a jury trial against the collector as well.[9]

In 1890, Congress abolished the statutory right of action and created the Board of General Appraisers ("Board"), whose nine members within the Department of the Treasury heard appeals of classification and appraisement determinations by the customs officers in the various ports of entry.[10] The Board's decisions with respect to classification were made subject to judicial review in the circuit courts, based on the record made before the Board. This role of the circuit courts was replaced by Congress with the Court of Customs Appeals, by the Act of August 5, 1909.[11] The 1909 Act gave this Court "exclusive appellate jurisdiction" to review classification and other "non-appraisement" cases.[12]

In 1926, Congress changed the name of the Board to the United States Customs Court and its role from that of an administrative body to a judicial one as well.[13] In 1929, the name of the Court of Customs Appeals was changed to the United States Court of Customs and Patent Appeals ("C.C.P.A."), when Congress expanded its jurisdiction to include appeals from determinations made by the U.S. Patent Office (now the Patent and Trademark Office).

In 1929, the Supreme Court ruled, in *Ex parte Bakelite Corp.*, that the United States Customs Court and the C.C.P.A. were legislative Article I courts.[14] However, Congress declared, in the Act of August 25, 1958,[15] that both were Article III courts, and a few years later, the decision in *Bakelite* was

7. *See* 44 U.S. (3 How.) 236, 239-52 (1845).
8. CONG. GLOBE, 28th Cong., 2d Sess. 195 (1845).
9. Act of Feb. 26, 1845, ch. 22, 5 Stat. 727.
10. *See* Tariff Act of 1890, 26 Stat. 567.
11. Act of August 5, 1909, ch. 6, § 29, 36 Stat. 11, 105.
12. *Id.* at 106.
13. *See* Tariff Act of May 28, 1926, ch. 411, 44 Stat. 669.
14. 279 U.S. 438, 460 (1929).
15. Act of Aug. 25, 1958, Pub. L. No. 85-755, § 1, 72 Stat. 848 (1958).

overruled by the Supreme Court in *Glidden v. Zdanok*.[16] In 1970, Congress passed the Customs Courts Act of 1970, which denominated seven types of decisions subject to protest by importers and reformed the procedures used in customs litigation.[17]

In 1980, Congress passed the Customs Courts Act of 1980 ("1980 Act"), which expanded the jurisdiction of the United States Customs Court and changed its name once again to the one currently used—the United States Court of International Trade ("CIT").[18] The CIT was then granted all the powers in law and equity of the district courts, including the power to enter money judgments, to remand determinations to agencies for further action consistent with the Court's rulings, and to grant any other relief available in the district courts. The CIT also was granted jurisdiction over review of antidumping and countervailing duty ("AD/CVD") determinations, which had previously been subject to judicial review in the district courts. The 1980 Act also reaffirmed the *de novo* standard of review in customs cases and the very deferential standard of review in AD/CVD cases.[19]

The sponsor of the 1980 Act, Senator Dennis DeConcini, stated that the purpose of the Act was to "eliminate the considerable jurisdictional confusion" that existed for trade practitioners as to which of the federal courts had jurisdiction over various types of trade disputes, and to "increase the availability of judicial review in the field of international trade in a manner which results in uniformity without sacrificing the expeditious resolution of import-related disputes."[20] The President, when signing the bill into law, stated that the 1980 Act created "a comprehensive system for judicial review of civil actions arising out of import transactions and federal statutes affecting international trade."[21] Despite these pronouncements, the confusion which the 1980 Act was intended to ame-

16. 370 U.S. 530 (1962).

17. Customs Courts Act of 1970, Pub. L. No. 91-271, § 110, 84 Stat. 274.

18. Customs Courts Act of 1980, Pub. L. No. 96-417, § 201, 94 Stat. 1727.

19. *See id.* at 1728-29.

20. 126 CONG. REC. 27,063 (1980) (statement of Sen. DeConcini), *quoted in* 19 U.S.C.A. §§ 25, 27 note (1980) (Litigation Before the United States Court of International Trade).

