Maryland Journal of International Law

Volume 7 | Issue 1 Article 10

Customs Court Reform

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CUSTOMS COURT REFORM

I. INTRODUCTION

The necessity for Customs Court reform arose as a result of inconsistent case law emanating from courts with jurisdiction over import transactions.[1] Varying interpretations of the law by the district courts and the Customs Court (two systems of judicial review that were bound by different precedent) created the need for Congressional intervention and reform.

Congress' primary objective was to create consistent judicial review of import transactions.[2] Congress had recently increased its influence over trade policy through the enactment of new trade laws; however, the provisions of these laws are subject to judicial interpretation and influence. When judicial decisions are inconsistent or unclear, Congress' trade policies are undermined.

Judicial review ensures that implementation of trade laws by agencies charged with such duties conforms to Congressional objectives. Two recent decisions of the Customs Court exemplify the influence of this court on trade policy. The first case, *Yoshida Int'l. Inc. v. United States,* upheld a surcharge on imports against attacks that the President had acted outside of his statutory authority by authorizing the imposition of the surcharge.[3] The second case, *Zenith Radio Corp. v. United States,* held valid countervailing duties imposed to counteract subsidies given by the Japanese government to its producers.[4] Review by the Customs Court ensured that the agency (the Customs Service in both examples) properly implemented the Congressional policies underlying the statutes in levying these duties. In *Yoshida*, the court found that Congress intended to give the President broad authority to impose import surcharges in order to reduce the injurious impact of imports on American industry. In *Zenith*, Congress authorized countervailing duties to combat the Japanese government's subsidization of its domestic producers.

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1. H.R. REP. No. 1235, 96th CONG., 2d SESS., 18–19 (1980), *citing Customs Courts Act of 1980, Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary,* H.R. 6394, 96th CONG., 2d SESS. 7 (1980).

2. H.R. REP. No. 1235, 96th CONG., 2d SESS. 18–19 (1980) (purpose).

3. Yoshida Int'l. Inc. v. United States, 378 F. Supp. 1155 (Cust. Ct. 1974), *rev'd,* 556 F.2d 560 (C.C.P.A. 1975) (countervailing duties imposed under section 201 of the Trade Act challenged).

4. Zenith Radio Corp. v. United States, 430 F. Supp. 242 (Cust. Ct.), *rev'd,* 562 F.2d 1209 (C.C.P.A. 1977), *aff'd,* 437 U.S. 443 (1978). *See also Customs Courts Act: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary on S. 2857,* 95th CONG., 2d SESS. 48 (1978).

Judicial review of agency action under trade legislation operated very ineffectively prior to the passage of the Customs Courts Act of 1980.[5] The goal of the Customs Courts Act of 1980 was to improve the consistency of judicial review of actions arising under trade legislation and to thereby ensure proper implementation of trade policy.[6] The Act was an attempt to resolve the problem of overlapping jurisdictional grants to the Customs Court and district courts by providing greater access to judicial review to those persons aggrieved by agency actions affecting importation, and by expanding the remedies available to aggrieved parties. This note discusses the three major aspects of change in the judicial review of import transactions — changes in jurisdiction, standing, and relief — in the Customs Courts Act of 1980.

A. APPROACH TO REFORM[7]

In reviewing the provisions of the Act, it is first beneficial to note how

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5. Customs Courts Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727 (1980) (amending 28 U.S.C. §§ 251, 1581–85, 2631–47 and technical and conforming amendments to various sections of titles 18 and 19) [*hereinafter* cited as Customs Courts Act].

6. Clarification of jurisdiction was the overriding Congressional goal among many, and the harm from unclear jurisdictional grants was the primary motivating force for this statute. The intolerable confusion demanded reform so the judicial system would be interpreting and implementing the law in one way. The other Congressional goals were: (1) to ensure access to the Customs Court to those persons aggrieved by agency action; (2) to complete the transfer of the Customs Court to an Article III court; and (3) to achieve uniformity of imports as required by the Constitution. All of these goals were expressed throughout the floor debates by the proponents of the bill and shall be discussed throughout this note. *See, e.g.*, 126 CONG. REC. S13344–45 (daily ed. September 24, 1980) (remarks of Senator DeConcini); 126 CONG. REC. H9342 (daily ed. September 22, 1980) (remarks of Rep. Rodino). *See also Customs Courts Act of 1980, Hearings on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 96th CONG., 2d SESS. 145–46 (1980) (statement of Leonard Lehman, Chairman of the American Bar Association Standing Committee on Customs Law, — statement enumerates the bill's objectives that were supported by the American Bar Association). For a compilation of legislative material on the Customs Courts Act of 1980, *see* LAW & BUSINESS, INC., LITIGATION BEFORE THE U.S. COURT OF INTERNATIONAL TRADE (1981).

7. In its reform of the process of judicial review of the Customs Court, the Act fits within a broader policy objective of Congress in the late 1970s to reform the federal judicial machinery. Omnibus Judgeship Act of 1978, 28 U.S.C. §§ 44–46 (Supp. II 1978) (increased number of permanent circuit court judgeships); Federal District Court Organization Act of 1978, 28 U.S.C. §§ 89–118 (Supp. II 1978) (increased number of permanent district court judgeships, reorganized and changed locations of places court to be held); Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96–458, 94 Stat. 2035 (1980) (to be codified in 28 U.S.C. § 331); Federal

the Customs Courts Act of 1980[8] comports with the traditional pattern of Congressional reform of the Customs Court. In the past, Congressional reform of judicial review focused on the procedural deficiencies of such review, as in the Customs Courts Act of 1970[9] and the Customs Procedural Reform and Simplification Act of 1978.[10] Both Acts responded to particular procedural defects in the system of judicial review of agency action affecting imports, and left the less pressing substantive problems of jurisdiction, standing and remedies unresolved.[11] Congress' approach was to reform the

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Courts Improvement Act of 1979, S. 1477, 96th Cong., 1st Sess. (1979) (proposed a Court of Appeals for the Federal Circuit — failed to pass the Senate).

Commentators long argued for reform of the federal judicial system in its totality and in regard to specific courts. *E.g.*, Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change, reprinted in* 67 F.R.D. 195 (1975) (Hruska Commission); Advisory Council for Appellate Justice, Recommendations for Improving the Federal Intermediate Appellate System (1975); Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (1972) (the Freund Committee).

The Administrative Conference of the United States completed a study of judicial review of actions taken by the United States Customs Service in 1977, resulting in Recommendation 77–2, which suggested certain changes in judicial review by the Customs Court, including, but not limited to, jurisdiction, standing, burden of proof, and assessment of penalties. Recommendation 77:2: Judicial Review of Customs Service Actions, as adopted by the Administrative Conference, may be found in *Customs Courts Act, Hearings on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary,* 96th CONG., 2d SESS. 241 (1980). *See also* Gerhart, *Judicial Review of Customs Service Actions,* 9 LAW POL'Y INT'L BUS. 1101 (1977).

8. Customs Courts Act, *supra* note 5.

9. Customs Courts Act of 1970, Pub. L. No. 91–271, 84 Stat. 274,(1970). This Act generally addressed agency action by the Customs Service in the valuation and assessment of duties and revised the process by which an importer protested and contested duties imposed. *Id.* (codified in 19 U.S.C. §§ 1513–15 (1976)).

10. Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95–410, 92 Stat. 888 (1978) (codified in diverse sections of title 28, chapter 19 of the United States Code). This Act enacted the recommendations of the Administrative Conference on civil penalty actions. 28 U.S.C. § 1592 (Supp. III 1979).

11. In 1970 and 1978, Congress was not presented with broad proposals meant to establish a comprehensive system with expanded opportunities for judicial review of agency actions affecting imports. Instead of removing the impediments to judicial review, Congress simply reformed the internal operations of the Customs Court. H.R. REP. No. 123, 96th CONG., 2d SESS. 18 (1980); *Customs Courts Act: Hearing on S. 2857 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary,* 95th CONG., 2d SESS. 67 (1978) (statement of Honorable Edward D. Re, Chief Judge, U.S. Customs Court).

immediate procedural defects and leave the substantive issues for later legislation.[12]

Congress approached the recent need to reform in the same fashion as it had in the past — by affecting only narrow changes. It failed to design the needed systems of judicial review that would anticipate and resolve prospective problems. Although Congress intended this Act to resolve all confusion, conflict and inequities, its intent did not materialize in the provisions of the Act.[13]

Importers advocate that Congress take a wider view in its reform of judicial review of agency action since the importers' right to review is solely defined by Congress in legislation and is not constitutionally granted.[14] If agency action impedes importation, only legislation can define the right of importers to protest such action in court.[15] The importers assert that more extensive Congressional reform should expand jurisdiction, standing and remedies in court; thus, increasing opportunities for review. A brief description of trade laws that define importers' rights of action follows.[16]

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12. Representative Rodino accurately described past Congressional action:

> Many complex questions have been raised over the years concerning the jurisdiction of the Customs Court, its scope of review and the type of relief the court may award. Periodically, the Congress has examined these issues and has altered the court's status, jurisdiction and powers in a manner intended to solve a specific problem or to meet a specific need at a particular time.

126 CONG. REC. H9,314 (daily ed. September 22, 1980). *See* S. REP. No. 466, 96th CONG., 1st. SESS. 2–3 (1979).

13. Congressional intent was to create a comprehensive system of judicial review. Many gaps still exist in the system of review established by Congress, and this legislation is not the final cure envisioned by Congress. S. REP. No. 96–466, 96th CONG., 1st SESS. 3 (1979); 126 CONG. REC. S13344 (daily ed. September 24, 1980) (remarks of Senator DeConcini); 126 CONG. REC. H9342 (daily ed. September 22, 1980) (remarks of Rep. Rodino).

