IS THE CUSTOMS COURTS ACT OF 1980's

JURISDICTIONAL SCHEME A

PARAGON OR A CLUNKER?

Joseph I. Liebman
Law Offices of Joseph I. Liebman
Rockville Center, NY

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"***SOMETHING OLD, SOMETHING NEW: EMERGING ISSUES BEFORE THE COURT***"

A Panel Discussion

JURISDICTION, IDENTIFICATION OF REMEDY, THE PERFECTION OF CLAIMS, AND RELATED MATTERS ARISING IN CUSTOMS LITIGATION

Presented By— Joseph I. Liebman, Esq.*

Is the Customs Courts Act of 1980's Jurisdictional Scheme a Paragon or a Clunker?

INTRODUCTION

In conjunction with my preparation for today's discussion, our moderator, Joel K. Simon, has requested that I examine recent decisions of the United States Court of International Trade ("CIT), and its appellate tribunal, the United States Court of Appeals for the Federal Circuit ("CAFC), which involve significant issues of jurisdiction decided within the last two years. Because another panelist was asked to identify and discuss cases in which the Government prevailed in its jurisdictional challenges, I was tasked to limit my discussion to those cases in which the Government did not succeed with its jurisdictional challenge. The scope of this panel's study and discussion is further limited to those cases involving Customs litigation. The parameters of the CIT's jurisdiction, involving actions against the Unites States, are set forth in the provisions of 28 U.S.C. § 1581(a)-(i)

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* From 1969 to 1978, I was a trial attorney in the former Customs Section of the Civil Division, United States Department of Justice, and from 1978. till my retirement from the Government in 2002, I was the Attorney in Charge of the Civil Division's International Trade Field Office, responsible for litigation in the CIT and CAFC. Among a variety of activities related to this field, I continue to serve as a long standing member of the CIT's Advisory Committee on Rules.

(See Appendix). Although not pertinent here, jurisdiction in the CIT of civil actions commenced by the United States is provided for in 28 U.S.C. §1582.

Consequently, actions described as those involving countervailing and antidumping duties, decisions of the Secretary of Labor, and those of decision makers outside the Bureau of Customs and Border Protection ("Customs") are generally outside the scope of our discussion. However, I will include, for the sake of completeness, those recent decisions where the courts have taken jurisdiction in cases involving decisions made outside Customs, despite the Government's arguments to the contrary, because they have implicated the provisions of 28 U.S.C. § 1581(i)(2).

BACKGROUND

Congress in furtherance of its pigeonhole scheme of jurisdictional provisions, prescribed different (a) procedural methods for commencing those actions (see 28 U.S.C. §2632), (b) periods of time to commence actions (statutes of limitation) (see 28 U.S.C. §2636), (c) requirements for filing certain documents needed for judicial review or "administrative records" (see 28 U.S.C. §2635), (d) requirements for the exhaustion of administrative remedies (see 28 U.S.C. §2637), (e) specifications for raising new grounds in certain types of actions (see 28 U.S.C. §2638), (f) requirements regarding the plaintiff's burden of proof (see 28 U.S.C. 2639), (g) limits upon the scope and standard of review (see 28 U.S.C. 2640), (h) limits upon the type(s) of relief that the court may award (see 28 U.S.C. §2643) and (i) specifications for granting interest in one category of action (28 U.S.C. §2644).[1]

Nothing in the statutory scheme employed by Congress with respect to the CIT directly suggests, with respect to a single cause of action, that litigants may not plead, hypothetically and in the alternative, different bases for jurisdiction, pending the Court's determination of the "singular" basis in the hierarchical scheme that applies. It is clear, however, that, until the Court makes its jurisdictional determination, there may be considerable uncertainty with respect to

[1] The text of these provisions is also set forth in the Appendix.

which of the specifications and limits Congress provided that govern such things as: the statute of limitations, scope and standard of review and the need for and time requirements of filing official documents or an administrative record.

Thus, one or both parties and the court may find it necessary to take what may appear to be inconsistent postures and steps pending a judicial resolution of the jurisdictional issue. This problem, may become more confounding when there are issues of serious harm injected in the action and the time for reaching a determination on the merits begs for early determination.

It is well established that an importer **cannot** use 28 U.S.C. §1581(i) ("section 1581(i)") to bypass administrative review by meaningful protest. Nor, the fact that importers could fashion a more desirable remedy does not make a remedy fashioned by Congress constitutionally inadequate. See *American Air Parcel Forwarding Company Ltd. v. United States*, 718 F.2d 1546 (1983) ("*American Air Parcel*"); *United States v. Uniroyal, Inc*. 687 F.467 (1982). Although not in the statute itself, from these cases has evolved a judicial test based upon the question of whether the protest procedure is "manifestly inadequate." Using this test, the courts have sought to determine whether a remedy, which was or is available under 28 U.S.C. §1581(a) ("section 1581(a)"), is "manifestly inadequate," in order to determine whether an importer may avoid being confined within: the time frames, procedures, and remedies applicable when that provision is the basis of the CIT's jurisdiction.

This question has often been the theme cases of for more than two decades and there are many reported cases where the CIT has dismissed the action because the importer's proof of "irreparable harm" was found to be speculative, unconvincing or caused because of lack of due diligence on the part of the importer.

An examination of the common meaning of the term "manifest," as pertinent to its use here, reveals that it essentially means, *Blacks Law Dictionary*, 1157 (4th Edition 1957) 1115):

> Evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, unmistakable, indubitable, indisputable, evident, and self-evident. ***(citation omitted).
>
> In evidence, that which is clear and requires no proof; that which is notorious.