21. *Id.* at xxvii (quoting President's Statement on Signing S. 1654 Into Law, 16 WEEKLY COMP. PRES. DOC. 2183 (Oct. 11, 1980)).

liorate still has not been completely resolved, even now as we celebrate nearly twenty years of jurisprudence under the 1980 Act.

III. THE CURRENT JURISDICTION OF THE CIT

The jurisdiction of the CIT is delineated in 28 U.S.C. §§ 1581-1585.[22] It encompasses civil actions brought by importers and interested parties to review adverse U.S. agency decisions concerning import matters.[23] Actions brought by the United States to recover civil penalties, to recover upon a bond relating to the importation of merchandise, and to recover customs duties, are also included.[24]

In addition to reviewing customs determinations[25] and AD/CVD decisions of the U.S. Department of Commerce, International Trade Administration ("ITA"), and the U.S. International Trade Commission ("ITC"),[26] the CIT also reviews decisions by the Secretary of the Treasury concerning customs broker's licenses,[27] by the Secretary of Commerce or the Secretary of Labor concerning eligibility for trade adjustment assistance under the Trade Act of 1974,[28] and by the ITA and ITC concerning requests for confidential information.[29] It also has exclusive jurisdiction "to render judgment upon any counterclaim, crossclaim, or third-party action of any party,"[30] and any civil action "commenced by the United States to enforce administrative sanctions levied for violation of a protective order or an undertaking."[31]

The grant of jurisdiction that has created some confusion is embodied in § 1581(i), the residual jurisdiction clause, under which the CIT is empowered to entertain

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the

22. 28 U.S.C. §§ 1581-1585 (1994).
23. *See id.* § 1581.
24. *See id.* § 1582.
25. *See id.* § 1581(a), (b).
26. *See id.* § 1581(c).
27. *See id.* § 1581(g).
28. *See* 28 U.S.C. § 1581(d) (1994).
29. *See id.* § 1581(f).
30. *Id.* § 1583.
31. *Id.* § 1585.

United States provided for:

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.[32]

To be certain, Congress included the following language in subsection (i):

> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 [19 U.S.C. § 1516a(a)] or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516a(g) of the Tariff Act of 1930 [19 U.S.C. § 151a(g)].[33]

This clause has been the subject of much litigation in the CIT and its appellate court, the Federal Circuit, and has caused some confusion and consternation by international trade practitioners, scholars, and the courts as well.

In addition, there are a number of international trade matters that are not currently subject to CIT jurisdiction or for which there is continued debate as to whether they fall within the residual clause, are subject to review in the Federal Circuit or the district courts, or are not subject to judicial review altogether. For example, the question remains whether the CIT has or should have jurisdiction over export matters or whether they properly belong in the district courts.[34] Section 337 actions concerning unfair trade practices such as imports that

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32. *Id.* § 1581(i).

33. *Id.*

34. *See* Dean A. Pinkert & Thomas D. Blanford, *Judicial Control of Export Control Determinations*, 26 BROOK. J. INT'L L. 843 (2001). *See also* F. Amanda DeBusk, *Role of Judicial Review in Administrative Enforcement Cases*, 26 BROOK. J. INT'L L. 853 (2001).

violate U.S.-held intellectual property rights are subject to review by the Federal Circuit on appeal from the ITC.[35] Section 301 actions are commenced by petition with the Office of the United States Trade Representative ("USTR") and are not subject to judicial review.[36] Disputes as to the constitutionality of NAFTA's chapter 19 procedure are subject to review in the U.S. Court of Appeals for the District of Columbia.[37]

IV. THE INTERNATIONAL TRADE REGIME

The interpretation and enforcement of U.S. trade law does not operate in a vacuum. There are a number of regional, plurilateral and multilateral agreements and institutions that govern international trade relations which have an impact on U.S. trade law and the settlement of international disputes. This section examines the historical evolution of the global trade regime and the rights and remedies that have developed therein.