14. Buttfield v. Stranahan, 192 U.S. 470, 492–94 (1904) (no individual has a vested right to trade with foreign nations). If the importer has no right to import, the violation of that right is not actionable, and for the right to be actionable, it must be given and defined statutorily. The importer may object to actions impeding importation only as the statute allows him to so object. *See* Canadian Tarpoly Co. v. United States Int'l Trade Comm'n, No. 81–5 (C.C.P.A. 1981), *reprinted in* 15 CUST. B. & DEC., No. 9 (March 4, 1981) (*citing* Buttfield v. Stranaham, 192 U.S. 470, 493, 496 (1904)) (disallowed collateral attack on agency action without scope of right of action defined in statute).

15. In United States v. Sherman & Sons Co., 237 U.S. 146, 152 (1915), the Court stated that the right of review in the Customs Court is not an appeal in the ordinary course of law. The right to appeal could only be exercised in "the statutory method, or statutory conditions before special tribunals of limited jurisdiction."

16. *See generally* G. BRYAN, TAXING UNFAIR INTERNATIONAL TRADE PRACTICES (1980).

B. BACKGROUND OF TRADE LEGISLATION

As foreign trade has become more important to the domestic economy,[17] the right to contest agency action has expanded. Beginning with the Tariff Act of 1930,[18] trade legislation has become more than a means of collecting revenue — it has become a means by which Congress can manipulate trade policy. The three legislative acts that have most significantly influenced trade policy are The Tariff Act of 1930,[19] The Trade Act of 1974,[20] and the Trade Agreements Act of 1979.[21]

The Tariff Act of 1930 was the first modern major tariff legislation. It established tariff rates[22] and defined the exact procedures for an importer to follow in order to recover excessive duties.[23] The Tariff Act was the basic trade legislation authorizing the imposition and enforcement of duties.

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17. In quantitative terms, the increased importance is very easy to illustrate. In 1970, imports into the United States amounted to $42.2 billion. In 1977, the figure increased by 246 percent to $246.8 billion. Not only the volume of imports has increased, but the ratio of imports as a percentage of the United States gross national product has increased from 4.3 percent to 7.8 percent. This growth has spawned an increased demand for the quick, orderly resolution of issues and disputes relating to imports. *Customs Courts Act of 1980: Hearing on S. 2857 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 95th CONG., 2d SESS. 77–78 (1978) (statistics quoted by Thaddeus Royek, Chief Counsel, United States Customs Service).

18. Tariff Act of 1930, 19 U.S.C. §§ 1202–1701 (1976 & Supp. III 1979).

19. *Id.*

20. Trade Act of 1974, 19 U.S.C. §§ 2101–2487 (1976, Supp. II 1978 & Supp. III 1979).

21. Trade Agreements Act of 1979, Pub. L. No. 96–39, 93 Stat. 300 (1979).

22. Tariff Act of 1930, 19 U.S.C. § 1202 (1976, Supp. II 1978 & Supp. III 1979). Beginning in 1979, the tariff schedules are no longer published in the United States Code but are available in a separate document maintained by the United States International Trade Commission. These tariff schedules contain descriptions of articles for classification and appraisement and applicable quotas. *See* the Note on Publication of Tariff Schedules preceding 19 U.S.C. § 1209 (Supp. III 1979).

23. Tariff Act of 1930, 19 U.S.C. §§ 1513–16 (1976 & Supp. III 1979). As a condition to judicial review of import determinations, administrative remedies must have been exhausted. This process required the entry of the goods into the United States, the assessment and liquidation of duties, and the payment of the duties. If the importer disagreed with the Customs Service's determination, he filed a protest with the Customs Service. After the Customs Service reviewed and denied the protest, the importer was required to file a summons and complaint before judicial review in the Customs Court. 19 U.S.C. § 1484 (entry of merchandise); *id.* § 1500 (appraisement, classification, and liquidation procedure); *id.* § 1514 (Supp. III 1979) (protest against decision of appropriate customs' officer); *id.* § 1515 (1976 & Supp. III 1979) (review of protests, administrative review, and modification of decisions); *id.* § 1516 (Supp. III 1979) (petitions by domestic interested parties); *id.* § 1516a (judicial review in antidumping duty

The Trade Act of 1974[24] was the second major piece of legislation. As tariffs were reduced over the years, sectors of the American economy, hurt by foreign competition, sought relief from reduced trade barriers. The Trade Act of 1974 provided relief for workers, firms and communities injured by increased import competition. If a worker lost his job, a firm went out of business, or a community as a whole suffered because increased imports were replacing the American-produced goods, the workers, firms and communities were now able to qualify for financial assistance.[25] This financial assistance could be spent to train workers for new jobs, make production more efficient, attract new industry to the community or otherwise counteract foreign import competition. The Act gave Congress greater freedom to reduce trade barriers because any American interest harmed as a result of reduced tariffs could now receive assistance to mitigate the adverse effects of increased import competition.

The Trade Agreements Act of 1979[26] amended both the Tariff Act of 1930 and the Trade Act of 1974. Congress enacted it[27] to implement the resolutions of the Tokyo Round of Multinational Trade Negotiations, which were aimed at reducing trade barriers. The Act attempted to reform judicial review,[28] however, its haphazard approach left more meaningful reforms to be made by the Customs Courts Act of 1980.

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proceedings — similar procedure as for review of denial of protest). *See also Customs Courts Act of 1980: Hearings on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary,* 96th CONG., 2d SESS. 113–15 (1980).

24. Trade Act of 1974, 19 U.S.C. §§ 2101–2487 (1976, Supp. II 1978 & Supp. III 1979).

25. 19 U.S.C. §§ 2273, 2341, 2371 (1976, Supp. II 1978 & Supp. III 1979).

26. Trade Agreements Act of 1979, Pub. L. No 96–39, 93 Stat. 144 (1979) (codified in titles 19 and 28 of the United States Code).

27. The major goals of the 1979 Act were: (1) to further international trade; and (2) to improve the rules of international trade and the enforcement of such rules. 19 U.S.C. § 2502 (Supp. III 1979) (Congressional Statement of Purposes).

28. The Act expanded the opportunity for judicial review in countervailing duty and antidumping duty proceedings and delegated review to the Customs Court along with very limited injunctive powers. Although it increased judicial review and marginally increased the powers of the Customs Court, the Trade Agreements Act of 1979 contained three defects. First, the Act did not set forth procedures and time limits necessary for commencement of civil actions in the Customs Court contesting agency determinations regarding countervailing and antidumping duties. Secondly, the Act failed to sufficiently expand standing in the Customs Court, and finally, it did not eliminate the confusion and inequities that had arisen in the case law due to the Customs Court's narrow jurisdiction. Extensive reform of the Customs Court was left for subsequent legislation. Trade Agreements Act, 19 U.S.C. § 1516a (Supp. III 1979). *See* H.R. REP. No. 96–1235, 96 CONG., 2d SESS. 20 (1980).

Congress shapes trade policy through legislation rather than deferring all authority over foreign trade to the executive branch.[29] While the trend is toward greater freedom of trade, Congress does not advocate the immediate and complete abandonment of trade barriers. Implicit in trade legislation is a careful balance between free trade and protectionism. The interest of Congress is to ensure that the balance struck is reflected by agency and judicial decisions. To ensure consistent interpretation of trade laws, Congress vested jurisdiction over all trade actions in the Customs Court and changed its name from the Customs Court to the Court of International Trade in order to better reflect its expanded jurisdiction over trade actions.[30]

II. THE ACT

The Customs Courts Act of 1980 expanded the jurisdiction of the United States Customs Court and renamed it the United States Court of International Trade.[31] This, in turn, necessitated a modification of the court's procedure.[32] The three most important changes in the law that will be discussed are the expanded jurisdiction of the Court, the greater number of persons who may now seek judicial review of agency actions concerning trade, and the expanded remedies that the Court now has as its disposal to relieve aggrieved parties.

A. JURISDICTION

The pressing need to clarify the jurisdiction of the Customs Court and of the district courts justified immediate reform. Prior to the Act, overlapping statutes and conflicting case law gave jurisdiction to both the Customs Court and the district courts. Whether a case was within the Customs Court's

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29. Congress has the power to regulate foreign commerce while the President has authority to conduct foreign relations. Although the Congress often delegates to the President the power to negotiate trade agreements, most international trade agreements are adopted by Congress in the form of domestic legislation. U.S. CONST. arts. I, § 8 and II, § 2. *See* Consumers Union, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir.), *cert. denied*, 421 U.S. 1004 (1975) (discussion of scope of Presidential authority).

30. Congress changed the name of the Customs Court to the Court of International Trade. The reason stated was "[t]he new name more accurately describes the court's clarified and expanded jurisdiction and its new judicial functions relating to international trade." H.R. REP. NO. 96–1235, 96th CONG., 2d SESS. 20 (1980). *See* Customs Courts Act, *supra* note 5, at 1727 (to be codified in 28 U.S.C. § 251).

31. Customs Courts Act, *supra* note 5, at 1728 (to be codified in 28 U.S.C. § 1581).

32. Customs Courts Act, *supra* note 5, at 1730–37 (to be codified in 28 U.S.C. §§ 2631–2642). A recent symposium, the transcript of which has been published, explained the practical workings of the statute. *International Trade Symposium*, 26 N.Y.L. SCH. L. REV. 431–504 (1981).

jurisdiction or within a district court's jurisdiction was difficult to determine.[33]

Once any action was within the jurisdiction of the Customs Court, it was supposed to be within the Customs Court's *exclusive* jurisdiction;[34] the district court was thereby precluded from taking jurisdiction.[35] The problem arose in trying to define *exclusive jurisdiction.* If a plaintiff chose a district court within which to bring an action, and the district court ruled that the case was properly within the exclusive jurisdiction of the Customs Court, the district court dismissed the case. When trying to ascertain how the district courts interpreted "exclusive," however, a party was confronted by conflicting case law based on and distinguished by minute factual details and differences.[36]

The typical scenario involved an importer who wished to import goods into the United States, but refused to do so because of the duties that would be imposed on the goods. These duties included the anti-dumping duty (imposed for selling goods below fair market value);[37] the countervailing duty (imposed because the foreign government of the importer provided a subsidy

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33. *See infra* note 36.