Similarly, the *Oxford English Dictionary* (Unabridged, CD Rom Edition, 1999) defines manifest, as pertinent here, as:

> 1a. manifest. Clearly revealed to the eye, mind, or judgment; open to view or comprehension; obvious

Consequently, it seems to clear to me that the determinations of whether something is "manifestly inadequate" is to be measured from the face of facts that the court may take judicial notice of because they are open and notorious. If one measures the degree of harm to an individual importer, who might be a "mom and pop" operation (perhaps, undercapitalized or which is a single product enterprise), then it becomes necessary for the courts to engage in intrusive, and often speculative fact finding. This type of inquiry, which requires proof from business records, percipient or expert witnesses, is not open, notorious or evidenced and established form from the face of the transaction.

Engaging in such fact finding means that jurisdiction may be permitted for one importer but denied for another, such as a behemoth, multinational corporation, whose business will not be substantially impaired by utilizing the traditional avenues of obtaining jurisdiction. Without proof of "catastrophic harm" that importer would be required to bring its action under section 1581(a). There is no evidence that Congress intended importers to be treated differently based upon their individual business circumstances.[2]

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[2] If that were the case, a jurisdictional scheme that carves out jurisdiction for what might be denominated as "small claims" cases, would be more appropriate.

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Thus, the CAFC has applied the "manifestly inadequate" test so an importer may bring an action under section 1581(i), and not be required to first have a timely denied protest in order to bring the action under section 1581(a), when the decision, action or inaction being challenged is not one that Customs can overturn or ignore. Additionally, apart from any irreparable or catastrophic injury to the importer bring the action, the CAFC has upheld jurisdiction in the CIT under section 1581(i) when an entire industry and the national economy will be substantially impacted. *See, e.g., United States Cane Sugar Refiners Ass'n v. Block*, 683 F.2d 399, 402 n.5 (CCPA 1982); *Conoco, Inc. v. United States Foreign-Trade Zones Board*, 18 F.3d 1581 (Fed. Cir.1994) ("*Connoco*"). See also, *Foodcomm International Inc. v. Kantor*, 19 CIT 620, 886 F. Supp. 35 (1995) (the remedy afforded under 1581(a) is not demonstrated to be manifestly inadequate merely by establishing that it is too costly to pay the anticipated duties or that the time required to obtain a denied protest is too long and will result in irreparable harm). Indeed, the CAFC, to my knowledge, has never extended the "manifestly inadequate" doctrine, in order to base jurisdiction under section 1581(i) instead of section 1581(a), **just based upon the economic distress, regardless of how severe, that befalls the individual importer(s).**

It is noteworthy that the Customs Courts Act of 1980 (Pub. L. No. 96-417, 94 Stat. 1727)("1980 Act"), which established the statutory scheme we have been discussing here, for the first time, created a "pre-importation" circumstance in which an importer could obtain judicial review of certain types of rulings under 28 U.S.C. § 1581(h) ("section 1581(h)). However, Congress provided that relief under section 1581 (h) would be limited to a declaratory judgment, and preconditioned the availability of this provision to situations where the importer established if the existence of the "irreparable harm" if it did not obtain pre-importation review of the ruling. This limited exception avoids the requirement of

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Congress, has not seen fit to establish such a scheme, and several different times a number of committees of bar associations and other groups have apparently considered the feasibility of formalizing such an approach, but have generally concluded that there are paramount policy and procedural barriers that outweigh or preclude the perceived benefits of such a regime.

having an actual import transaction and the normal requirement that all liquidated duties be paid before the action may be commenced in the CIT.

The very existence of this new and well defined departure from requiring an importer to seek relief under the traditional protest method prescribed in section 1581(a), may, by itself, suggests Congress did not intend section 1581(i) to be used in circumstances where the "manifestly inadequate" relief test is to be measured by the same requirements ("irreparable harm") applicable to section 1581(h). Otherwise, why would section 1581(h) even be necessary, if as some argue, other situations of"irreparable harm" to the individual importer could be brought under section 1581(i)?

To the extent that litigants may properly combine distinct, although concurrent, causes of action, in a single action, which are predicated upon different statutory bases, the same procedural problems and concerns discussed above may arise. In those circumstances the different jurisdictional bases may require some portions of a case to be considered on an administrative record, and others on the record made before the Court. These difficulties may be minimized by the court conducting a Postassignment Conference under the Rules of the United States Court of International Trade (USCIT R.), Rule 16. In such a conference, the Court should consider such steps as may be needed to rationalize the conflicts and, as appropriate, provide for the separate determination of separate cause of action and claims. Indeed, the Court may consider, among other things: preliminary hearings limited to certain issues, severance, separate motions for judgment, separate trials or stays of aspects the action pending a determination of other aspects.

The problems addressed here and some of the derivative procedural dilemmas they create should prompt a practitioner to carefully consider which bases of jurisdiction apply to the cause(s) of action that the plaintiff intends to include in the complaint. To the extent a practitioner, as suggested by at least one recent decision, discussed below, foresees that artful pleading may result in the plaintiff obtaining better forms of relief than may apply to what otherwise appears

to be the "traditional" basis for jurisdiction,[3] a litigant may attempt to skillfully craft its complaint. In doing so, a litigant may mask its real objectives and hope that such obfuscation will enable it to "slide into" obtaining greater relief than it would otherwise be entitled. Alternatively, it may be properly "skip over" a hurdle that less skillful litigants have stumbled on and avoid losing an opportunity to obtain the full relief Congress envisioned to be available under those circumstances.

From my perspective, the difference between use and abuse of such methods may lay in part, with the good faith of the attorney who files such a pleading, *viz.*, counsel must be mindful of the requirements of USCIT R. 11. Pleadings must not be presented for improper purposes, such as: to harass or cause unnecessary delay or needlessly increase the costs of litigation. Also, in situations where there is a fine line that permits review of a discrete administrative action, decision or failure to make a decision, prior to exhaustion of administrative remedies, which would preclude a court from reviewing a wider path, chaos or order may depend upon the wisdom and skill employed by the court that vets the causes of action.[4]

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[3] In its opinion in *American Air Parcel*, the Court expressed concern that "artful pleading would enable a litigant to change the statutory scheme Congress has enacted." 718 F. at 1550. Indeed, that concern was part of the appellate tribunal's rationale for finding that jurisdiction did not exist in that case under section 1581(i).