The evolution of the global trade regime must be understood against the history of the use of mercantilism by most states to warp trade in favor of their own traders. According to some historians such as Alfred Eckes, in his book "Opening America's Market: U.S. Foreign Trade Policy Since 1776,"[38] this was true with respect to the United States as well as many of its current trading partners:

> Before the New Deal the United States prospered behind high protective tariffs and used a variety of import restrictions to shelter home market producers from competition, much the way Asian countries have done successfully since World War II . . . In the late nineteenth century . . . a protectionist America and a protectionist Germany both outperformed free trade Britain.[39]

In the 1920s, the U.S. economy was doing well but the speculative boom in the stock market was unsustainable. The United Kingdom's economy stalled because of asymmetrical

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35. *See* 28 U.S.C. § 1295 (1994).
36. *See id.* § 2645.
37. *See id.* § 1295.
38. ALFRED ECKES, OPENING AMERICA'S MARKET: U.S. FOREIGN TRADE POLICY SINCE 1776 (1995).
39. *Id.* at xvii.

openness, which led to heavy unemployment and obsolescent industries. The U.K. then implemented the Safeguarding of Industries Act of 1921.[40] In 1929, the stock market crash in the United States aggravated the slowdown in the European economy and most of the world suffered greater restrictions on trading activity. The United States then implemented Smoot-Hawley tariffs, which provided protection to U.S. industries and extended such protection to agriculture.[41]

In 1939, Japan and Germany began to use Keynesian pump-driving deficits to stimulate their economies, although both nations were responsible for starting World War II. Not until the war mobilization effort did some Europeans and then the United States begin to use Keynesian economics, too. Near the conclusion of the war, the Allies called a conference in 1944 in Bretton Woods, New Hampshire, to organize the peace.

The Bretton Woods deal would have two dimensions: finance and trade. The financial dimension consisted of the International Monetary Fund ("IMF"), which was to have enough reserves to be able to stabilize currency fluctuations but was inadequately funded, and the International Bank for Reconstruction and Development (the "World Bank"), which would be used to help reconstruction and development efforts to rebuild Europe.[42] There was to be lending to developing countries as well, but because the World Bank was undercapitalized, this financial system's aims had to be limited. The trade dimension consisted of an International Trade Organization ("ITO") proposed by the U.S. Department of State, but the U.S. Congress did not approve it. Instead, the General Agreement on Tariffs and Trade ("GATT"), which was negotiated to reduce tariffs and lock in these concessions until the ITO was to enter into force, became the modest institution that was to govern trade until the creation of the World Trade Organization in 1995.[43]

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40. Safeguarding of Industries Act of 1921, 11 & 12 Geo. 5, c. 47 (Eng.).

41. Smoot-Hawley Tariff Act, Pub. L. No. 71-361, 46 Stat. 590 (1930).

42. *See* JOHN JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 12-27 (1994).

43. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947]. On Apr. 15, 1994, GATT was incorporated into the World Trade Organization [hereinafter WTO] as GATT 1994 in Annex 1A to the WTO Agreement [hereinafter GATT 1994].

The GATT 1947 agreement came into force with the Protocol on Provisional Application.[44] This allowed pre-existing national legislation to stand despite any inconsistency with GATT obligations. The GATT 1947 became the forum for a limited series of tariff reduction negotiation rounds and for the development of a diplomatic form of dispute resolution. During the first five rounds, the GATT 1947 remained as such; but with the Kennedy Round, the United States raised its concerns with two aspects of European Economic Community ("EEC") policy: its common external tariff and common agricultural policy, both of which the United States feared would lead to EEC evasion of its obligations under the successful previous GATT 1947 rounds.[45] The Nixon (renamed Tokyo) Round led to the adoption of several Multinational Trade Negotiation ("MTN") Codes on dumping and subsidies, for example, and lower formal Japanese tariff levels comparable to those in the United States and Europe.[46] Developing countries sought greater access to developed country markets and permission to form commodity cartels like the successful OPEC oil cartels. The appearance of progress was maintained.