34. Congress amended the Customs Court's jurisdiction based on the authority of Patchogue-Plymouth Mills Corp. v. Durning, 101 F.2d 41 (2d Cir. 1947) and David L. Moss Co., Inc. v. United States, 103 F.2d 395 (C.C.P.A. 1939) by adding the word "exclusive" before "jurisdiction" in the statute. *See* Act of June 25, 1948, ch. 646, 62 Stat. 943, *as amended* by the Customs Court Act of 1970, Pub. L. No. 92–271, tit. I, § 110. 84 Stat. 278 and the Trade Agreements Act of 1979, Pub. L. No. 96–39, tit. x, § 1001(b)(4)(B), 93 Stat. 305 (*amended in full* by Customs Courts Act of 1980, *supra* note 5, at 1728–32).

35. 28 U.S.C. § 1340 (1976). The statute reads:

> The district courts shall have the original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage, except matters within the jurisdiction of the Customs Court.

36. The reason jurisdiction was so difficult to determine is because the decisions rendered by the courts did not present a coherent body of law. The conflicts in the case law were well-illustrated in district court and Court of Appeals decisions dismissing and granting jurisdiction. The courts often strained to factually distinguish seemingly identical cases. *Compare* Sneaker Circus v. Carter, 566 F.2d 396, 399–400 (2d Cir. 1977) (case will never ripen sufficiently to meet statutory requirements — district court granted jurisdiction); *and* Davis Walker Corp. v. Blumenthal, 460 F. Supp. 283, 290 (D.C. Cir. 1978) (granted jurisdiction although requirements for review in Customs Court not met); *with* Riconini v. United States, 69 F.2d 480, 482 (9th Cir. 1934) (payment of duties conceded jurisdiction of Customs Court — dismissal from district court); *and* J.C. Penney Co. v. Dep't of the Treasury, 319 F. Supp. 1023, 1029 (S.D.N.Y.), *aff'd* 439 F.2d 63, 68 (2d Cir.), *cert. denied,* 404 U.S. 869 (1970) (the fact that the controversy was not ripe for review did not deprive the Customs Court of exclusive jurisdiction — district court dismissed for lack of jurisdiction).

37. 19 U.S.C. §§ 1673, 1673a–1673i (1976 & Supp. III 1979).

to aid in the production of the goods);[38] the import restraint duty (imposed because the import quota for the goods had already been filled for the year);[39] and finally, simple import duties.[40] Such an importer would never bring the goods into the United States because he considered the duties that would be imposed too excessive to allow for profit.[41] If the goods never entered the United States and a customs official never assessed duties on the goods, the importer could not protest the duty, and the Customs Service, therefore, could not deny the protest. Without a denied protest, the importer could never bring the only action over which the Customs Court had jurisdiction — an action to contest the denial of a protest against duties already assessed and paid.[42] This onerous barrier to challenging import duties in the Customs Court presented the importer with the dilemma of either importing goods and risking a loss, or not importing at all.

Another alternative sometimes existed for the importer who desired to contest potential action by the Customs Service without importing the goods and risking an adverse decision with the resulting profit-destroying duties. Such an importer would not import goods unless the probable duties could be successfully challenged beforehand. As a result, he would not be able to follow the mandatory procedure for review in the Customs Court that required importation of the goods.[43] Fortunately, some district courts lessened

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38. 19 U.S.C. §§ 1303, 1671, 1671a–1671f (1976 & Supp. III 1979). *See also* 19 U.S.C. §§ 1516a (1976 & Supp. III 1979) (judicial review over imposition of countervailing and antidumping duties).

39. 19 U.S.C. § 2253 (Supp. II 1978) (tariff-rate quota).

40. 19 U.S.C. §§ 1481–1510 (1976 & Supp. III 1979) (ascertainment and collection of duties). *See also* 19 U.S.C. §§ 1514–16 (1976 & Supp. III 1979) (recovery of excessive duties).

41. Many times the rate of duty was so high that a plaintiff would be forced out of business if he brought the goods into the United States and tried to sell it at a price high enough to recoup the duty paid on it. In these cases, it was very improbable that the plaintiff would petition for the adequate remedy at law. He would simply not import the goods. *See, e.g.*, Jerlian Watch Co. v. Dep't of Commerce, 597 U.S. 687, 690 (9th Cir. 1979); Horton v. Humphrey, 146 F. Supp. 819, 821 (D.C. Cir.), *aff'd*, 352 U.S. 921 (1956).

42. 19 U.S.C. §§ 1514–1516a (1976 & Supp. III 1979) (method of obtaining judicial review in the Customs Court).

43. The action was not ripe until all available administrative remedies had been pursued. If the action was not ripe, the Customs Court would not take jurisdiction, and the district court would dismiss for lack of subject matter jurisdiction because the subject matter of the case was within the exclusive jurisdiction of the Customs Court. *See, e.g.*, Matsushita Elec. Indus. Co., Ltd. v. Dep't of the Treasury, 485 F.2d 1402, 1403 (C.C.P.A. 1973) (jurisdiction not properly invoked under the statute, case not ripe, dismissed); J.C. Penney Co. v. Dep't of the Treasury, 439 F.2d 63, 68 (2d Cir.), *cert. denied*, 404 U.S. 869 (1970) (case dismissed — when ripe must then be reviewed in Customs

the inequities resulting from this mandatory procedure for review by granting jurisdiction based on a judicially-created exception to the otherwise exclusive jurisdiction of the Customs Court.

These district courts held that no adequate remedy existed in the Customs Court since the Customs Court would not take jurisdiction in these cases, and that the cases were, therefore, not within the exclusive jurisdiction of the Customs Court. On this basis, the district courts held that they were free to exercise jurisdiction.[44] In *Sneaker Circus v. Carter*,[45] the Court of Appeals for the Second Circuit exercised this court-made exception and granted jurisdiction and the injunctive relief sought by the aggrieved parties. The court held that it was very unlikely that the importer would ever file a preliminary protest contesting quota restraints on Korean athletic footwear. As a result, the import restrictions would be enforced in the foreign port and importation would never occur.[46] This judicial exception to the Customs Court's exclusive jurisdiction was viewed by many district courts as a relief measure that avoided the inherent inequities of the statutory scheme.

Other district courts, however, interpreted the exclusivity of Customs Court jurisdiction more literally.[47] Sensitive to the possible abuse and

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Court); Morgantown Glassware Guild Inc. v. Humphrey, 236 F.2d 670, 671 (D.C. Cir.), *cert. denied*, 352 U.S. 896 (1956) (prescribed administrative remedy must be exhausted) Patchogue-Plymouth Mills Corp. v. Durning, 101 F.2d 41, 44 (2d Cir. 1939) (dismissed — must file protest and seek review in the Customs Court).

44. *E.g.*, Sneaker Circus v. Carter, 566 F.2d 396 (2d Cir. 1977) (trade agreements regulated at foreign port made it unlikely a protest would be filed in the United States); Davis Walker Corp. v. Blumenthal, 460 F. Supp. 283, 290 (D.D.C. 1978) (strong likelihood plaintiffs would not obtain review in Customs Court because foreign suppliers would not sell below trigger price to cause an investigation to be initiated). *Accord*, SCM Corp. v. Int'l Trade Comm., 549 F.2d 812 (1977); Timken Co. v. Simon, 539 F.2d 221 (D.C. Cir. 1976). *But see* Jerliah Watch Co. v. Dep't of Commerce, 597 F.2d 687, 692 (9th Cir. 1979) (financial barrier irrelevant consideration); J.C. Penney Co. v. Dep't of the Treasury, 439 F.2d 63, 68 (2d Cir), *cert. denied*, 404 U.S. 869 (1970) (more desirable remedy in district court does not mean inadequate remedy in Customs Court).

45. 566 F.2d 396 (2d Cir. 1977).

46. *Id.* at 401.

47. If a district court dismissed the case, the plaintiff's only alternative was to seek review in the Customs Court and follow the statutory procedures requiring importation, payment of duties, and finally, the challenge to the agency action. *Cf.* Flintkote Co. v. Blumenthal, 596 F.2d 51, 54–55 (1979) (lack of injunctive relief in Customs Court not within inadequate remedy exception); J.C. Penney Co. v. Dep't of the Treasury, 319 F. Supp. 1023 (S.D.N.Y.), *aff'd* 439 F.2d 63, 65 (2d Cir.), *cert. denied*, 404 U.S. 869 (1970); Horton v. Humphrey, 146 F. Supp. 819 (D.C. Cir.). *aff'd*, 352 U.S. 921 (1956) (case dismissed because adequate remedy to import goods, pay antidumping duty, and then protest the duty).

manipulation of the inadequate remedy exception explained above, these courts held that the mere lack of injunctive relief or any equitable remedy prior to importation in the Customs Court did not mean that there was an inadequate remedy.[48] The courts dismissed cases on the grounds that exclusive jurisdiction meant that all cases involving evaluation and imposition of duties were to be in the Customs Court — regardless of the remoteness of any remedy.[49]

This split in the case law prompted Congress to clarify the law in support of the preference for consistent precedent and the constitutional mandate that import duties be uniform.[50] If the amount of the duty depended on the district of importation, duties were not being uniformly imposed.[51]

The Customs Courts Act, in an effort to eliminate the inconclusive case law and the unfairness of inconsistent treatment, conferred exclusive subject-matter jurisdiction over imports to the Court of International Trade in the following broad language:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action . . . that arises out of any law of the United States providing for—
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> (1) revenue from imports or tonnage;

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48. Some district courts made it very clear they were going to follow the intent of Congress to have a complete, integral system of customs laws and justice in the Customs Court. *E.g.*, J.C. Penney Co. v. Dep't of the Treasury, 319 F. Supp. 1023 (S.D.N.Y.), *aff'd*, 439 F.2d 63, 66 (2d Cir.), *cert. denied*, 404 U.S. 869 (1970). *See infra* note 49.