[4] Indeed, in certain cases, consideration of Alternative Dispute Resolution ("ADR") methods, may be appropriate. Too often, however, the exigencies of litigation and the need for expedited decision making, present barriers to the effective use of such methods while the case is litigation. On the other hand, pre-litigation opportunities, where a variety of ADR methods may be employed may be more conducive to success. Evaluation and implementation of such methods, however, may require that policies or cultures of both government agencies and private litigants and their counsel be modified. In addition to any essential changes in statutes, regulations, first, and, perhaps, foremost, all potential litigants and the counsel may need to make a change which is simply known as an "attitude

Care must be taken by the courts to limit their review to narrow questions and limit the relief to be awarded to remedies appropriate to the narrow cause of action and claims that are entitled to being adjudicated under Congress' statutory regime. The difference of course is that, while a litigant may be able to frame a discreet cause of action that will fall within the limits of section 1581(i), the actual relief the court should award may be considerably narrower than that sought be the plaintiff.

Moreover, provisional remedies, such as injunctions should be sparingly issued. If granted, adequate security should be required to protect not only the public fisc, but due regard, both in weighing the competing interests in the first instance, before granting the application, and in determining the amount of security, should be given for the fact that tariffs, quotas and other aspects of the trade laws are designed not only to raise revenue but to protect American industry and workers. *Cf., Mutual Supply Co. v. United States*, 17 Cust. Ct. 442, 1946 WL 5558, RD 6559 (1946).

An examination of the longstanding line of cases involving some of the problems discussed here, as well as exposition of emerging decisions, in my view, gives one pause to ask whether the jurisdictional regime Congress established in the 1980 Act is still the paragon its proponents proclaimed it to be or whether it has become a "clunker?" At the conclusion of this paper, I will offer some brief and modest thoughts and suggestions.

With this background in mind, I will discuss the cases I have identified that meet the criteria assigned to me.

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adjustment."

SIGNIFICANT COURT DECISIONS CONSIDERING JURISDICTIONAL ISSUES WHERE THE GOVERNMENT HAS NOT PREVAILED WITH ITS MOTION TO DISMISS FOR LACK OF JURISDICTION IN ACTIONS INVOLVING CUSTOMS

Apart from the cases involving the section 1581, section 1581(h) or section 1581(i) dichotomies, the past two years have seen the courts resolve several cases in favor of jurisdiction resting in the CIT, even though concurrent jurisdiction may also lay in the Federal district courts. Additionally, one judicial decision of interest involves a determination that the CIT has ancillary jurisdiction to consider the importer's claims.

I will touch upon the latter categories of judicial decisions after I discuss the first group because they, in particular, implicate the issues this panel was requested to focus upon. Since another member of our panel is counsel to the importer in several of the actions, I assume that Simeon M. Kriegsburg will also address several of these cases in his paper or oral remarks.

1. ***International Custom Products, Inc. v. United States***, 374 F. Supp. 2d 1311 (CIT 2005)(decided by Carman, *J.*), Appeal No. 05-1444, pending (oral argument heard, August 8, 2006).

In 1994, the importer here, prior to commencing the establishment of its processing facilities in the United States and engaging in importations of a product know as "white sauce" (according to the court's opinion, white sauce is a milkfat product that is used as a base for other products such as sauces, salad dressing and processed cheese) from its foreign supplier, obtained a binding ruling from Customs that the product would be classified under item 2103.90.9060 of the Harmonized Tariff Schedules of the United States ("HTSUS"), as "sauces and preparations therefor;...other" at a rate of duty of 6.6%. Although not consequential to the discussion here, the provision was renumbered in 1995, with a lower duty rate. The importer began importing this product, which it previously obtained domestically, in 1999. In 2004, even though the composition of the sauce

had not changed, as apparently agreed by all parties to this action, Customs requested information from the importer concerning one of the entries and received, among other things, a customer list. Customs, as a result of its further investigation concluded that unliquidated entries should be liquidated under a different HTSUS provision, at a significantly higher rate of duty, resulting in an estimated 2400% increase in the duties.

The importer commenced an action, originally based upon section 1581(h), but at the Court's suggestion, the importer modified its complaint to assert jurisdiction under section 1581(i)(4). The Government moved to dismiss, asserting that plaintiff's only remedy was to commence an action based upon a timely filed and denied protest. The Government indicated that it was prepared to cooperate with the importer in order to facilitate the expeditious consideration of any protest that the importer would file.[5]

Basically, the importer alleged that it could not wait, as it would suffer the total loss of its one product business and it would go out of business, if it were required to proceed, even though the expedited protest route promised by the Government, if it had to await action on a protest and then proceed with the inevitable minimum time frames, even under an expedited discovery and accelerated trial date, under section 1581(a) and also be required to seek a determination on the basis of the record made before the court. Instead, the importer maintained that it was entitled to a review on the administrative record as to whether the Government's "Notice of Action" was an improper revocation, of the earlier binding ruling it received from Customs, without a period of notice and

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[5] Under the recently modified statutory regime for filing and consideration of protests (19 U.S.C. §§1514 and 1515), an importer may immediately upon filing a protest request accelerated review. Consequently, the protest must either be granted or denied within 30 days, or it is deemed denied, and a judicial action may then be immediately commenced under section 1581(a). Just because filing a protest may be futile, when it is presumed based upon the circumstances evident to all that the protest will likely be denied, does not mean its filing can be dispensed with. *See Wear Me Apparel v. United States*, 1 CIT 194, 511 F. Supp. 814 (1981), citing *United States v. Felt Tarrant & Co.*, 283 U.S. 269, 273 (1931).

comment and opportunity to be heard, as well as a denial of the 60-day period prior to the effective of any revocation, in violation of the rights that it obtained under 19 U.S.C. §1625(c).