An effort by the United States in 1981-82 to open another round to extend GATT 1947 to services and intellectual property died early. The Latin American debt overload crisis threatened the financing system, especially the top ten United States banks whose capital cover had become increasingly narrow. To maintain the banking system, additional loans had to be made to Lesser Developed Countries ("LDCs") to pay their debts; some were partly written down, some were privatized.[47] By switching debt to equity, bankers became asset bankers. This financing scheme renewed interest in what was to be called the Uruguay Round.

The Uruguay Round was opened with aspirations to further lower tariffs and non-tariff trade barriers, to open markets, to extend the scope of the rules to cover services and

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44. Protocol on Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 2041.

45. *See* JEFFREY THOMAS & MICHAEL MEYER, THE NEW RULES OF GLOBAL TRADE 6 (1997); JOHN JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND 12-26, 50-52 (1984).

46. *See* THOMAS & MEYER, *supra* note 45, at 9-12.

47. *See* Rumu Sarkar, *Development Law and International Finance*, *in* 10 INTERNATIONAL ECONOMIC DEVELOPMENT LAW 98-112 (1999).

intellectual property, and to liberalize agriculture, among other things. The United States also sought more certainty in dispute settlement by "legalizing" it—making panel decisions have more binding legal effect—and providing more automaticity to the system. The global trade regime also experienced growing regionalism—not only with the EEC, but also NAFTA, ASEAN, ANDEAN, Mercosur and others—as well as the collapse of Communism. In the end, though, serious asymmetrical openness was locked into the system and national trade remedies were limited. This was to the advantage of multinational enterprises ("MNEs") and international bankers, but some saw social problems and major disruptions to national industries, among other concerns.

The international trade regime was based on Smithian free trade theory, which holds that free trade promotes mutual gains through greater specialization.[48] GATT 1947 was intended to facilitate free trade by providing a forum for reducing tariffs and non-tariff barriers and negotiating rules of non-discrimination. In addition to tariff reductions in schedules of concessions,[49] the key features of GATT 1947 were "unconditional" most favored nation treatment,[50] and national treatment,[51] as well as other "non-discrimination" rules,[52] the discouragement of quotas,[53] with exceptions for agriculture and fisheries,[54] and theatrical showing of films.[55] General exceptions were made for health, safety, consumer protection, and national treasures (culture);[56] a specific exception was made for national security.[57] The early GATT was used to block dumping and subsidies for exports. Laws against dumping and subsidies had existed since the turn of the century and loopholes for their use as offsets were left in GATT 1947.[58] Other

48. *See* ADAM SMITH, THE WEALTH OF NATIONS 121-23 (Penguin Books ed. 1974) (1776).
49. *See* GATT 1947, *supra* note 43, at art. II.
50. *Id.* at art. I.
51. *See id.* at art. III.
52. *Id.* at arts. V, XII, XVII.
53. *See id.* at art. XI.
54. *See id.*
55. *See* GATT 1947, *supra* note 43, at art. IV.
56. *See id.* at art. XX.
57. *See id.* at art. XXI.
58. *See id.* at art. VI.

offsets were the allowance of balance of payments restraints,[59] exchange rate agreements,[60] subsidies for economic development,[61] and safeguards measures.[62]

Offsets and loopholes in GATT 1947 allowed for national trade law remedies to limit disruptions from imports because of unfair trade practices (dumping or subsidization) or a surge of imports (safeguards/escape clause) that injure or threaten to injure a domestic industry.

Antidumping law, for example, imposes penalty duties on unfairly priced imports, defined as those that are priced in the United States lower than they are sold in the country of export or a comparable third country, or based on a constructed price analysis.[63] The U.S. Department of Commerce, ITA, makes a determination on whether the product at issue is unfairly dumped.[64] The ITC must determine whether the "unfairly dumped" product has caused or is likely to cause "material injury" to an established U.S. industry or materially retards the establishment of a U.S. industry.[65] Under the trade agreements and U.S. law in force prior to the Uruguay Round, this determination was required only if the product was from a country that was a contracting party to the GATT or the Antidumping Code or any other agreement committing the country to similar obligations.[66]

If the determinations of the ITA and the ITC are both affirmative, the ITA issues an antidumping order requiring the Customs Service to obtain a deposit or bond equal to the margin by which the product is "dumped" in addition to the normal customs duties assessed on the product.[67]

An "interested party" may request an administrative re-

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59. *See id.* at art. XII.

