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Why Congress Should Expand the Subject Matter Jurisdiction of the United States Court of International Trade

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WHY CONGRESS SHOULD EXPAND THE SUBJECT MATTER JURISDICTION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE

Devin S. Sikes[*]

> Nations have their periods of birth, youth, maturity and decay. Like individuals, they are influenced through all the stages of their existence, by the conditions and circumstances they create for themselves, as well as those which exist independently of them. All persons who observe the natural laws of health have a reasonable assurance of long life, while those who violate them are apt to die early. So it is with nations.
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> – R.W. Thompson[1]

I. INTRODUCTION

The subject matter jurisdiction of the U.S. Court of International Trade (CIT) covers only disputes that involve goods and has remained

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[1] R.W. THOMPSON, THE HISTORY OF PROTECTIVE TARIFF LAWS 17 (Garland Publ'g, Inc. 1974) (1888). Thompson uses the above passage as an eloquent introduction to his argument that protectionism is necessary to ensure the continued economic growth of the United States. Applied to the topic of this article, the quote importantly describes the duty of Congress, as the sole authority in the United States government to expand the subject matter jurisdiction of the federal courts, to maintain the health and relevancy of United States Court of International Trade.

mostly unchanged since the Customs Courts Act of 1980. The federal statutes vesting the CIT with jurisdiction over international trade disputes do not account for the evolution of international trade into new areas. While the CIT has established coherent and consistent law on disputes over import transactions, Congress has failed to expand its subject matter jurisdiction to reflect the realities of contemporary trade so that the court may fulfill its intended purpose,[2] distilled in the U.S. Constitution's mandate that "all Duties, Imposts, and Excises shall be uniform throughout the United States."[3] The article first explains the current subject matter jurisdiction of the CIT. It then examines the development of international trade law over the last 60 years in federal statutes and in the multilateral and bilateral trade agreements to which the United States is a party. Finally, drawing on these developments, the article proposes what additional matters should fall within the ambit of the court's review and argues that the new subject matter jurisdiction must exceed the scope of other recent proposals.

II. THE SUBJECT MATTER JURISDICTION OF THE CIT

"Subject matter jurisdiction" refers to a court's "power to deal with the general subject involved in the action."[4] Article I of the Constitution vests Congress with the authority to "constitute tribunals inferior to the Supreme Court,"[5] an authority that also implies Congress may shape and define the jurisdictions of the lower federal courts.[6]

The unique history of the CIT and its predecessors demonstrates that its power to hear international trade controversies has expanded

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[2] Congress stated two principal goals for the CIT when it expanded the subject matter jurisdiction of the United States Customs Court in 1980: (1) to make more efficient use of under-utilized resources, expertise, and the nation-wide jurisdiction of the United States Customs Court and (2) to "create[] a comprehensive system of judicial review of civil actions arising from import transactions . . . ." H.R. REP. NO. 96-1235, at 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731 [hereinafter House Report].

[3] U.S. CONST. art. I, § 8, cl. 1.

[4] BLACK'S LAW DICTIONARY 1425 (6th ed. 1990); *see also Ex parte* McCardle, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

[5] U.S. CONST. art. I, § 8, cl. 9. Congress alone has the authority to create federal courts inferior to the Supreme Court. U.S. CONST. art. III, § 1, cl. 1.

[6] *See, e.g.*, Sheldon v. Sill, 49 U.S. 441, 448-49 (1850).

continually since its inception[7] and that Congress has extended its subject matter jurisdiction to account for changes in international trade. The CIT began as the Board of General Appraisers (the Board) in 1890 as a quasi-judicial administrative body within the Treasury Department.[8] The Board reviewed customs determinations on the classification and valuation of imported merchandise, as well as the duty rate assessed to such goods – a task especially important because the U.S. government then relied heavily on tariffs for revenue. Over time, the types of decisions pertaining to import transactions expanded to include antidumping duty and subsidy determinations.[9] Because the review of such decisions fell outside of the Board's jurisdiction, Congress reconstituted it as the U.S. Customs Court (the Customs Court) under Article I of the Constitution to reflect the emergence of the new antidumping and countervailing duty remedies.[10] Over the next thirty years, Congress further integrated the court into the federal judiciary and ultimately elevated the Customs Court to Article III status in 1956 so that the judges could exercise similar powers in law as their counterparts on other federal courts,[11] though they still could not exercise certain equitable powers.[12] However, litigation before the Customs Court essentially remained unchanged because Congress did not alter the functions, duties, or jurisdiction of the court at that time.[13]

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[7] For a thorough recounting of the history and jurisdiction of the CIT, and an explanation of litigation before the court, see Hon. Edward D. Re, *Litigation Before the Court of International Trade*, Preface to 19 U.S.C.A., at XXV-LVIII (West 1999) (updating and expanding upon an address given by Chief Judge Re at the International Bar Association Conference in Atlanta, Georgia on November 3, 1977).