49. These district courts dismissed cases properly within Customs Court jurisdiction so as not to undermine Congressional intent to have all import decisions in the Customs Court, as was evidenced by the addition of the word "exclusive" to the statute. Act of June 25, 1948, ch. 646, 62 Stat. 943 *See supra* note 34. *See, e.g.*, Jerlian Watch Co. v. Dep't of Commerce, 597 F.2d 687 (9th Cir. 1979) (adequate remedy to import in excess of quota, pay duty, and protest — distinguished *Sneaker*); SCM Corp. v. Int'l Trade Commn, 549 F.2d 812, 821 (D.C. Cir. 1977) (Customs Court should be given chance to determine if case within its exclusive jurisdiction); J.C. Penney Co. v. Dep't of the Treasury, 319 F. Supp. 1023 (S.D.N.Y.), *aff'd*, 439 F.2d 63, 66 (2d Cir.), *cert. denied*, 404 U.S. 869 (1970) (proper administration of customs laws requires a complete, integral system of customs laws justice); Cottman Co. v. Dailey, 94 F.2d 85, 88 (4th Cir. 1938) (dismissed — Congress placed comprehensive system of review in Customs Court).

50. U.S. CONST. art. I, § 8, cl. 1. The exact language is as follows: "Imports and excises shall be uniform throughout the United States."

51. Court decisions state that a tax is uniform if it operates with the same force and effect in every place where the subject of the tax is found. This requirement is not met if the enforcement of a duty can be more easily circumvented in some districts than in others. *See* Billings v. United States, 232 U.S. 261 (1914); Head Money Cases, 112 U.S. 596 (1884); C.S. Taver & Sons v. United States, 135 F. Supp 874 (Cust. Ct. 1955).

> (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 matters [already within the jurisdiction of the court].[52]

In addition, the Act specifically transferred civil actions commenced under the Trade Act of 1974, to the Court of International Trade. These civil actions reviewed agency action on brokers' licenses, and challenged rulings pertaining to the justification for countervailing and anti-dumping duties made by the Secretary of the Treasury prior to importation.[53]

Although the problems the Act sought to rectify were clear and the statutory language was thought to be precise, resulting conflicts in interpretation have negated any Congressional hope for complete clarity in the Act.

In framing the language of the bill, Congress could have chosen a specific listing of all actions or statutes affecting imports, or a sweeping grant of jurisdiction over all actions affecting imports. In previously proposed bills, exclusive jurisdiction was vested in the court over all "civil actions . . . directly affecting imports."[54] The bills then excluded certain actions from that otherwise all-encompassing grant.[55] This grant in the earlier bills contrasts sharply with that of the Customs Courts Act of 1980, which specifically enumerates all the possible civil actions affecting imports, without exception, as properly within the court's jurisdiction.[56]

In drafting the Act, some concern was expressed about the possible ambiguity created by the failure to list specific statutes, which might

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52. Customs Courts Act, *supra* note 5, at 1739 (to be codified in 28 U.S.C. § 1581(i)). *See also* Cohen, *The "Residual Jurisdiction" of the Court of International Trade Under the Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 471 (1981) (general explanation of expanded jurisdiction).

53. Customs Courts Act, *supra* note 5, at 1728–29 (to be codified in 28 U.S.C. §§ 1581(d), (g), (h)).

54. S. 2857, 95th CONG., 2d SESS., § 302 (1978).

55. *Id.* The exclusions from jurisdiction totaled seven and included actions arising under antitrust laws, actions under the Shipping Act of 1916, actions concerning labor, actions under the Freedom of Information Act or the Privacy Act, actions concerning obscene material, actions involving a function vested by law in the Department of Energy, and actions brought to review a discretionary decision of the President or internal advice issued by the Secretary of the Treasury.

56. Customs Courts Act, *supra* note 5, at 1729 (to be codified in 28 U.S.C. § 1581(i)).

arguably have resulted in the inadvertent omission of a statute or action. In response to these concerns, the House of Representatives Subcommittee on Trade recommended a "generic approach rather than a specific listing of statutes in an effort to provide greater protection for the rights of persons involved in disputes arising out of import transactions."[57] The Act, therefore, sets forth broad categories of jurisdiction with the intent that the court should liberally construe them in order to avoid the injustices encountered by prior legislation.[58]

By listing in the Act only those civil actions within the jurisdiction of the court, questions inevitably arose concerning the proper forum for those actions not listed. An example of this confusion is *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*[59] In *Alberta*, the district court, and later the Court of Appeals for the Second Circuit, took jurisdiction over a business tort issue concerning imports.[60] While these two courts were deciding particular issues,[61] another action involving the same imported merchandise and parties was stayed in the Court of International Trade.[62] Such multiple litigation in three different courts could have been avoided had the Act given the Court of International Trade sweeping jurisdiction over all actions concerning imports. This would have placed all import actions in one court, and the inconsistency in decisions and confusion as to the proper forum for any particular cause of action involving imports could have been eliminated.

In contrast, other recent decisions have demonstrated the Court of International Trade's ability to work within the limits of the Act and fulfill Congress' intent that the grant of jurisdiction be given broad judicial application in order to eliminate the prior jurisdictional conflicts between the courts. In *Di Jub Leasing v. United States*[63] and *Zenith Radio Corp. v. United*

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57. H.R. REP. NO. 1235, 96th CONG., 2d SESS. 34 (1980).

58. The intent of Congress in its effort to avoid omission of any one statute was to provide greater protection for the rights of persons involved in disputes arising out of import transactions. *Id.*

59. No. 80–9021 (2d Cir. May 12, 1981).

60. *Id.* The plaintiff alleged tortious interference with a business opportunity. Defendant had allegedly presented false testimony before the International Trade Commission that had caused an injury finding and consequentially higher duties on plaintiff's imported goods.

61. The case was remanded to the International Trade Commission for a determination of whether perjury had, in fact, been committed. *Id.*

62. The action pending in the Court of International Trade was the review of the Secretary of the Treasury's decision to impose the antidumping duty. *Id.*

63. No. 80–9 (Ct. Int'l Trade 1980), *reprinted in* 14 CUST. B. & DEC. No. 15 (December 31, 1980).

States,[64] the court took jurisdiction over two actions not specifically listed in the statute, but which were actions arising under the import laws.

In *Di Jub Leasing*, the court held that the Congressional intent to establish a comprehensive system of review over a broad spectrum of administrative trade actions mandated that the court review actions concerning the suspension or revocation of various customs licenses. In *Di Jub Leasing*, the court considered the revocation of a cartman's license.[65]

In *Zenith Radio Corp. v. United States*, the court discovered yet another law meant by Congress to be included in those over which it has jurisdiction: the provision of the Tariff Act of 1930 that allows for settlement by the government of anti-dumping cases against foreign importers.[66] The plaintiff, Zenith Radio, asserted that such a settlement was not authorized by the statute. The court exercised jurisdiction, found for Zenith, and issued a preliminary injunction that prohibited the government from settling the case.[67]

Although the court has shown great initiative in exercising its broad grant of review, explicit indications in the legislative history[68] and in the Act itself, inhibit complete expansion of the court's jurisdiction. The undesirable result is that district courts will be forced to take jurisdiction over most civil actions not definitively within the Court of International Trade's exclusive jurisdiction. These exclusions create further potential for confusion and inconsistency as cases involving imports are necessarily bifurcated. Depending on the statute under which the action is brought, jurisdiction over certain issues could remain in a district court while the rest of the issues in the case might be heard in the Court of International Trade.

Congress implicitly excluded certain preliminary actions from the court's jurisdiction. Congress did not want plaintiffs using the broad grant of

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64. No. 80–10 (Ct. Int'l Trade 1980), *reprinted in* 15 CUST. B. & DEC. No. 1 (January 7, 1981).

65. No. 80–9 (Ct. Int'l Trade 1980), *supra* note 63. A cartman moves merchandise between official Customs Service warehouses and is licensed by the Customs Service to conduct such a trucking business for the Customs Service.

66. *See* Tariff Act of 1930, 19 U.S.C. § 1617 (1976). If the attorney handling the claim by the government for the antidumping duties feels that the terms of the claim and the probabilities of recovery might be compromised, the attorney may settle the claim.

67. No. 80–10 (Ct. Int'l Trade 1980), *reprinted in* 15 CUST. B. & DEC. No. 1 (January 7, 1981).

68. *See, e.g.*, H.R. REP. No. 1235, 96th CONG., 2d SESS. 33–34 (1980) (use of the word "involve" in jurisdiction section too broad); S. REP. No. 466, 96th CONG., 1st SESS. 10 (1979) (requirement that legislation out of which action arises directly and substantially involve international trade).

jurisdiction to circumvent other more specific and express grants of jurisdiction in the Act, and thereby, nullify preliminary procedures of review under the specific grants. If there was an express grant of jurisdiction in the Act, it was Congress' intent that the plaintiff claim jurisdiction under that express grant.[69] Using this interpretation, the court has held that the design of Section 516(a) of the Trade Agreements Act of 1979 prevailed over the broader grant of jurisdiction in the Customs Courts Act of 1980.[70] The court would not review the preliminary determination made by the Secretary of the Treasury that critical circumstances did not exist to warrant the imposition of anti-dumping duties. The court said that only final determinations by the Secretary would be reviewable.[71] The broad grant of jurisdiction in the Customs Courts Act of 1980 cannot be used to circumvent the intent of the Trade Agreements Act of 1979 not to provide such preliminary review.[72] Furthermore, the explicit grant of jurisdiction in the Customs Courts Act over anti-dumping determinations by the Secretary of the Treasury does not state that preliminary determinations may be reviewed by the court.[73]

In most instances, Congress stated more expressly those actions to be excluded from the court's jurisdiction. The Act prohibits the court from taking jurisdiction over actions arising out of laws providing for quantitative restrictions on the importation of merchandise that may be hazardous to the

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69. Congress did not intend that Section (i) (in particular paragraph 4, the broad grant) be utilized to circumvent the exclusive method of judicial review of those anti-dumping and countervailing duties listed in Section 516a of the Tariff Act of 1930. Strong legislative history precludes the court from expanding its jurisdiction over interim decisions preceding the final determinations listed in Section 516a of the Tariff Act or any other determination specified in Section 516a — any preliminary administrative action that will be incorporated or superseded by such determination is reviewable exclusively as provided in Section 516a. A preliminary affirmative or negative antidumping or countervailing duty determination is reviewable only in connection with the review of the final determination by the administering authority. H.R. REP. No. 96–1235, 96th CONG., 2d SESS. 48 (1980); S. REP. No. 6–466, 96th CONG., 1st SESS. 10–11 (1979). *See also infra* note 81.