60. *See id.* at art. XV.

61. *See* GATT 1947, *supra* note 43, at arts. XVI, XVIII.

62. *See id.* at art. XIX.

63. *See* 19 C.F.R. § 351.212 (2000). *See also* Agreement on Implementation of Article V of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex 1A (1994) [hereinafter Anti-Dumping Measures], *available at* http://www.wto.org/english/docs_e/legal_e/final_e.htm.

64. *See* 19 C.F.R. § 351.101 (2000).

65. 19 U.S.C. § 1677 (1994).

66. *See* SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 12.01-08 (1999).

67. 19 C.F.R. § 351.102 (2000).

view conducted by the ITA.[68] An injury determination by the ITC is no longer required; however, under the Uruguay Round agreements, a five-year "sunset" review must be made to determine whether revocation would lead to resumption of the unfair trade practice and consequent damage to a U.S. industry. The ITA's review determines the actual margin for the period examined. At that time the ITA orders Customs to liquidate entries and assess the antidumping duties in addition to normal customs duties for the product. The process is essentially the same for export subsidies, with the ITA determining whether the government of a country or a foreign person is providing a specific subsidy to aid exports.

There has been considerable disagreement over what constitutes an actionable subsidy and over how to measure dumping, *e.g.*, which led among other things to the inclusion of chapter 19 in the United States-Canada Free Trade Agreement and its successor, NAFTA.[69] Under chapter 19, a complaining party who participated in the AD/CVD proceeding may challenge a final determination of the ITA or ITC by invoking a three-person panel dispute settlement system instead of appealing to the U.S. Court of International Trade or its equivalent in Mexico or Canada.[70] The panel would be called upon to apply the standard of review and substantive AD/CVD law of the member country whose agency's decision is challenged. This system has been celebrated as a success, though not as a model for future trade agreements. In addition, there were some controversial decisions, one of which concerned Canadian softwood lumber products which survived an extraordinary challenge by the United States complaining that the panel did not apply the very deferential standard of review that the CIT would have had to apply if the matter had been brought before it.[71]

The Uruguay Round agreements attempted to bring more clarity, definition and hence certainty to what are countervailable subsidies and dumping practices. However, it

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68. *Id.*

69. North American Free Trade Agreement, Dec. 19, 1992, 32 I.L.M. 605 [hereinafter NAFTA].

70. *See id.* ch. 19.

71. *See* Certain Softwood Lumber Products From Canada: Notice of Panel Decision, Revocation of Countervailing Duty Order and Termination of Suspension of Liquidation, 59 Fed. Reg. 42,029-30 (Aug. 16, 1994). *See also* 19 U.S.C. § 1516(a) (1994).

raised burdens of proof requirements for domestic petitioners in AD/CVD proceedings. Domestic industries must now meet a higher threshold to prove that they do indeed represent the domestic industry. The agreements also weaken and limit the use of anti-subsidy devices. Red light subsidies—those specifically to export industries or that impose domestic content requirements as a condition for their being granted—are generally impermissible and prohibited, except for LDCs.[72] Yellow (or amber) light subsidies—specific subsidies causing appreciable injury to a domestic industry—are actionable, but not for those that are less than or equal to 2% of ad valorem value.[73] Green light subsidies—general or non-specific subsidies—are non-actionable.[74]

Before GATT 1994, an AD/CVD order could be revoked only if the ITA found in three successive annual reviews that there was no unfair dumping or subsidization of the product concerned and the ITC determined that revocation would not harm a domestic industry.[75] With GATT 1994, U.S. law now provides for the "sunset review" of AD/CVD orders in existence for five years, to determine whether revocation of the order likely would lead to resumption of the unfair trade practice and subsequent injury to a domestic industry.[76] This places an additional burden on domestic industries.