The Court, in distinguishing this case from *American Air Parcel*, found that the importer did not sleep on its rights and that this case was more like *Dofasco, Inc. v. United States*, 326 F. Supp. 2d 1340 (CIT 2004), *aff'd*, 390 F.3d 1370 (Fed. Cir. 2004)(an antidumping duty review case) ("*Dofasco*")[6], where plaintiff's action would be moot if it waited to secure judicial review through the ordinary route. The Court viewed these two cases as similar. First, because the Court concluded that the importer here would be irrevocably harmed because it would be forced out business if it had to go through the ordinary processes entailed in an action commenced under section 1581(a). Second, also, like in *Dofasco*, because the

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[6] My examination of the CAFC's decision, however, did disclose any discussion of the jurisdictional issue raised in the CIT or expression of approbation of the court's reasoning for finding an exception there, which permitted the plaintiff to initiate its action under section 1581(i) rather than requiring it so proceed under the statute scheme pertaining to review of antidumping proceedings, 28 U.S.C. §1581(c) ("section 1581(c)") . In my view, analysis of the "manifestly inadequate" standard, that was applied in *Dofasco*, because the very nature of the relief sought would become moot if the plaintiff were required to await its opportunity to bring a an action under section 1581(c), was manifest from the face of the administrative review procedures being compared. This is different from the section 1581(a) and section 1581(i) dichotomy in which Customs has the power to reverse the decision, action or inaction being challenged and on the face of the administrative process, without looking at circumstances unique to the importer, the administrative procedures are not "manifestly inadequate."

Even if the 30 day minimum is insufficient, and judicial review also may take too long, the thresholds and procedures established by Congress have to be abided , regardless of the harm that may flow to a particular importer. Redress, if any lies with Congress, either through amendment of the 1980 Act, or a private bill to relief an importer from what the law does not allow the courts to remedy.

importer's gravamen here rested upon a claim that the Government deliberately violated its statutory and regulatory rights and that conduct would result in plaintiff having to incur "manifestly inadequate" procedures.[7]

Once, having concluded that it had jurisdiction, the Court went on to determine, based upon the administrative record that Customs had improperly revoked the importer's ruling by issuing a "Notice of Action," which was not issued in accordance with law. It went to find that the revocation was improper because the required procedures were not followed and Customs, in any event, did not conduct a proper legal analysis to support its revocation.

Since the *ICP* case is on appeal, it is unsettled whether the Court erred in looking to the actual harm to the importer to determine whether the remedies available under section 1581(a) are manifestly inadequate. Nor, is it clear whether the Court's further conclusion that the Government acted in willful violation of regulatory and statutory rights, by forcing the importer to utilize burdensome administrative proceedings before it can obtain review, provides another exception that permits a complainant to bypass review under section 1581(a) and seek more expeditious review under section 1581(i), by contending that such review provides better relief by effecting other entries beyond those covered by a protest which is reviewed under section 1581(a).[8]

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[7] This reasoning strikes me as raising a questionable "estoppel" against the Government. Ordinarily, estoppel does not apply to the Government in matters, such as implicated here when the Government is acting in its sovereign capacity.

[8] In a related action, ***International Customs Products, Inc. v. United States***, CIT Court No. 05-00615 (dismissed, unpublished Order, July 17, 2006) involving the same parties, and contesting a subsequently issued ruling, after a period of notice and comment, revoking ICP's earlier ruling, and which presumably avoided the procedural infirmities that were the core basis for ICP's action, discussed above, Judge Eaton, in an earlier unpublished order, dated June 20, 2006, granted the Government's motion to dismiss Count I of the ICP's complaint for lack of jurisdiction. The Court held that the importer could not avoid the requirements to

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2. ***Heartland By-Products, Inc. v. United States***, 424 F. 3d 1244 (Fed. Cir. 2005). The facts in this case, given the number of related actions decided by the courts, which are implicated here, are hard to follow in a brief discussion, and are best obtained from a reading of the CAFC's decision. Stripped to the bare minium required for an understanding of the holding of the case, it suffices to say that the importer became entangled in a series of actions and court decisions subsequent to the dismissal of its initial challenge. The Government had conceded that the first action was correctly under 28 U.S.C. §1581(h) to challenge a ruling revoking an earlier ruling the importer had obtained. Although the importer initially prevailed on the merits in the CIT, the CAFC reversed and affirmed the correctness of Customs subsequent revocation, after applying *Skidmore*[9] deference to the agency's reasoning, based upon the administrative record. The importer then brought an ancillary proceeding in the CIT, as part of the initial action, cited above, n. 9, to have the CIT determine whether Customs was correct in assessing duty upon entries made while the judgment of the CIT was effective, prior to being reversed by the CAFC and before the mandate of the appellate court issued.

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[8](...continued)
exhaust its administrative remedies under section 1581, by filing a protest under 19 U.S.C. §§ 1514 and 1515, by alleging that they were time consuming and vexing.

Although the Court retained jurisdiction over Counts II-IV of the complaint, the importer later stipulated to the dismissal of the action, in an order entered on July 17, 2006, so that it would be able to file an appeal with respect to the Court's dismissal of Count I. Appeal No. 06–1531 is now pending before the CAFC (appellant's brief filed on August 18, 2006). That appeal, essentially, raises the same jurisdictional questions found in the principal case. The roles of the parties, however, have ben reversed and ICP in the second appeal apparently bears the burden of convincing the CAFC to uphold jurisdiction because the importer contends it is faced with irreparable harm. There, ICP also seeks relief with respect to entries that are not the subject of a denied protest.