[8] Customs Administrative Act of June 10, 1890, ch. 407, §§ 12, 13, 26 Stat. 136-37 (1890) (historical notes at 28 U.S.C.A. pt. I, ch. 11).

[9] Antidumping Act, 1921, ch. 14, § 201, 42 Stat. 11 (codified at 19 U.S.C. § 160), *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 143, 193; Act of Sept. 21, 1922, ch. 356, 42 Stat. 935, *repealed by* Tariff Act of 1930, Pub. L. No. 71-361, ch. 497, § 651(a)(1), 46 Stat. 590, 762.

[10] Act of May 28, 1926, ch. 411, § 1, 44 Stat. 669 (1926) (general provisions incorporated in 19 U.S.C. § 1518 (1940)), amended by Act October 10, 1940, ch. 843, § 1, 54 Stat. 1101, *retained in* 28 U.S.C. § 296.

[11] 28 U.S.C. § 251 (1956).

[12] For example, the Customs Court could neither issue money judgments nor provide equitable relief until Congress passed the Customs Courts Act of 1980. House Report, *supra* note 2, at 18-19.

[13] *See* Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 274 (1970).

In 1980, recognizing that "[t]he primary statutes governing the United States Customs Court have not kept pace with the increasing complexities of modern day trade litigation,"[14] Congress gave the court its current name, expanded its subject matter jurisdiction, and clarified that the court has powers in law and equity identical to those of other federal courts.[15] Congress expressed that the chief aims of the Customs Courts Act of 1980 were to (1) clarify the subject matter jurisdiction of the court and (2) grant it the full powers of an Article III court.[16] With these changes, Congress hoped that the CIT would uniformly and effectively resolve conflicts over disputes arising out of the tariff and international trade laws.[17] In Title 28 of the United States Code, Congress set forth the current subject matter jurisdiction of the CIT.[18]

A. 28 U.S.C. §§ 1581-1584

The current jurisdiction of the CIT encompasses civil actions arising out of import transactions. Specifically, the CIT reviews agency actions regarding the administration, enforcement, and interpretation of U.S. customs and international trade laws.[19] The court hears disputes falling into two major categories: (1) actions against the United States and (2) actions brought by the United States.

Congress entrusted the CIT with the authority to resolve disputes falling under the first category in § 1581. These actions include challenges to U.S. Customs & Border Protection's (Customs) denial of a protest over the classification or valuation of imported merchandise;[20]

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[14] House Report, *supra* note 2, at 18.

[15] *See* Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980) [hereinafter Customs Courts Act].

[16] *See* House Report, *supra* note 2, at 19-20 ("The majority of cases before the Customs Court traditionally involve classification and valuation issues. In almost all of these cases, the court could only agree or disagree with the decision of the administrative agency. The court could not issue money judgments, nor, until 1980, could it provide equitable relief.").

[17] *Id.* at 27-28. Congress also recognized that the expanded jurisdiction must account for the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979), which it believed would shift the bulk of the caseload of the court from customs cases to claims involving antidumping and countervailing duties. House Report, *supra* note 2, at 19.

[18] 28 U.S.C. §§ 1581-1584 (2000).

[19] *Id.*

[20] *Id.* § 1581(a). The CIT also may review, prior to importation of the merchandise at issue, a ruling or refusal to issue or change a ruling by Customs concerning classification, valuation, rate of duty, marking, restricted

cases in which a domestic producer of a like product alleges that Customs's improper classification of imported merchandise harmed a domestic industry;[21] and challenges to a decision by the U.S. Department of Commerce (Commerce) or the U.S. International Trade Commission (the Commission) regarding an antidumping or countervailing duty proceeding.[22] The CIT may also review determinations by the U.S. Departments of Labor and Agriculture regarding certain workers' eligibility for trade adjustment assistance;[23] final determinations dealing with advisory rulings on whether a foreign article deserves non-discriminatory treatment for government procurement purposes;[24] and rulings denying, revoking, or suspending a customs broker's license.[25]

Section 1581(i) constitutes a broad grant of residual jurisdiction, which authorizes the CIT to entertain any civil action against the United States arising out of certain laws relating to international trade or the administration or enforcement of those laws.[26] In passing the Customs Courts Act of 1980, Congress intended § 1581(i) to eliminate confusion over whether federal district courts or the CIT had authority to hear these matters.[27] The Committee Report to the Customs Courts Act also noted that this grant of residual jurisdiction sought to fulfill the requirement under Article I of the Constitution that "all Duties, Imposts, and Excises shall be uniform throughout the United States"[28]

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merchandise, entry requirements, drawback, vessel repairs, or similar matters. *Id.* § 1581(h).