Section 201 of the Trade Act of 1974 allows U.S. industries "seriously harmed" by imports to obtain temporary relief against all imports of a particular product from all countries.[77] Remedies include quotas, supplementary duties, tariff-rate quotas (supplemental duties that kick in after a certain quota level is exceeded), and orderly marketing arrangements (export limits negotiated by the U.S. with other countries). However, its use has been very limited, as have adjustment assistance programs for workers, industries or communities affected by a surge in imports. The administrations apparently disfavored use of the safeguard clause and the Tariff Commission (now the ITC) only occasionally found relief appropriate.

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72. *See* GATT 1994, *supra* note 43.
73. *See id.*
74. *See id.*
75. *See* 19 U.S.C. § 1677 (1994).
76. *See* GATT 1994, *supra* note 43.
77. Trade Act of 1974 § 201, 19 U.S.C. § 1675 (1994).

Moreover, when it is used, compensation must be offered to all other GATT 1994 parties, it must be non-discriminatory in its application, and it must be granted for no more than five years.[78]

Section 337 is directed at other unfair import practices, including infringement of patents, trademarks and copyrights; antitrust-type violations; and other unfair acts or methods of competition, such as false advertising and palming off.[79] In addition to showing the unfair practice, one must show the ITC that the practice has the effect or tendency to cause "substantial injury" to U.S. firms.[80] The president has sixty days to reject any ITC decision granting relief.[81] ITC determinations are appealable directly to the Federal Circuit, bypassing the Court of International Trade.[82] However, once the determination is made and Customs attempts to enforce the order, an importer may challenge the Customs action in the CIT.[83]

Although section 337 has been used as an effective tool for intellectual property rights holders in the United States, a GATT 1994 panel found that procedural advantages of a domestic alleged infringer defending against an infringement claim brought in a U.S. district court are absent for importers of allegedly infringing goods who can be brought before the ITC.[84] Claims against domestic infringers are not subject to judicial review in the district court or in the ITC.[85] Actions brought before the ITC could be made in the alternative or in addition to claims brought in the district courts as well.[86] In response to the adverse GATT ruling, the United States amended section 337, thus making it a little weaker than before but still a better tool than other U.S. trade law remedies.[87] A defendant may now pursue counterclaims that could be removed to the district court and any claims then pending would be stayed while the ITC conducts its investigation.[88]

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78. *See id.*
79. Tariff Act of 1930 § 337, 19 U.S.C. § 2436 (1994).
80. *Id.*
81. *See id.*
82. *See id.*
83. *See id.*
84. *See id.*
85. *See* Tariff Act of 1930 § 337, 19 U.S.C. § 2436 (1994).
86. *See id.*
87. *See id.*
88. *See id.*

Section 301 of the Trade Act of 1974, and its 1979, 1984 and 1988 amendments, requires the United States Trade Representative ("USTR") to investigate certain unfair trade practices of foreign countries and to identify them and analyze their practices or policies that constitute "significant barriers" to U.S. exports of goods or services in an annual Report of National Trade Estimate ("NTE").[89] The USTR may impose up to 100% additional duties on imports from the identified countries.[90] Special 301 actions may be brought for such foreign country practices concerning failure to enforce rights of U.S. intellectual property rights holders.[91] Use of this tool is somewhat limited, but it is very controversial because of claims that it violates principles of international law.[92]

Section 301 is perceived as having prompted the Japanese to enter into an agreement with the Bush Administration—the so-called "Structural Impediments Initiative" ("SII")—which sought to address significant non-trade barriers in both countries.[93] With the strengthened WTO and dispute settlement system established under GATT 1994 and the principle that trade disputes are to be settled in the multilateral forum provided by the Dispute Settlement Understanding ("DSU"), section 301's utility and legitimacy are highly questionable.