[9] See *Heartland By-Products, Inc. v. United States*, 264 F.3d 1125 (Fed Cir. 2001), citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

Apparently, while the CIT initially acknowledged that it had jurisdiction to entertain the questions being raised by the importer, as a result of discussions with the parties, it was agreed that the importer would instead commence a new action based upon a denied protest. The CIT dismissed the action, without including a clause indicating that the dismissal was without prejudice to any rights of later renewal.

Following what appears to be unsuccessful negotiations between the parties for purposes of designating one or more entries as "test" entries, representing the key time periods implicated in all the entries that might be resolved on the basis of a decision on the test entries, the importer went back to the CIT, again seeking to have it resolve the same questions originally posed. In its new complaint, the importer argued that the CIT had jurisdiction under USCIT R. 60(b), as an independent action to relieve a party from a judgment (i.e., the dismissal of the earlier action) or under section 1581(h) or section 1581(i). This time, however, the CIT, which had dismissed the original action held that it no longer had jurisdiction to consider the entries included in the new complaint.

The CAFC reversed. It held that the CIT had inherent power to determine the effect of its original decision, prior to the issuance of the CAFC's mandate on entries that were made in reliance upon the CIT's initial judgment. The CAFC reasoned that because the basis for the CIT's jurisdiction, under section 1581(h), review of pre-importation rulings, constitutes such an unusual exception to the normal procedures of obtaining review following entry and denial of a timely filed protest and paying all liquidated duties that it would be wrong to impute an intent by Congress to require an importer to commence an entirely separate action under section 1581(a) to determine in that action the scope of relief available in the section 1581(h) action.

Consequently, the Court concluded by holding that because the CIT had inherent, ancillary jurisdiction to consider the importer's newly filed complaint, it was not necessary for the Court to also determine whether the CIT erred by not entertaining the importer's newly filed complaint as an independent action under USCIT R. 60(b) or by holding that it had no jurisdiction, under sections 1581(h) or (i), to determine the questions the importer raised in its complaint.

With respect to the central questions to be discussed by this panel, this decision provides, in my view, little guidance to inform the parties and the CIT on the issue of when an action may be brought under section 1581(i), in lieu of requiring the importer to pursue available remedies under section 1581(a). It does, however, leave a wider crack for future litigants to argue that the relief available in actions commenced under section 1581(h) may not be narrowly circumscribed by the limits of relief specified in 28 U.S.C. §2643, which indicates that relief in cases brought under section 1581(h) is limited to the issuance of declaratory judgments with respect to the ruling under review in the action. Additional declaratory relief, apart from the ruling, may be permissible.

What types of ancillary relief litigants may seek and how the CIT will apply its powers to grant such relief remains an emerging issue.

3. ***Gilda Industries, Inc. v. United States***, 446F.3d 1271(Fed. Cir. 2006). This case was brought in the CIT by an importer, also seeking class certification, to obtain removal of products from a trade dispute retaliation list, refunds of duties and reliquidation of the entries. Jurisdiction was claimed with respect to entries which had been timely protested and the protests denied under section 1581(a), and, as to prospective entries, under section 1581(i).

The CIT granted the Government's motion and dismissed the action for failure to state a claim upon which relief can be granted. On appeal, the Government asserted that the CIT erred in concluding that it had jurisdiction under section 1581(i) and consequently any relief to be awarded would have to be limited to the entries that were protested, and, **not**, prospectively, to future entries.

The reasoning of the CAFC on the merits of the case is of little consequence to this discussion here and may be obtained from a reading of the Court's decision. What is significant is that the Court held that the CIT properly had jurisdiction as to the protested entries under section 1581(a). Also, inasmuch as the gravamen of the importer's challenge went to a decision of the Trade Representative, and because Customs had no independent power to overrule or ignore the decisions made by the Trade Representative, it concluded that, following established precedent, it was "manifestly inadequate" to require the importer to go through the

motions of filing protests and awaiting their denial. Therefore, the CIT did properly have jurisdiction under section 1581(i).

The CAFC's decision on the jurisdictional question does not appear to add anything new to an already well established exception to the requirement that an importer needs to exhaust its administrative remedies through the protest process; when the underlying decision involved is outside the province of Customs to consider, exhaustion is not required. Here, Customs role in collecting the duties was essentially ministerial and it is the decision of the Trade Representative that is being questioned.

4. ***Orleans International , Inc. v. United States***, 334 F.3d 1375 (Fed. Cir. 2003) ("*Orleans*"). This action is included here because it involves a jurisdictional determination in which the Government lost. This case does not inform with respect to the question of when an action may be brought under section 1581(i) instead of section 1581(a). In this case, the importer brought an action challenging the constitutionality of assessments applied to imports of beef and related beef products pursuant the Beef Promotion and Research Act (Beef Act). The CIT, per Carman (then Chief Judge), granted the Government's motion to dismiss for lack of jurisdiction.

The case does, however, raises a question as to whether the clarity that was intended to be achieved when the Customs Courts Act of 1980 was enacted was achieved with respect the uncertainty which existed between whether an action was with the jurisdiction of the district courts or the newly empowered and renamed CIT. The CIT, unlike the United States Customs Court, was for the first time given full powers of law and equity under 28 U.S.C. §1585.

In reversing the judgment of the CIT, the CAFC held that the proper method for the CIT to make a determination whether it has jurisdiction is to focus upon its own jurisdictional grants of jurisdiction and not to first look to see if the Federal district courts [or some other court] may have exercised jurisdiction over similar suits. Here the CAFC went on to hold that the portion of the Beef Act being contested fit squarely within the CIT's jurisdiction under section 1581(i)(2), over actions arising from laws providing for fees on the importation of certain

merchandise, even though the district courts had jurisdiction over different types of action arising out of the Beef Act.