[21] *Id.* § 1581(b).

[22] *Id.* § 1581(c). The court also may review cases concerning the request for confidential information from Commerce or the Commission in antidumping or countervailing duty investigations. *Id.* § 1581(f).

[23] *Id.* § 1581(d).

[24] *Id.* § 1581(e).

[25] *Id.* § 1581(g).

[26] *See* Re, *supra* note 7, at XXX. Specifically, the CIT may entertain claims against the U.S., its agencies, or officers that arise out of U.S. law providing for (1) revenue from imports or tonnage; (2) tariffs, duties fees, or other taxes on the importation of merchandise for reasons other than raising revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of public health or safety; and (4) the administration and enforcement of any matter referred to in § 1581. 28 U.S.C. § 1581(i)(1)-(4) (2000). Explicitly excepted from the court's jurisdiction under this subsection are disputes that may be heard properly under § 1581(c). *See Id.*

[27] House Report, *supra* note 2, at 47.

[28] U.S. CONST. art. I, § 8, cl. 1.

and to provide a forum for the consistent application and interpretation of U.S. customs and trade laws.[29]

The court's jurisdiction over claims falling under the second category, actions by the United States, arises from § 1582. Pursuant to this section, the CIT may hear disputes filed by the United States arising out of import transactions that concern the recovery of a civil fine or forfeiture for fraud; an importer's gross negligence or negligence in the entry of imported merchandise; or an importer's intentional violation of agreements to eliminate dumping, foreign subsidies, or their injurious effects.[30] The court also has the authority to hear cases in which the United States seeks to recover an import or export bond as well as unpaid customs duties.[31] The CIT may also hear claims brought by the United States to enforce administrative sanctions levied for violation of either a protective order or the provisions of certain undertakings protecting proprietary information under the North American Free Trade Agreement (NAFTA).[32]

Finally, the court may entertain counterclaims, cross-claims, or third party actions that (1) relate to imported merchandise that is the subject matter of the underlying action before the court or (2) look to recover a bond or duties relating to the imported merchandise.[33] Explicitly excepted from the jurisdiction of the CIT are claims relating to the importation of immoral merchandise under 19 U.S.C. § 1305(a),[34] such as "patently offensive representations or depictions of . . . specific 'hard core' sexual conduct,"[35] and actions reviewing antidumping or countervailing duty determinations in which the merchandise at issue comes from a NAFTA country and a party to the action requests review by a NAFTA bi-national panel.[36]

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[29] *See* House Report, *supra* note 2, at 47.

[30] 28 U.S.C.A. § 1582(1) (West 1993).

[31] *Id.* § 1582(2)-(3) (West 1993).

[32] *Id.* § 1584 (West 1992).

[33] *Id.* § 1583 (West 1980).

[34] *Id.* § 1581(j) (West 2009).

[35] United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 130 n.7 (1973). In upholding the constitutionality of § 1305(a), the Supreme Court reasoned that Congress, under its broad Commerce Clause powers to prohibit the importation of contraband, acted within Constitutional bounds when it proscribed the importation of certain obscene materials. *See id.* at 128-30.

[36] 19 U.S.C. § 1516a(g)(2) (2006).

III. THE EXPANDED SCOPE OF INTERNATIONAL TRADE LAW

A. THE INADEQUACIES OF 28 U.S.C. §§ 1581-1584

The term "trade," depending on its use, constitutes a noun, verb, or adjective.[37] In its traditional use as a noun, the term means the "business of buying and selling commodities."[38] A "commodity" generally describes an "article of trade or commerce . . . that can be transported."[39] The noun "article" indicates a particular kind of item, or at the least, an element of a specific class of things.[40] In other words, a commodity is akin to a chattel in the nomenclature of property under common law and represents a tangible, moveable item.[41] Thus, taking these definitions together, trade is co-extensive with exchanges in "goods,"[42] which involves the sale of merchandise.