70. Zenith Radio Corp. v. United States, No. 80–10 (Ct. Int'l Trade 1980), *reprinted in* 15 CUST. B. & DEC. No. 1 (January 7, 1981). *Accord*, Haarman & Reimer Corp. v. United States, No. 81–13 (Ct. Int'l Trade 1980), *reprinted in* 15 CUST. B. & DEC. No. 9 (March 4, 1981).

71. Zenith Radio Corp. v. United States, No. 80–10 (Ct. Int'l Trade 1980), *reprinted in* 15 CUST. B. & DEC. No. 1 (Jan. 7, 1981).

72. Generally only final determinations relating to antidumping duty and countervailing duty proceedings are reviewable. *See* Trade Agreements Act of 1979, 19 U.S.C. § 1516a(2)(b) (Supp. III 1979) (reviewable determinations listed).

73. Customs Courts Act, *supra* note 5, at 1728 (to be codified in 28 U.S.C. § 1581(c)).

public health or safety[74] and over civil actions filed to determine whether or not goods imported into the United States are obscene.[75]

Not all cases involve a single fact pattern that fits squarely within either the jurisdiction of the Court of International Trade or the jurisdiction of the district court. For example, an embargo may be imposed for a multitude of reasons, and the determination of those reasons may depend not only upon objective guidelines, but upon the initial forum in which the case is brought or upon factual distinctions. Although the few exclusions from the court's jurisdiction over which the district courts might take jurisdiction seem easy to delineate, problems in interpretation suggest that the two forums might easily disagree on the question of which court should take jurisdiction. In order to pursue its goal of creating a comprehensive system of judicial review over all import transactions, Congress should have included these excluded actions in the Court of International Trade's statutory grant of jurisdiction.

Overriding policy reasons persuaded Congress to omit the excluded actions. Because laws for the protection of the public health and safety affect both domestic and foreign industry, it was considered to be in the public interest that only one system of judicial review implement health and safety laws. It was determined that there should not be two bodies of laws — one in the Court of International Trade for foreign producers and one in the district

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74. Customs Courts Act, *supra* note 5, at 1729 (to be codified in 28 U.S.C. 1581(i)(3)). Customs Service administers a variety of laws that do not involve questions of classification, valuation, or rates of duty, but involve questions of the public health and safety. Cases arising under the Federal Food, Drug, and Cosmetics Act and the Toxic Substances Act, which exclude hazardous goods from the United States, usually do not involve trade issues for which the Customs Court has a developed expertise. Consequentially, Congress decided that the disadvantages of transferring jurisdiction from the district courts to the Customs Court outweighed the advantages and left jurisdiction in the district courts for those cases concerning both the public welfare and imports. *See* Gehart, *Judicial Review of Customs Service Actions*, 9 LAW & POL'Y INT'L BUS. 1101, 1159 (1977). *See, e.g.*, Precise Imports Corp. v. Kelly, 378 F.2d 1014, 1016 (2d Cir. 1967) (district court took jurisdiction to decide if imported knives fell within the Switchblade Knife Act which prohibits transportation and distribution of switchblade knives — not a customs law).

75. Customs Courts Act, *supra* note 5, at 1729 (to be codified in 28 U.S.C. § 1581(i)). This section excludes from the jurisdiction of the Court all actions brought under Section 305 of the Tariff Act of 1930 which prohibits the importation of immoral articles into the United States. The term immoral articles is defined as any written or printed matter advocating insurrection or forcible resistance to any law or containing any threat to take the life of or inflict bodily harm upon any person, any obscene book or other representation, any drug causing unlawful action, or finally any printed paper that may be used as a lottery ticket. Tariff Act of 1930, 19 U.S.C. § 1305 (1976).

courts for domestic producers.[76] This argument ignores the resulting blurred jurisdictional lines and the resulting diverse treatment of similar imports that depends upon the district in which the good is originally imported. If cases involve imports, they should be heard by the Court of International Trade so that the system of judicial review will harmonize with Congress' original intentions of having both an integral system of review over import transactions and a uniform body of import law.

Similar arguments compel the conclusion that review over the importation of obscene material should rest with the Court of International Trade. The correct standard to determine whether or not such material is offensive is a national community standard that would be more consistently promulgated by the Court of International Trade than by the many district courts.[77] The Act also empowers the court to empanel a jury that could implement the national community standard.[78] This further neutralizes opposition to the court taking jurisdiction in these cases. One standard would then apply to all imports instead of a variety of community standards applying in each separate district of importation.[79]

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76. *See* H.R. 6394, 96th CONG., 2d SESS. § 201 (1980). The earlier House Bill stated that the court had jurisdiction of any civil action arising under an import transaction, conceivably including embargoes to protect public health and safety which were not excluded from the jurisdiction of the court. *Id.* This earlier version of Subsection (i) (the broad grant in Section 1581) could have been interpreted to permit the court to assert jurisdiction over civil actions involving such cases. H.R. REP. NO. 1235, 96th CONG., 2d SESS. 47–48 (1980).

77. The appropriate standard for imports is a national standard rather than a local community standard. The Court of International Trade would be more capable than the district courts of applying such a national standard. That consideration, along with the new ability of the court to conduct jury trials, made many who testified before the House Committee on the Judiciary question why these trials should not be in the Court of International Trade. *See, e.g., Customs Courts Act of 1980: Hearings on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 96th CONG., 2d SESS. 205, 214, 228 (1980) (remarks of Leonard Lehman on behalf of the American Bar Association, Andrew P. Vance on behalf of the Association of the Customs Bar, and the Honorable Howard Thomas Markey, Chief Judge of the United States Court of Customs and Patent Appeals).

78. Customs Courts Act, *supra* note 5, at 1739 (to be codified in 28 U.S.C. § 1876). The method to be used in conducting jury trials in the Court of International Trade duplicates district court procedures: the selection, qualification challenge, and compensation of jurors is identical in the district courts and in the Court of International Trade. The Act further states that "the clerk of the district court shall act as clerk of the Court of International Trade for purposes of selecting and summoning the jury."

79. *Cf.*, Hamling v. United States, 418 U.S. 87, 104 (1976) (the test in district courts is the average person applying contemporary community standards).

These express exclusions destroy clear demarcation of jurisdiction between the Court of International Trade and the district courts since not all actions arising out of import legislation are within the court's exclusive jurisdiction. Instead of formulating an all-inclusive standard, Congress enacted a half-way measure that deviated from its original intent of having an integral system of review.

A persuasive argument in favor of giving the court exclusive jurisdiction emphasizes the Court of International Trade's developed expertise over import legislation and the nation's trade policy. The court is the most logical forum in which to promote a consistent international trade policy. The court more readily understands the degree to which Congress will pursue free trade or protectionist policies due to its familiarity with Congressional pronouncements in other statutes. The court is also less susceptible to local influences and is more capable of promoting a national trade policy. A coherent national trade policy is becoming more important as imports and exports exert substantial influence on the national economy. Comprehending the importance of imports and international trade, the court better anticipates the impact of its decisions and appropriately shapes its decisions to meet national trade goals.

Congress was somewhat more successful in pursuing its goals of consistency and clarity in the Act's second broad grant of jurisdiction. This grant gave the court jurisdiction over all actions commenced prior to importation that request review over rulings[80] by the Secretary of the Treasury relating to various duties and agency actions.[81] The court, however,

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80. The language requires review of a ruling or a refusal to issue or change a ruling "relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs or similar matters." Customs Courts Act, *supra* note 5, at 1729 (to be codified in 28 U.S.C. § 1581(h)).

The word "ruling" is defined as a determination by the Secretary of the Treasury as to the manner in which it will treat the contemplated transaction. "Ruling" does not include internal advice or a request for further review, both of which relate to completed import transaction. H.R. REP. NO. 1235, 96th CONG., 2d SESS. 46 (1980).

81. Customs Courts Act, *supra* note 5, at 1929 (to be codified in 28 U.S.C. § 1581(h)). The Subsection states:

> (h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate or duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

must otherwise have jurisdiction over the main action before it grants review over such preliminary action.[82]

This grant of jurisdiction is intended to eliminate the inadequate remedy exception that had caused the bulk of conflicting case law governing jurisdiction. Although plaintiffs under the Act do not generally have to suffer the risk of importation, the court will not grant review prior to importation in every case.[83] The plaintiff must demonstrate that he would be "irreparably harmed" if denied review prior to importation,[84] and "irreparably harmed" is not liberally defined.

According to the legislative history, a plaintiff who finds it would be financially or commercially impracticable to import the goods, pay duties, protest, and then seek judicial review would be "irreparably harmed" if unable to obtain judicial review in a manner that did not require such a procedure as a precondition to judicial review. Congress uses the term "commercial impracticability" to refer to cases where the demand for goods is seasonal, thereby necessitating immediate importation.[85] Congress intended this exception to be narrowly construed and granted only in limited circumstances. Otherwise, the statutory scheme of express grants of jurisdiction would be nullified.[86] If unable to make the necessary showing of irreparable injury, the plaintiff must follow the statutory procedures requiring importation of the goods and then seek redress under one of the express grants of jurisdiction.

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82. This additional requirement for review which is not expressed in the language of the statute, demands that the ruling relate to subject matter already within the jurisdiction of the court. *See* H.R. REP. No. 96–1235, 96th CONG., 2d SESS. 46 (1980); S. REP. No. 96–466, 96th CONG., 1st SESS. 11 (1979). This grant is also subject to the express exclusions of the other broad grant, but this grant of jurisdiction does not contain any other exclusions peculiar to review prior to importation.