In making its analysis, the CAFC agreed with the importer that portions of the Beef Act pertain to questions that are solely agricultural and there are portions that bear on international trade. The Court held that there was no requirement that a statute, as opposed to a specific cause of action, relate solely to international trade for the action to be within the CIT's jurisdiction, as long as it relates concerns, as it does here, to a fee collected upon the importation of beef or beef products. Furthermore, even though the role of the Customs is ministerial when it collects the fee, the plain language of section 1581(i)(2), nevertheless prescribes that the CIT has exclusive jurisdiction over actions challenging the legality of such fees. It should be noted that the decision of the CAFC here was 2-1. Chief Judge Mayer, dissented.

5. ***Cricket Hosiery, Inc. v. United States***, Slip Op. 04-72, 2004 WL 1376402 (CIT 2004)(not reported in F. Supp. 2d). This case is very much like *Orleans*, except, instead of the Beef Act, it involves an importer's challenge to the constitutionality of fees collected on imports of cotton and cotton products, pursuant to the Cotton Research and Promotion Act of 1966 ("Cotton Act"). It was decided after the CAFC's decision in *Orleans*. The Government maintained that the rationale of *Orleans* with respect to the exclusiveness of jurisdiction in the CIT under section 1581(i)(2), was distinguishable here because the Cotton Act provides in 7 U.S.C. §2111 ("section 2111") specific procedures for bringing a challenge to the Cotton Act. Basically, those procedures require the complainant file a petition with the Secretary of Agriculture seeking a review decision from the Secretary. After conducting a hearing, if the Secretary's decision is adverse to the complaint, the decision may then be reviewed in the appropriate district court.

The CIT, per Musgrave, *Sr. J*. found no basis for distinguishing *Orleans* based upon the arguments the Government advanced with respect to section 2111 and in strong words expressed its frustration with the "government's now predictable–assault upon the jurisdiction of the Court of International Trade." The Court went on further to chide the Government for pursuing what it perceives as "scorch and burn tactics or obstructionist pursuits," which the Ninth Circuit has

succinctly characterized as "creative arguments" citing "*Cornet Stores v. Morton*, 632 F.2d 96, 98 (9th Cir. 1980)."

From my perspective, if Congress did intend to limit review of decisions of the Secretary to ones first commenced in accordance with the procedures set for in section 2111, it is plausible that the Congress did not foresee the potential for overlapping jurisdiction of kind upheld here in the CIT. Despite the Court's derision of the Government's litigation posture, it seems apparent from the scholarly analysis the Court undertook to reject any distinction between this case and *Orleans* based upon the Government's argument, that Government counsel had a justifiable basis to raise the jurisdictional issue. The question of jurisdiction is always present and the parties cannot stipulate to a court taking jurisdiction when it does not exist.

This case may further demonstrate the need for Congress to reexamine the jurisdictional scheme it crafted in the 1980 Act as some bar associations, other professional organizations, and even a Committee of the CIT have undertaken. Not only do old questions pertaining to the dichotomy between sections 1581(a), 1581(h) and 1581(i) continue to reemerge, but some of the same concerns that warranted clarification in 1980 of jurisdiction between the district courts and the CIT (formerly Customs Court) may again warrant clarification from Congress.

CONCLUSION

The theme of this conference aptly applies to the jurisdictional issues the decisions of the courts addressing these issues. We continue to see many of the same jurisdictional disputes, regardless of whether they have subtle or substantial differences in their factual underpinnings. Decisions involving these jurisdictional problems continue to vex litigants and the courts. In 1994, the CAFC in its decision in the *Connoco* case, in its opinion quoted, apparently approvingly, the personal frustration that the court below expressed when it ruled against taking

jurisdiction as follows (18 F.3d at 1590):

> This Court feels compelled to express its sense of exasperation and frustration with the results of this case. Individuals and firms are often required to spend an inordinate amount of time and money to obtain judicial review in this Court. They are required to navigate arcane jurisdictional passages. They waste time and resources fighting over jurisdiction and oftentimes they are denied a chance to be heard on the merits of the case. These obstacles unnecessarily increase cost and hurt the efforts of the United States to be competitive in the international community.
> 790 F. Supp. at 288-89.

> Judge Carman aptly states the reasons why Congress granted to the Court of International Trade the jurisdiction that it did. It is time to bring to an end the unproductive jurisdictional ping-pong games, and to give litigants their right to the expeditious and timely decisions on the merits of their claims.

Those observations continue to ring true, now almost 13 years later. Plainly, given the ambiguities, confusion, frustration, and expense and delays that exist, some adjustments to the 1980 Act may be required. It may be that the decision making in Customs has shifted more an more from borderline, port decisions when the merchandise is presented, and post importation decisions, to advance rulings. The formal administrative review processes, coupled with the subsequent judicial review of those decisions have not kept pace with these changes. Arcane procedural methods and limited resources are not suited for the modern era.

Also, despite, what I believe has substantially been good faith efforts of counsel for the private litigants and the Government[10] to navigate the sea of

[10] Based upon my years of experience representing the Bureau of Customs and Boarder Protection (formerly Customs Service), I was always impressed by (continued...)

jurisdiction that Congress established in 1980, it's apparent that Congress may need to take a fresh look at the jurisdictional charts it crafted so that what's old yesterday does not become new again today and tomorrow brings a new beginning. Congress may need to consider whether the exigencies of international trade and commerce tody require new administrative and/or judicial procedures to resolve the continuum of issues that arise before the Bureau of Customs and Border Protection and the courts that review that agency.

Apart from any modifications that may legislatively be warranted in the jurisdiction of the CIT and its appellate court, it may be time to take a fresh, scholarly look at the administrative procedures, both formal and informal, which are used by Customs, both in connection with how it issues and reviews rulings and how it reviews challenges to its actions, decisions and/or refusals to act.