The statutes delineating the CIT's subject matter jurisdiction follow this narrow and historical definition of the term trade. More specifically, the Tariff Act of 1930 and the Trade Agreements Act of 1979 sculpt the court's current subject matter jurisdiction around dealings in goods because international trade revolved almost entirely around commodities at the time Congress passed each bill.[43] The Tariff Act of 1930 gives rise to claims arising under §§ 1581(a), (b), (c), (f), (g), 1582, and 1584, whereas the Trade Agreements Act of 1979 serves as the basis for § 1581(e) claims.[44] Congress passed the Tariff Act of

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[37] *See, e.g.*, AMERICAN HERITAGE COLLEGE DICTIONARY 1456-57 (4th ed. 2007).

[38] *Id.* at 1456.

[39] *Id.* at 289. To transport necessarily involves movement, usually of someone or something from one place to another. *See id.* at 1461.

[40] *Id.* at 80.

[41] BLACK'S LAW DICTIONARY 236 (6th ed. 1990) (A "chattel" constitutes "a thing [that is] personal and moveable.").

[42] *Id.* at 597 (defining "goods" as "personal property"); *see also id.* at 868, 1112 (defining "merchandise" and "products").

[43] *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 294-95 (18th ed. 2005) (explaining that goods account for the "bulk" of international trade in United States); NATHAN ROSENBERG & L.E. BIRDZELL, JR., HOW THE WEST GREW RICH 37-40 (1986) (noting that historically "the elementary task of providing food" has preoccupied society and that trade in agricultural goods has dominated most economies).

[44] The Tariff Act of 1930, 19 U.S.C. §§ 1581-1584. Although actions filed under §§ 1581(d), (h), (i) or 1583 do not stem from the Tariff Act of 1930 or the Trade Agreements Act of 1979, claims made under those provisions also

1930 in an attempt to protect the domestic production of certain goods from the effects of the Great Depression.[45] Congress intended the Act, *inter alia*, to "encourage the industries of the United States[] [and] to protect American labor."[46] Congress identified which domestic goods needed the most protection and, in Titles I and II, spelled out which foreign imports would enter the U.S. subject to increased tariffs or gain duty-free entry.[47] Moreover, the Tariff Act of 1930 aimed to protect only domestic commodities from unfairly traded foreign imports, and Congress designed the remedies against unfair trade practices–such as countervailing duties–to cover claims related to goods only.[48]

The origins of the Trade Agreements Act of 1979 stem from the Tokyo Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT).[49] Several

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limit their view of trade to exchanges in goods. Section 1581(d) authorizes the court to review eligibility determinations by the Departments of Labor or Agriculture under the Trade Adjustment Assistance ("TAA") program for workers who manufactured goods like or directly competitive with the imported merchandise. *Id.* §§ 2272 (Supp. II 2002), 1581(d); *see also* Former Employees of Elec. Mobility Corp. v. U.S. Sec'y of Labor, slip op. 08-140, 2008 WL 7020689, at *2 n.5 (Ct. Int'l Trade Dec. 22, 2008). However, when Congress passed the American Recovery and Reinvestment Act of 2009, TAA eligibility extended to certain workers in services industries. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. B, subtitle I, part I, §1801, 123 Stat. 115, 367-72 (2009); *Reps. Rangel, Levin Applaud Trade Adjustment Assistance Expansion in Recovery Bill*, U.S. FED. NEWS, Feb. 26, 2009, *available at* 2009 WLNR 3711268. Similarly, the focus of claims arising under subsections (h) and (i) of § 1581 also center on trade in commodities, evinced by the use of the terms "goods" and "merchandise" in the text. 19 U.S.C. §§ 1581(h)-(i). Moreover, by conferring the CIT with jurisdiction over claims concerning the administration and enforcement of matters referred to in § 1581(a)-(i)(3), § 1581(i)(4) necessarily incorporates the Smoot-Hawley Tariff Act, the Trade Agreements Act of 1979, and thus the limited reach of both Acts to transactions in goods. *Id.* § 1581(i)(4). The use of "merchandise" throughout § 1583 also suggests that the CIT may entertain counterclaims, cross-claims, and third-party actions that concern only goods. *Id.* § 1583.

[45] While this work does not address the wisdom of the beggar-thy-neighbor policies adopted in the Smoot-Hawley Tariff Act, there are many good accounts on the subject. *See, e.g.*, E. E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF (1935); PETER TEMIN, LESSONS FROM THE GREAT DEPRESSION (1989).