83. Although many individuals will desire to obtain judicial review without the payment of duties, such review is exceptional and authorized only if the requirement of the Section, a showing of irreparable harm, is met. H.R. REP. No. 1235, 96th CONG., 2d SESS. 47 (1980).

84. *See supra* note 81.

85. S. REP. No. 466, 96th CONG., 1st SESS. 11–12 (1979).

86. If a remedy is available under the statute, the plaintiff must use that remedy unless he would be irreparably harmed by following that statutory procedure. Only then, may the plaintiff obtain review prior to importation. Both the House of Representatives and the Senate in their reports on the Customs Courts Act stated that the intent was to have a very narrow exception to the general rule requiring an importer to follow statutory procedures. A broad interpretation would nullify those procedures, contrary to the intent of the enacters. H.R. REP. No. 1235, 96th CONG., 2d SESS. 46 (1980); S. REP. No. 466, 96th CONG., 1st SESS. 12 (1979).

The court should use its powers, expand its jurisdiction over actions commenced prior to importation, and not strictly confine review prior to importation only to cases of extreme commercial impracticability. It should grant review of those cases previously reviewed by the district courts under the inadequate remedy exception. The legislative history supports this interpretation of the court's jurisdiction.[87]

The court should use its broad grant of jurisdiction to achieve Congressional goals of clarity and consistency. It can take jurisdiction over any case involving imports in order to prevent the district courts from asserting their jurisdiction. Where other legislative history is not clear, the intent of consistency should prevail, and the Court of International Trade should exercise jurisdiction.

B. ACCESS TO THE COURT

After resolving the jurisdictional conflicts by vesting jurisdiction in the Court of International Trade, Congress reformed the narrow standing provisions in trade legislation that had previously prevented access to judicial review. Congress intended that those persons adversely affected by agency action be afforded greater access to judicial review.[88] Accordingly, Congress expanded the right to judicial review[89] by making the right of those persons aggrieved by agency action concerning imports identical to the right of those aggrieved by other similar agency actions.[90]

Two defects existed in the former, more narrow standing provisions. The first was in the strict technical requirements that had to be met before review was granted.[91] The second was in the statutory definition of persons eligible to seek review in the courts.[92]

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87. The House Reports cite those cases in which the district courts took jurisdiction under the inadequate remedy exception and specify that the transfer to the Court of International Trade is intended to authorize the Court of International Trade to take those cases. H.R. REP. No. 1235, 96th CONG., 2d SESS. 29–30 (1980).

88. H.R. REP. No. 1235, 96th CONG., 2d SESS. 22 (1980).

89. *See* Customs Courts Act, *supra* note 5, at 1730–32 (to be codified in 28 U.S.C. § 2631).

90. Commentators had criticized the Tariff Act of 1930 and the Trade Agreements Act of 1979 because these Acts did not provide the same judicial review to those persons and domestic associations aggrieved by agency actions pertaining to importation as Congress has provided for persons and associations aggrieved by other agency actions. *Customs Courts Act of 1979: Hearing on S. 1654 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 96th CONG., 1st SESS. 3 (1979).

91. Trade Agreements Act of 1979, Pub. L. No. 96–39, 93 Stat. 300 (1979).

92. *Id.*

The defect of strict technical procedure was easily remedied by allowing importers to seek review without following the burdensome statutory steps of importation; assessment of duties; payment of duties; protest of duties; denial of protest; and finally, review in the Customs Court.[93]

The second defect — the definition of the right to action — was found in the Tariff Act of 1930 and in the Trade Act of 1974, both of which restricted the class of persons eligible to bring an action. The Trade Agreements Act of 1979, in its amendments to the Tariff Act of 1930, somewhat enlarged the class of individuals entitled to bring an action,[94] but defects still remained.

Prior to the amendments, only an American manufacturer, producer, or wholesaler could petition the court for review of the imposition of duties.[95] The Trade Agreements Act amendments added the following classes to those already having standing: certified or recognized unions working in an industry engaged in the production of a product that is the subject matter of the suit; and a domestic trade or business association, a majority of whose members manufacture, produce, or sell a like product that is the subject of the suit.[96] However, the Trade Agreements Act did not extend standing to foreign trade associations or to foreign governments[97] (nor did the Customs Courts Act of 1980).[98]

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93. *See supra* note 81 and accompanying text.

94. The Trade Agreements Acts sets forth those particular "interested parties" which may seek review:

> (1) a foreign manufacturer, producer, or exporter, or the United States importer, of merchandise which is the subject of an investigation under this subtitle; or
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> (2) a manufacturer, producer, or wholesaler in the United States of a like product; or
>
> (3) a certified union or recognized union, or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product; or
>
> (4) a domestic trade or business association, a majority of whose members manufacture, produce, or wholesale a like product in the United States.

Trade Agreements Act, 19 U.S.C. §§ 1516a(d), (f), 1671a(b)(1), 1673a(b)(1), 1675(b), 1677(a) (Supp. III 1979). The above list summarizes the statutory definitions of those interested parties entitled to bring an action.

95. *See* Trade Act of 1930, ch. 497, § 516, 46 Stat. 735 (1980) (*amended* by Trade Agreements Act of 1979, 19 U.S.C. §§ 1516, 1516a (Supp. III 1979)).

96. *See supra* note 94.

97. The only persons entitled to seek review in the court under the Trade Agreements Act were those party to the prior proceeding, that is, those parties entitled to initiate the proceeding or those parties who were the subject of the proceeding. Because domestic interested parties initiated a proceeding only against foreign importers, foreign governments and foreign trade associations were never proper parties to the proceeding. *See supra* note 94.

98. That Act simply restates the standing rule under Section 516a of the Tariff Act, being the same as the Trade Agreements Act: "Any action may be commenced by

In contrast to the exclusion of foreign trade associations from review in the court, Congress did recognize that domestic trade associations do have judicially-recognized interests in the outcome of litigation affecting an item produced by members of such associations. This is an arbitrary distinction. The interests of foreign trade associations do not differ in a manner significant enough to justify their total exclusion from the court while the same domestic concerns may enter court in a like action.

It might be suggested that the proper procedure for these foreign trade associations would be to present their claims through diplomatic channels, but this argument ignores the basis of the importers' protest. They contest the administrative imposition of a duty on their goods — not the law providing the legal basis for the duty. It is not the policy that foreign trade associations challenge but the specific administrative imposition of a duty which, if left unchallenged, will establish precedent for levying the same duty on all goods of that kind. It is ludicrous to suggest that these foreign trade associations are not aggrieved by such agency action and that they should not be given the right to judicial review.

This anomalous distinction in the Trade Agreements Act and Customs Courts Act demonstrates Congress' approach to reform. Since the need to grant standing to foreign trade associations did not present a direct problem for its own constituencies, Congress did not acknowledge that this narrow view of standing defeated its goal of providing judicial review to those persons aggrieved by agency action to the same extent as provided in other courts for persons aggrieved by other agency actions.

An organization is usually qualified to bring an action in a representative capacity if its individual members would have standing to bring suit under Section 702 of the Administrative Procedure Act.[99] A foreign trade association certainly represents members who are injured by agency action that hinders the importation of goods by the group. The individual members

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any interested party who was a party to the proceeding in which the matter arose." This restatement of the law from the prior Acts excludes foreign import associations. Customs Courts Act, *supra* note 5 at 1730 (to be codified in 28 U.S.C. § 2631(c)).

99. Public Citizen v. Lockheed Aircraft Corp., 565 F.2d 708 (D.C. Cir. 1977). An organization whose members are injured may represent those members in a proceeding for judicial review under Section 702 of the Administrative Procedure Act. *Id. See also* Sierra Club v. Morton, 405 U.S. 727 (1972).

(importers) of the group do have standing under Section 702 of the Administrative Procedure Act.[100]

This limitation on the definition of persons aggrieved by agency action contradicts Subsection (i) of the standing section of the Customs Courts Act, which permits any person adversely affected or aggrieved by agency action, within the meaning of section 702 of the Administrative Procedure Act,[101] to commence an action.[102] On its face, this definition seems to include foreign trade associations within those persons eligible to seek review, but a qualification to the definition prevents it from governing actions brought under the Trade Agreements Act.[103] The result is that foreign import associations do not have standing to contest the amount of duties levied on their members — a conclusion confirmed by a recent decision of the court.[104]

Although the law excluding foreign trade associations remained the same under the Customs Courts Act, this Act did expand the standing of domestic interest groups to include groups such as the Consumers' Union.[105]

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100. For a plaintiff to have standing, the plaintiff must allege injury within the zone of interests protected by the statute in question. Foreign importers definitely fit this qualification: they are injured by the imposition of antidumping and countervailing duties that are within the zone of interest regulated by the statute. *See* Starbrick v. San Francisco, 556 F.2d 450 (9th Cir. 1977); Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 201 (3d Cir. 1976).

101. Administrative Procedure Act, 5 U.S.C. § 702 (1976). The statute states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

102. Customs Courts Act, *supra* note 5, at 1731 (to be codified in 28 U.S.C. § 2631(i)).

103. Subsection (i) only applies to a civil action not already covered in any other subsection, one particular subsection being the definition of standing for actions commenced under the Trade Agreements Act. *See supra* notes 94 & 97.

104. In Armco, Inc. v. United States, No. 81–10 (Ct. Int'l Trade 1981), *reprinted in* CUST. B. & DEC. No. 7 (February 18, 1981), the court held that the foreign producers and exporters of steel were interested parties and properly before the court, but denied standing to the foreign business association and stated: "[N]o provision has been made in the statute for inclusion of foreign business associations within the definition of interested parties, as has been done in the statute with respect to business associations of domestic manufacturers, producers, and even importers.