It may be that either statutory revisions or changes in regulations are required to implement new, perhaps more formal administrative review proceedings. Alternatively, policy makers within the agency may also want to consider, as suggested before, the use of ADR, compromise and settlement at the administrative level. Consideration of the consequences of an adverse court decision, which may have broader adverse impact than compromise in an isolated

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[10](...continued)
what was with very rare, if any exception, the substantial, good faith efforts by the officers and employees of that agency to reject improper influences from inappropriate outside agents or political pressures. Often, under funding from Congress, limited resources and higher priorities relating to national security and the like might hamstrung efforts by the agency to facilitate the speedy, fair and just resolution of disputes. No doubt, arcane policies, blind sightedness and occasional shortsightedness on the part of some involved in the decision making and/or review process may have contributed to unnecessary hardships. However, I also saw inflexible private litigants and their counsel, often who were often focused upon a singular objective, and who were unwilling to propose, consider and/or accept constructive compromise or alternative suggestions. They must accept responsibility for delays and harm they brought upon their own interests and accept changes in their attitudes and approaches.

case, may not always be given as full consideration as they deserve. Changes, as I have said, before, should not be viewed only from one side. No doubt there are changes in the way that importers and others who interact with Customs can be implemented to enable Customs to more effectively, with the resources it has, fulfill its mission.

In sum, while the Act of 1980 may not be a paragon, it's not a "clunker" that needs to be trade in for something brand new. It may require tinkering, refreshing, and upgrades may be needed to the administrative processes upon which jurisdiction is based, but the 1980 Act has proven to be effective in resolving thousand of cases.

APPENDIX

§ 1581. Civil actions against the United States and agencies and officers thereof

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any decision of the Secretary of the Treasury to deny a customs broker's license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customs broker's permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act;

(2) any decision of the Secretary of the Treasury to revoke or suspend a customs broker's license or permit, or impose a monetary penalty in lieu thereof, under section 641(d)(2)(B) of the Tariff Act of 1930; and
(3) any decision or order of the Customs Service to deny, suspend, or revoke accreditation of a private laboratory under section 499(b) of the Tariff Act of 1930.

(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 of 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.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;
(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a bi–national panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

* * *

§ 2632. Commencement of a civil action

(a) Except for civil actions specified in subsections (b) and (c) of this section, a civil action in the Court of International Trade shall be commenced by filing concurrently with the clerk of the court a summons and complaint, with the content and in the form, manner, and style prescribed by the rules of the court.

(b) A civil action in the Court of International Trade under section 515 or section 516 of the Tariff Act of 1930 shall be commenced by filing with the clerk of the court a summons, with the content and in the form, manner, and style prescribed by the rules of the court.

(c) A civil action in the Court of International Trade under section 516A of the Tariff Act of 1930 shall be commenced by filing with the clerk of the court a summons or a summons and a complaint, as prescribed in such section, with the content and in the form, manner, and style prescribed by the rules of the court.

(d) The Court of International Trade may prescribe by rule that any summons, pleading, or other paper mailed by registered or certified mail properly addressed to the clerk of the court with the proper postage affixed and return receipt requested shall be deemed filed as of the date of mailing.

* * *

§ 2635. Filing of official documents

(a) In any action commenced in the Court of International Trade contesting the denial of a protest under section 515 of the Tariff Act of 1930 or the denial of a petition under section 516 of such Act, the Customs Service, as prescribed by the rules of the court, shall file with the clerk of the court, as part of the official record, any document, paper, information or data relating to the entry of merchandise and the administrative determination that is the subject of the protest or petition.

(b)(1) In any civil action commenced in the Court of International Trade under section 516A of the Tariff Act of 1930, within forty days or within such other period of time as the court may specify, after the date of service of a complaint on the administering authority established to administer title VII of the Tariff Act of 1930 or the United States International Trade Commission, the administering authority or the Commission shall transmit to the clerk of the court the record of such action, as prescribed by the rules of the court. The record shall, unless otherwise stipulated by the parties, consist of—

(A) a copy of all information presented to or obtained by the administering authority or the Commission during the course of the administrative proceedings, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be maintained by section 777(a)(3) of the Tariff Act of 1930; and

(B)(i) a copy of the determination and the facts and conclusions of law upon which such determination was based,

(ii) all transcripts or records of conferences or hearings, and

(iii) all notices published in the Federal Register.

(2) The administering authority or the Commission shall identify and transmit under seal to the clerk of the court any document, comment, or information that is accorded confidential or privileged status by the Government agency whose action is being contested and that is required to be transmitted to the clerk under paragraph (1) of this subsection. Any such document, comment, or information shall be accompanied by a nonconfidential description of the nature of the material being transmitted. The confidential or privileged status of such material shall be preserved in the civil action, but the court may examine the confidential or privileged material in camera and may make such material available under such terms and conditions as the court may order.

(c) Within fifteen days, or within such other period of time as the Court of International Trade may specify, after service of a summons and complaint in a civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930, the administering authority or the Commission shall transmit under seal to the clerk of the Court of International Trade, as prescribed by its rules, the confidential information involved, together with pertinent parts of the record. Such information shall be accompanied by a nonconfidential description of the nature of the information being transmitted. The

confidential status of such information shall be preserved in the civil action, but the court may examine the confidential information in camera and may make such information available under a protective order consistent with section 777(c)(2) of the Tariff Act of 1930.

(d)(1) In any other civil action in the Court of International Trade in which judicial review is to proceed upon the basis of the record made before an agency, the agency shall, within forty days or within such other period of time as the court may specify, after the date of service of the summons and complaint upon the agency, transmit to the clerk of the court, as prescribed by its rules—

(A) a copy of the contested determination and the findings or report upon which such determination was based;

(B) a copy of any reported hearings or conferences conducted by the agency; and

(C) any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action.

(2) The agency shall identify and transmit under seal to the clerk of the court any document, comment, or other information that was obtained on a confidential basis and that is required to be transmitted to the clerk under paragraph (1) of this subsection. Any such document, comment, or information shall include a nonconfidential description of the nature of the material being transmitted. The confidential or privileged status of such material shall be preserved in the civil action, but the court may examine such material in camera and may make such material available under such terms and conditions as the court may order.