[46] Tariff Act of 1930, Pub. L. No. 71-361, ch. 497, 46 Stat. 590, 590.

[47] *Id.* §§ 1-201, 46 Stat. at 590-685.

[48] *See id.* §§ 303, 337, 46 Stat. at 687, 703-04.

[49] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. A concise, but thorough, history of the

nations signed the GATT after the Second World War, and although it represented a new era of trade liberalization, it did not alter the existing limited scope of international trade regulation. While the Tokyo Round addressed several new arenas in international trade law, the concessions granted by the participating members centered on goods.[50] Participating nations agreed to further reduce tariff levels on certain goods and minimize non-tariff barriers to trade.[51] The nations agreed on rules governing countervailing duty regulations which cemented them with antidumping duties as legitimate weapons against unfair trade practices in the international trade arena; however, the new standards concentrated solely on commodities.[52] Of particular note, the participating nations also reached an agreement on government procurement, an accord that Congress later implemented and which served as the basis for the CIT's jurisdiction over decisions on a product's eligibility for government procurement programs under § 1581(e).[53]

Congress implemented the accords reached during the Tokyo Round into U.S. law through the Trade Agreements Act of 1979.[54] In contrast to the crisis-provoked Tariff Act of 1930, this new legislation aimed "to foster the growth and maintenance of an open world trading system" and to "expand opportunities for the commerce of the United States in international trade."[55] The domestic legislation provided

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GATT and successive multilateral trade negotiations, or "rounds," occurs in RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 228-79 (Sweet & Maxwell 2005) [hereinafter MODERN GATT LAW].

[50] For a detailed account of the Tokyo Round, see MODERN GATT LAW, *supra* note 49, at 245-49. For additional background, see WILLIAM R. CLINE ET AL., TRADE NEGOTIATIONS IN THE TOKYO ROUND (1978).

[51] OLIVIER LONG, GENERAL AGREEMENT ON TARIFFS AND TRADE, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS 116-46 (1979).

[52] *Id.* at 129-32, 181.

[53] The agreement established "the principles of non-discrimination and national treatment as between domestic *products* and suppliers and *products* and suppliers of other participating countries, with respect to laws, procedures and practices regarding government procurement." *Id.* at 137 (emphasis added). The non-discrimination, or most favored nation, principle requires an importing country to treat foreign like products equally, whereas national treatment calls for the equal treatment of foreign and domestic like products. *See* MODERN GATT LAW, *supra* note 49, at 43, 95.

[54] Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 143 (codified primarily in sections of 19 & 26 U.S.C.).

[55] *Id.* § 1(c), 93 Stat. at 146.

reductions in the tariff schedules, as well as new, commodity-focused rules on the antidumping and countervailing duty systems and on government procurement.[56] Congress simultaneously provided the framework for resolving disputes over antidumping and countervailing duty orders under § 1581(c).

Following its legislative predecessors, the Customs Courts Act of 1980 explains the CIT's jurisdiction in terms of goods.[57] Congress recognized that the effectiveness of the CIT depended on the harmonization of the Customs Court's subject matter jurisdiction with the final agreements of the Tokyo Round and its domestic counterpart, the Trade Agreements Act of 1979. More specifically, Congress noted that the "[Trade Agreements Act of 1979] provided for major revisions in the overall statutory structure for administrative and judicial review of decisions pertaining to *imported merchandise* and *import transactions*."[58] In other words, through the passage of the Customs Courts Act, Congress sought only to clarify the Customs Court's jurisdiction and bring uniform resolution to disputes on the importation of goods into the United States.

Thus, the pre-Uruguay Round legislation limited the reach of international trade law in the United States to exchanges in commodities. The existing subject matter jurisdiction has allowed the CIT to craft uniform and coherent law on import transactions centering on goods. Nevertheless, the scope of international trade law has grown since 1980 to include areas beyond mere dealings in goods. A schism now separates the regulation of international trade in multilateral and free trade agreements signed by the United States from the laws that give rise to claims made before the CIT. Congress has yet to address this gap, and its inaction prevents the U.S. laws that affect international trade from conveying a coherent, uniform understanding of international trade and the nation from remaining in lockstep with an evolving legal community.

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[56] *Id.* §§ 101-107, 301-309, 501-514.

[57] Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified in sections 19 & 28 U.S.C.).

[58] 126 CONG. REC. 26,546, 26,554 (1980) (statement of Rep. Rodino) (emphasis added). While a "transaction" does not necessarily imply an exchange in goods, the juxtaposition of the phrase "imported merchandise" with "import transactions" suggests Congress intended only to bestow on the court the authority to hear disputes involving goods.