105. Consumers Union brought many actions contesting agency action in the past. To qualify for standing in the courts, the group used a variety of methods and did not rely on its status as a group representing individuals affected by agency action. *See, e.g.*, Consumers Union v. The Committee for the Implementation of Textile Agreements, 561 F.2d 872 (D.C. Cir. 1977), *cert. denied*, 485 U.S. 933 (1978) (plaintiff itself bought textile merchandise for testing purposes and was thereby injured); *cf.* Consumers Union v. Rogers, 352 F. Supp. 319 (D.D.C. 1973) (action brought under Sherman

In the past, Courts had denied standing to these interest groups because they were not a domestic manufacturer, producer, wholesaler, or trade association. These groups may now seek review in the Court of International Trade under the Act's standing provision, which incorporates the broad definition of aggrieved person from the Administrative Procedure Act and the broad jurisdictional grant in the Act itself.[106]

For example, if import restraints on textiles are increased through the use of quotas, Consumers' Union or any other interested group may bring an action to object to the decreased number of goods that will enter the United States. Consumers' Union would represent individual consumers who would be injured by any reduction in available textiles and the consequent increase in prices. The desire of these groups to present their views on trade policy was well-known to Congress, which facilitated their receipt of favorable reform attention.

Finally, the Customs Courts Act of 1980 expanded standing in those actions commenced under the Trade Act of 1974. Previously, only workers could bring suit,[107] but now workers, firms and communities may challenge adverse agency action in the Court of International Trade.[108] All parties eligible to receive assistance under the Trade Act of 1974 may now seek judicial review of adverse agency determinations,[109] due to the Customs Courts Act's definition of aggrieved person, which is similar to that of the definition in the Administrative Procedures Act.

Antitrust Act), *modified sub nom.*, Consumers Union, Inc. v. Kissinger, 406 F.2d 136 (D.C. Cir. 1974) (action was brought under Trade Expansion Act of 1962, which recognized such affects on domestic interests — this provision was later repealed by the Trade Act of 1974, which contained a more restrictive view of standing), *cert. denied*, 421 U.S. 1004 (1975); Consumers Union v. Butz, No. 2142–72 (D.D.C. September 6, 1973) (Consumers Union is not a manufacturer, producer, wholesaler, union, group of workers, or a trade or business association of producers or wholesalers — as required for standing).

106. H.R. REP. No. 96–1235, 96th CONG., 2d SESS. 52 (1980) (catch-all standing section meant to correlate with catch-all jurisdictional section).

107. Trade Act of 1974, tit. II, § 205, 88 Stat. 2029 (1975) (repealed by Customs Courts Act of 1980, Pub. L. No. 96–417, § 612, 94 Stat. 1746).

108. Customs Courts Act, *supra* note 5, at 1730–31 (to be codified in 28 U.S.C. § 2631(d)). Firms and communities sue the Secretary of Commerce, and workers sue the Secretary of Labor.

109. The determinations made by pertinent agencies that are subject to review are as follows: (1) The Secretary of Labor certifies workers as eligible to receive assistance to compensate for injury from import competition; and (2) The Secretary of Commerce certifies firms and communities similarly injured as a result of import competition. Trade Act of 1974, 19 U.S.C. §§ 2273, 2341, 2371 (1976).

Political pressures influenced Congress to expand the standing provision to include all of the domestic entities, workers, firms and communities that could be injured by import competition and therefore be eligible under the Trade Act for relief assistance. Because of Congressional trade policies that liberalized international trade and reduced trade barriers in the United States, domestic concerns demanded increased relief and fairer administration of that relief. Congress provided import relief in the Trade Act of 1974, but it left implementation and disbursement of that relief entirely to the administering agencies without providing for judicial review over such agency action to ensure just administration of the import assistance program (except for agency action on workers). The Customs Courts Act reflects the goal of Congress that those workers, firms and communities eligible for assistance have the right of judicial review if the agency action adversely affects their interests.

This intense concern over the impact of foreign trade only on the domestic economy is evidenced by the narrow standing provision of the Trade Agreements Act — a provision continued in the Customs Courts Act, which excludes foreign trade associations. Domestic interests are more capable of persuading Congress that they have a right to be heard in court than foreign interests which, unless they are the subject of a proceeding, do not suffer a reviewable harm as defined by the law. It is difficult to rationalize the distinction made by Congress between foreign import associations aggrieved by agency action and aggrieved domestic interest groups, except to recognize the great political pressures that domestic interests can bring to bear as compared with the negligible pressures brought by foreign interests. This result contravenes the Congressional objective of granting judicial review to all parties aggrieved by agency action.

C. RELIEF AVAILABLE

Before the Customs Courts Act of 1980 became law, the Customs Court could only render decisions and express its opinion as to what it thought was the proper outcome of a case.[110] The court could not enter money judgments or

110. Under the prior law, if the court decided a case for an importer, the court returned the case to the Customs Service with an order that the duty be reassessed in accordance with its decision. The Customs Service would then issue the refund. Now, the Court may simply enter a judgment for the amount to be refunded, and the judgment is to be paid in the same manner as any other judgment against the United States. H.R. REP. No. 1235, 96th CONG., 2d SESS. 60 (1980); *cf.* Mego Corp. v. United States, 73 Cust. Ct. 190 (1974) (illustrates lack of authority in denial of higher rate of duty for government).

issue injunctions; it could only return a case to the administering agency, along with its decision and hope that the agency would voluntarily implement the decision of the court — a very ineffective system by which to compel agency compliance.[111]

The Customs Court Act gave the court the power to enter money judgments against recalcitrant importers who refused to pay duties and against the U.S. government when it refrained from refunding overpaid duties.[112] To encourage the expeditious refund of overpaid duties, the court now has the additional power to award interest on its money judgments.[113] Thus, the court may now enforce its decisions and compel agencies to adhere to public policy as expressed in legislation interpreted by the court.

There was still another defect in the court's power prior to the passage of the Customs Courts Act of 1980. The court lacked all power in equity,[114] except as meagerly granted under the Trade Agreements Act of 1979.[115] The Trade Agreements Act anticipated the later adoption of the Customs Courts Act of 1980 by granting the court limited equity powers. However, under the Trade Agreements Act, the court could only enjoin the assessment of anti-dumping duties and countervailing duties imposed by the Secretary of the Treasury or the administering authority. This limited injunctive relief (the only equitable relief available in the Customs Court) required the

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111. The Customs Court could not compel agency action because it lacked the equitable power necessary to order certain agency action. Gehart, *Judicial Review of Customs Service Actions*, 9 LAW POL'Y INT'L BUS. 1101, 1159 (1977).

112. Customs Courts Act, *supra* note 5, at 1737 (to be codified in 28 U.S.C. § 2643). These judgments may be registered in any judicial district, and if so registered, they shall have the same effect as a judgment of the district court of the district where registered. Customs Courts Act, *supra* note 5, at 1743 (to be codified in 28 U.S.C. § 1963A).

113. Customs Courts Act, *supra* note 5, at 1738 (to be codified in 28 U.S.C. § 2644). One of the reasons offered to explain the tardiness of Customs Service's actions on refunds was that they did not pay interest on refunds and did not have that extra incentive to hastily process refunds. S. REP. No. 466, 96th CONG., 1st SESS. 20 (1980). *See Customs Courts Act of 1980: Hearings on H.R. 6394 before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 96th CONG., 2d SESS. 126, 129 (1980).

114. *See* Gehart, *Judicial Review of Customs Service Actions*, 9 LAW & POL'Y INT'L BUS. 1101, 1142 (1977). *See, e.g.*, Matsushita Elec. Indus. Co. v. Dep't of the Treasury, 67 Cust. Ct. 328 (1971), *aff'd*, 485 F.2d 1402 (C.C.P.A.), *cert. denied*, 414 U.S. 21 (1973) (Customs Court admitted its lack of equity power and refused to invoke the All Writs Act).

115. Trade Agreements Act. 19 U.S.C. § 1516a(a)(4)(c)(2) (Supp. III 1979).

satisfaction of criteria explicitly enunciated in the statute.[116] Because of the limited relief available in the Customs Court, plaintiffs preferred to bring suit in the district court where there was a broader range of available remedies.[117]

The Customs Courts Act of 1980 expanded the available remedies and granted the Court of International Trade "all the powers in law and equity of, or as conferred by statute upon, a district court . . ."[118] The court is now capable of granting full equitable relief;[119] however, not all forms of relief are available in every action under all the trade laws. Some limitations on the court's equitable powers remain in the Act in those actions commenced under the Trade Act of 1974 and in those actions commenced prior to importation.[120]

In actions commenced to review final determinations made under the Trade Act of 1974, the court may not grant an injunction or issue a writ of

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116. The four criteria set forth in the Trade Agreements Act that the court must consider before granting injunctive relief under that statute are as follows:

(A) the party filing the action is likely to prevail on the merits;

(B) the party filing the action would be irreparably harmed if liquidation of some or all of the entries is not enjoined;

(C) the public interest would best be served if liquidation is enjoined; and

(D) the harm to the party filing the action would be greater if liquidation of some or all of the entries is not enjoined than the harm to other persons if liquidation of some or all of the entries is enjoined.

Trade Agreements Act, 19 U.S.C. § 1516a(a)(4)(C)(2)(A)–(D) (Supp. III 1979). Liquidation of entries means levying or imposing the duty on the imported goods.

117. *See supra* notes 43–46 and accompanying text.

118. Customs Courts Act, *supra* note 5, at 1730 (to be codified in 28 U.S.C. § 1585). The court has used its equitable powers, but seems more inclined to deny relief. The court clearly considers injunctive relief extraordinary and available only in special circumstances. *Cf.*, S.J. Style Assocs., Ltd. v. Snyder, No. 81–12 (Ct. Int'l Trade 1981), *reprinted in* 15 CUST. B. & DEC. No. 6 (Feb. 11, 1981) (denied relief); Haarman & Reimer Corp. v. United States, No. 81–13 (Ct. Int'l Trade 1981), *reprinted in* 15 CUST. B. & DEC. No. 15 (March 4, 1981) (denied relief); Wear Me Apparel Corp. v. United States, No. 80–13 (Ct. Int'l Trade 1980), *reprinted in* 15 CUST. B. & DEC. No. 2 (Jan. 14, 1981) (denied relief); Zenith Radio Corp. v. United States, No. 80–10 (Ct. Int'l Trade 1980), *reprinted in* 15 CUST. B. & DEC. No. 1 (Jan. 7, 1981) (granted preliminary injunction); Di Jub Leasing Corp. v. United States, No. 80–9 (Ct. Int'l Trade 1980), *reprinted in* 14 CUST. B. & DEC. No. 15 (Dec. 31, 1980) (denied relief).