(3) The parties may stipulate that fewer documents, comments, or other information than those specified in paragraph (1) of this subsection shall be transmitted to the clerk of the court.

§ 2636. Time for commencement of action

(a) A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade—

(1) within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act; or

(2) within one hundred and eighty days after the date of denial of a protest by operation of law under the provisions of section 515(b) of such Act.

(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within thirty days after the date of mailing of a notice pursuant to section 516(c) of such Act.

(c) A civil action contesting a reviewable determination listed in section 516A of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within the time specified in such section.

(d) A civil action contesting a final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 or a final determination of the Secretary of Commerce under section 251 or section 271 of such Act is barred unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of notice of such determination.

(e) A civil action contesting a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979 is barred unless commenced in accordance with the rules of the Court of International Trade within thirty days after the date of the publication of such determination in the Federal Register.

(f) A civil action involving an application for the issuance of an order making confidential information available under section 777(c)(2) of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within ten days after the date of the denial of the request for such confidential information.

(g) A civil action contesting the denial or revocation by the Secretary of the Treasury of a customs broker's license or permit under subsection (b) or (c) of section 641 of the Tariff Act of 1930, or the revocation or suspension of such license or permit or the imposition of a monetary penalty in lieu thereof by such Secretary under section 641(d) of such Act, is barred unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of the entry of the decision or order of such Secretary.

(h) A civil action contesting the denial, suspension, or revocation by the Customs Service of a private laboratory's accreditation under section 499(b) of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the

Court of International Trade within 60 days after the date of the decision or order of the Customs Service.

(i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)–(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

§ 2637. Exhaustion of administrative remedies

(a) A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced, except that a surety's obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest.

(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the Court of International Trade only by a person who has first exhausted the procedures set forth in such section.

(c) A civil action described in section 1581 (h) of this title may be commenced in the Court of International Trade prior to the exhaustion of administrative remedies if the person commencing the action makes the demonstration required by such section.

(d) In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.

§ 2638. New grounds in support of a civil action

In any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground—

(1) applies to the same merchandise that was the subject of the protest; and

(2) is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest.

§ 2639. Burden of proof; evidence of value

(a)(1) Except as provided in paragraph (2) of this subsection, in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.

(2) The provisions of paragraph (1) of this subsection shall not apply to any civil action commenced in the Court of International Trade under section 1582 of this title.

(b) In any civil action described in section 1581 (h) of this title, the person commencing the action shall have the burden of making the demonstration required by such section by clear and convincing evidence.

(c) Where the value of merchandise or any of its components is in issue in any civil action in the Court of International Trade—

(1) reports or depositions of consuls, customs officers, and other officers of the United States, and depositions and affidavits of other persons whose attendance cannot reasonably be had, may be admitted into evidence when served upon the opposing party as prescribed by the rules of the court; and

(2) price lists and catalogs may be admitted in evidence when duly authenticated, relevant, and material.

§ 2640. Scope and standard of review

(a) The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:

(1) Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930.

(2) Civil actions commenced under section 516 of the Tariff Act of 1930.

(3) Civil actions commenced to review a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979.

(4) Civil actions commenced under section 777(c)(2) of the Tariff Act of 1930.

(5) Civil actions commenced to review any decision of the Secretary of the Treasury under section 641 of the Tariff Act of 1930, with the exception of decisions under section 641 (d)(2)(B), which shall be governed by subdivision (d) of this section.

(6) Civil actions commenced under section 1582 of this title.

(b) In any civil action commenced in the Court of International Trade under section 516A of the Tariff Act of 1930, the court shall review the matter as specified in subsection (b) of such section.

(c) In any civil action commenced in the Court of International Trade to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 or any final determination of the Secretary of Commerce under section 251 or section 271 of such Act, the court shall review the matter as specified in section 284 of such Act.

(d) In any civil action commenced to review any order or decision of the Customs Service under section 499(b) of the Tariff Act of 1930, the court shall review the action on the basis of the record before the Customs Service at the time of issuing such decision or order.

(e) In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5.

* * *

§ 2643. Relief

(a) The Court of International Trade may enter a money judgment—

(1) for or against the United States in any civil action commenced under section 1581 or 1582 of this title; and

(2) for or against the United States or any other party in any counterclaim, cross-claim, or third-party action under section 1583 of this title.

(b) If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

(c)(1) Except as provided in paragraphs (2), (3), (4), and (5) of this subsection, the Court of International Trade may, in addition to the orders specified in subsections (a) and (b) of this section, order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

(2) The Court of International Trade may not grant an injunction or issue a writ of mandamus in any civil action commenced to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974, or any final determination of the Secretary of Commerce under section 251 or section 271 of such Act.

(3) In any civil action involving an application for the issuance of an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930, the Court of International Trade may issue an order of disclosure only with respect to the information specified in such section.

(4) In any civil action described in section 1581 (h) of this title, the Court of International Trade may only order the appropriate declaratory relief.

(5) In any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, the Court of International Trade may not order declaratory relief.

(d) If a surety commences a civil action in the Court of International Trade, such surety shall recover only the amount of the liquidated duties, charges, or exactions paid on the entries included in such action. The excess amount of any recovery shall be paid to the importer of record.

(e) In any proceeding involving assessment or collection of a monetary penalty under section 641(b)(6) or 641(d)(2)(A) of the Tariff Act of 1930, the court may not render judgment in an amount greater than that sought in the initial pleading of the United States, and may render judgment in such lesser amount as shall seem proper and just to the court.

§ 2644. Interest

If, in a civil action in the Court of International Trade under section 515 of the Tariff Act of 1930, the plaintiff obtains monetary relief by a judgment or under a stipulation agreement, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1986. Such interest shall be calculated from the date of the filing of the summons in such action to the date of the refund.