In sum, the international trade regime has placed limits on national government actors and domestic petitioners to use domestic trade law remedies to curtail unfair foreign trade practices. Moreover, the numerous GATT/WTO rounds have reduced U.S. customs duties significantly, and the NAFTA provides for a phased elimination of tariff and most nontariff barriers on trade among Canada, Mexico and the United States within ten years. Thus, although customs duties provided for the vast majority of revenues for the U.S. Treasury until the U.S. Constitution was amended to allow for the collection of income taxes, they are currently, with respect to most goods, insignificant.

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89. Trade Act of 1974 § 301, 19 U.S.C. § 2411 (1994) (amended 1979, 1984 and 1988).

90. *See id.*

91. *See id.*

92. *See id.*

93. Joint Report of U.S.–Japan Working Group on the Structural Impediments Initiative, Tokyo, Japan (June 28, 1990).

V. CURRENT DEVELOPMENTS AND OTHER CONSIDERATIONS

One recent development that will certainly have an impact on the CIT's role in international trade relations is the decision of the Supreme Court in *United States v. Haggar Apparel Company*.[94] In that case, the Court determined that Customs rulemaking determinations are entitled to deference despite the statutory requirement that the CIT must decide cases using a *de novo* standard of review and must reach the correct result once the importer overcomes the statutory presumption of correctness to which Customs determinations are entitled.[95]

Suffice it to say that there is some concern among the Bench and the Bar that with such limits on judicial review of customs rule-making determinations, heightened requirements for domestic industries in AD/CVD determinations, and the reduction of tariffs, there is likely to be a substantial reduction in the load of cases for the CIT to decide in the near future.

On the other hand, there are a number of substantive areas in which the CIT does not currently have jurisdiction and for which some may suggest judicial review should reside in the CIT.

For example, would it be appropriate to subject Section 301 actions to judicial review? Perhaps this review can be limited to deciding whether a petitioner has met the requirements for the USTR to conduct an investigation. Some may suggest that the CIT should have judicial review to determine whether actions taken by agencies of the U.S. government and by the various states are consistent with U.S. obligations under international law. Some may suggest that the Court should have jurisdiction over certain private international commercial disputes as well—perhaps with regard to petitions for the enforcement of foreign arbitral awards and civil judgments that are challenged on the basis that enforcement would violate a fundamental public policy of the United States or the subject matter is not properly subject to review by the arbitral body or foreign court from which the decision was rendered.

Others may propose that the CIT's subject matter jurisdiction should expand commensurate with that of the scope of the WTO and other international trade agreements. One of the

94. 526 U.S. 380 (1999).
95. *See id.* at 493.

other panels discussed the impact of globalization and the role that the CIT has begun to have and is likely to have with respect to social issues such as labor and the environment. No doubt, the developments from the Ministerial Conference in Seattle, Washington, just prior to the Judicial Conference, will have an impact as well.

Alternatively, would it be appropriate to statutorily require the CIT to refer certain issues to the WTO for guidance much like the highest national courts of the Members of the European Community are required to refer such questions to the Court of Justice of the European Communities - the so-called "preliminary reference" procedure? This would certainly raise objections under the political question doctrine - that such referrals may interfere with the role of the Executive and the Congress in deciding whether to comply with decisions of WTO panels and the Appellate Body. The CIT and the Federal Circuit, as well as the Implementation Act and the Statement of Administrative Action, have determined that GATT/WTO law and dispute settlement decisions do not have a direct effect, and only U.S. Congress may decide to change federal law to bring it into compliance with the Uruguay Round agreements.

Lastly, a comment on the role that technology and advanced communications will have on the practice before the CIT. The CIT is a national court, with authorization to hold trials anywhere in the country and evidentiary hearings abroad. The CIT commonly decides cases based on the record developed by the agencies below and the briefs submitted by counsel, without the need for counsel and the parties to appear before the Court for oral argument. With the advent of electronic filings and teleconferencing systems, what will it be like for trade practitioners and the Bench when there will be even less need to travel to New York City to make an appearance and to participate in oral argument before the Court? In addition, there certainly will be ethical issues and other concerns that must be addressed before such a system is put into place.