119. The Act lists the forms of relief the court may grant, noting that the list is not exclusive, nor does it apply in every action. The list includes declaratory judgments, orders of remand, injunctions, writs of mandamus and prohibitions. Customs Courts Act, *supra* note 5, at 1738 (to be codified in 28 U.S.C. § 2643(c)(1)).

120. Customs Courts Act, *supra* note 5, at 1738 (to be codified in 28 U.S.C. §§ 2643(c)(2), 2643(c)(4)).

mandamus. Declaratory judgments and orders of remand, however, are permissible remedies.[121] The legislative history does not explain why some remedies are permissible while others are not, but the Act reflects a belief that the court should not unduly interfere with the agency decision-making process. The court may not require an agency to make a specific decision on whether a worker, firm or community is eligible to apply for assistance. The decision on eligibility is within the discretion of the Secretaries of Labor and Commerce. Review follows only after a final determination of assistance, and not after preliminary determination of eligibility.[122]

Full equitable relief in actions commenced prior to importation was also denied by Congress, which only authorized declaratory relief. The agency process must be completed, and the final decision to grant assistance or impose a duty must be rendered, before the court may enter with its full equitable powers.[123]

Although very little legislative history exists to explain Congress' rationale for restricting the court's equitable powers, ample legislative history does exist to define the appropriate standards for the court to follow in applying the new equitable powers it has been granted. It is the express intent of Congress that the Court of International Trade consider the same factors a district court considers when granting similar relief.[124] The Customs Courts Act does not contain a checklist of the factors the court must consider.[125] However, a listing does remain in the Trade Agreements Act of

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121. Customs Courts Act, *supra* note 5, at 1738 (to be codified in 28 U.S.C. § 2643(c)(2)).

122. Customs Courts Act, *supra* note 5, at 1738 (to be codified in 28 U.S.C. § 2643(c)(4)).

123. Customs Courts Act, *supra* note 5, at 1738 (to be codified in 28 U.S.C. § 2643(c)(4)).

124. Congressional intent was that the authorization of equitable powers be deemed to grant the court powers coextensive with the powers of the federal district courts and that the court be guided by the same factors utilized by a federal district court when considering a request for permanent or injunctive relief. This intent extends logically to all forms of equitable relief. H.R. REP. NO. 1235, 96th CONG., 2d SESS. 61 (1980). *Cf., Customs Courts Act of 1979 Hearing on S. 1654 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 96th CONG., 1st SESS. 19 (1979) (representative of the Department of Justice confident that the Court of International Trade will utilize standards already developed by the district courts).

125. The earliest Senate bill required that before the court could grant preliminary injunctive relief, the court had to determine that the plaintiff would suffer substantial irreparable injury if denied relief and that the public interest would be served by granting such relief. S. 2857, 95th CONG., 2d SESS. § 402 (1979) (contained in section entitled "Exhaustion of Administrative Remedies").

Compare this lack of specific enumeration of factors in the Customs Courts Act of 1980 to the list in the Trade Agreements Act. *See supra* note 116.

1979 and it still governs those actions challenging the assessment of anti-dumping or countervailing duties.[126] In other cases in which plaintiffs have demanded equitable relief, the court has referred to the four factors developed by the district courts to aid it in deciding the appropriate relief.[127] The critical factor preventing most plaintiffs from obtaining relief, however, is their inability to demonstrate irreparable injury. The court has held that a showing of increased costs does not suffice to meet the necessary requirement of irreparable injury.[128]

Congress gave the court wide authority to eliminate inequities prevailing under the former laws. In so doing, Congress mandated that if a plaintiff presented a valid claim, the court should award the plaintiff the appropriate relief — whether it be a money judgment or equitable relief.

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126. The Court of International Trade retains jurisdiction over these actions, and although an early Senate bill expressly amended the Trade Agreements Act to conform to the nonenumerated factors in the bill, the present Act does not so amend the Trade Agreements Act. *See* Customs Courts Act, *supra* note 5, at 1728 (to be codified at 28 U.S.C. § 1581(c)) (section granting jurisdiction to the court over civil actions under the Trade Agreements Act); S. 1654, 96th CONG., 1st SESS. § 613 (1979) (Senate bill expressly amending the Trade Agreements Act).

127. The court refers to the four factors constituting the criteria as the *Virginia Petroleum/Holiday Tours* test. *See* Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1972)); Zenith Radio Corp. v. United States, No. 80–10 (Ct. Int'l Trade 1980), *reprinted in* 15 CUST. B. & DEC. No. 1 (Jan. 7, 1981) (*citing* Virginia Petroleum Jobbers Association v. F.P.C., 259 F.2d 921, 925 (D.C. Cir. 1958)).

The exact criteria used by the courts requires that the plaintiff show the following: (1) there is a substantial likelihood that the plaintiff will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the plaintiff outweighs the threatened harm that the granting of an injunction might do to the defendants; (3) there is a substantial likelihood that plaintiff will eventually prevail on the merits; and (4) the public interest would be promoted by granting or denying the injunction. Zenith Radio Corp. v. United States, No. 80–10 (Ct. Int'l Trade 1980), *reprinted in* 15 CUST. B. & DEC. No. 1 (Jan. 7, 1981). *See also supra* note 118.

128. In two cases, S. J. Stile Assocs., Ltd. v. Snyder, No. 81–2 (Ct. Int'l Trade 1981), *reprinted in* 15 CUST. B. & DEC. No. 15 (Feb. 11, 1981) and Di Jub Leasing v. United States, No. 80–9 (Ct. Int'l Trade 1980), *reprinted in* 14 CUST. B. & DEC. No. 15 (Dec. 31, 1981), the court denied relief because of an insufficient showing of irreparable injury. In *S. J. Stile*, the court held that the proof of irreparable injury in the form of increased business costs was minimal, speculative, and in any event, outweighed by the injury affecting the public interest upon the issue of an injunction. In *Di Jub Leasing*, the plaintiff also failed to show sufficient irreparable injury by claiming total loss in business volume. Instead, the plaintiff needed to show that the loss in business resulting from the revocation of a customs' license was absolute and that such business would not be readily replaced by other business.

III. CONCLUSION

While Congress provided many needed reforms in the Customs Courts Act of 1980, it failed to implement the needed widesweeping reforms in the judicial review of import transactions. The pressing need for reforms that existed at the time the bill was drafted prompted these halfway measures. Due to Congress' desire to pass some type of reform legislation as rapidly as possible, the more expansive goals of Congress were compromised in the process of pushing this Act quickly into law.[129]

In defining the valid claims to which the full authority of the court would attach, Congress only recognized recurring fact patterns, representative of certain well-documented injustices presented to them, and did not thoroughly explore the possible injustices likely to occur in the future. Congress did not creatively approach this reform and failed to provide the optimal system of judicial review. A truly effective system would apply to all import transactions consistent with Congressional goals of uniformity, increased access, and expanded relief.

Congress sought to establish a comprehensive system of judicial review over all actions arising under trade legislation; however, opposing policies surfaced to defeat these intentions in the Act — despite the great advantages of such a system in terms of simplicity and consistency. The Act's exceptions to the complete grant of jurisdiction to the court destroyed the concept of a complete system of review.

In addition, Congress neglected to follow its original objective of assuring that access to the Court of International Trade would be similar to access to other courts reviewing similar agency actions. The Customs Courts Act failed to duplicate the definition of standing as contained in the Administrative Procedure Act.[130] Whether it was due to oversight or opposition by domestic interests opposed to any greater protection for foreign interests, the Act failed to fulfill this goal.

The final powers granted to the court also disregarded the Congressional goal of making the relief available in the Court of International Trade

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129. The pressing need for this bill encouraged Congress to pass a bill to reform the jurisdiction of the Customs Court as soon as possible. The overriding desire was to pass a complete bill as expeditiously as possible and to eliminate or modify any disagreements barring that end. *Customs Courts Act: Hearing on S. 2857 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 95th CONG., 2d SESS. 76 (1978) (remarks of Senator DeConcini). *See, e.g.*, 126 CONG. REC. S13345 (daily ed. Sept. 24, 1980) (remarks of Senator DeConcini seeking to avoid a time-consuming conference).

130. Administrative Procedures Act, 5 U.S.C. § 702 (1976). *See supra* note 101.

similar to that available in the district courts. The Act granted circumscribed equitable powers to the court that compare unfavorably to the full powers of the district courts.

The shortcomings of the Act, when compared to the broad, original Congressional goals, were caused by Congress' traditional approach to the reform of trade legislation; that is, undertaking reform only as absolutely necessary on an *ad hoc* basis, instead of enacting comprehensive and prospective reform. Issues undiscovered or insufficiently emphasized have been left for later legislation. The harsh results — caused by the lack of congressional foresight — could have been prevented by more creative legislation. Congress should have taken a more aggressive approach to reform, anticipated injustices in the system of judicial review, and reformed on a more comprehensive basis.

Broad reform is as important to Congress as it is to those individuals who suffer from an inequitable system of review. Defects in judicial review of import transactions cause ineffective oversight in the implementation of Congressional policy as established through legislation. The actual policies being implemented by the agencies will not remain consistently in agreement with Congressional intent if judicial review ineffectively monitors agency action. The need to ensure correct implementation of Congressional trade policy justifies wider reform of the system of review. Congress' overriding goal has been to reduce trade barriers, but not to such an extent as to unduly harm domestic interests. Once Congress correctly translates into legislation the balance desired between free trade and protection of U.S. industry, Congress will have established a workable framework through which the agencies may implement the achievement of Congressional goals.

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