B. THE DEVELOPMENT OF INTERNATIONAL TRADE LAW AFTER 1980

The expansion of international trade law into non-traditional arenas after 1980, as evinced by the subject matter of the agreements resulting from the Uruguay Round multilateral trade negotiations under the GATT and Congress's domestic implementation of those accords, marks a significant disconnect between the court's current subject matter jurisdiction and the reach of contemporary international trade law. By the early 1980s, the service and intellectual property industries constituted an important, if not fundamental, aspect of the economies of most developed nations. In addition to significant policy and tariff concessions under the auspices of the GATT, developing nations received improved access to the agricultural, textile, and apparel markets of developed nations in exchange for greater access to their service markets and increased intellectual property protection.[59] With the adoption of the agreement establishing the World Trade Organization (WTO)[60] and additional accords covering, *inter alia*, sanitary, phytosanitary and investment measures, services, and intellectual property,[61] the coverage of international trade regulation extended into several new arenas. Though Congress examined and subsequently implemented these agreements with meticulous care,[62] it regrettably failed to recognize the legislation's effect on the subject matter jurisdiction of the CIT, leaving it untouched despite the reach of those agreements into several non-goods sectors.

The broad scope of free trade agreements signed by the United States and implemented by Congress after 1980 demonstrates another gap between the CIT's subject matter jurisdiction and contemporary trade. Eight of the twelve agreements regulate at least one non-goods

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[59] *See* MODERN GATT LAW, *supra* note 49, at 262-64.

[60] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Uruguay Round].

[61] *See* Uruguay Round, Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 33 I.L.M. 1125; Uruguay Round, Agreement on Trade-Related Investment Measures, Apr. 15, 1994, 33 I.L.M. 1125; Uruguay Round, General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1125; Uruguay Round, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994.

[62] 19 U.S.C. § 3511 (2006) (implementing Uruguay Round Agreements).

sector.[63] The first U.S. free trade agreement liberalized trade with Israel and extended beneficial treatment to certain Israeli services for purposes of government procurement.[64] In 1988, the United States signed an agreement with Canada that authorized the President to negotiate agreements with Ottawa on, *inter alia*, services, investment rules, intellectual property rights, and government procurement services.[65] Five years later, Congress passed NAFTA, which covered intellectual property, services rendered for government procurement, as well as measures on labor, the environment, and sanitary and phytosanitary standards.[66] With legislation passed in 2004, Congress reduced barriers for certain Australian services "for procurement by the United States,"[67] as it did the following year for services from Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua.[68] In the three most recent implemented agreements, Congress extended similar treatment to certain procurement services from Bahrain, Oman, and Peru.[69] Three other free trade agreements signed, but not implemented, during the last four years by the United States with Colombia, the Republic of Korea, and Panama have equally

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[63] The agreements signed by the United States with Jordan, Singapore, Chile, and Morocco cover only goods. *See* United States-Jordan Free Trade Area Implementation Act, Pub. L. No. 107-43, 115 Stat. 243 (2001); United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, 117 Stat. 948 (2003); United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (2003); United States-Morocco Free Trade Agreement Implementation Act, Pub. L. No. 108-302, 118 Stat. 1103 (2004).

[64] United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, §7, 99 Stat. 82 (1985).

[65] United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, §§ 304, 306, 102 Stat. 1873, 1876 (1988) (codified at 19 U.S.C. § 2114).

[66] North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103-182, §§ 331-35, 351, 381, 531-32, 107 Stat. 2057, 2113-16, 2118-2122, 2128-29, 2163-64 (1993).

[67] United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, § 401, 118 Stat. 919, 950 (2004).

[68] Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, § 401, 119 Stat. 462, 495 (2005).

[69] *See* United States-Bahrain Free Trade Agreement Implementation Act, Pub. L. No. 109-169, § 401, 119 Stat. 3581, 3599-3600 (2006); United States-Oman Free Trade Agreement Implementation Act, Pub. L. No. 109-283, § 401, 120 Stat. 1191, 1209-10 (2006); United States-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, § 401, 121 Stat. 1455, 1486 (2007).

expansive scopes. These agreements cover, among other topics, cross-border trade in certain professional, financial, and government procurement services; intellectual property; investment; and measures on labor, the environment, e-commerce, transparency, and sanitary and phytosanitary standards.[70]

Taken together, the Uruguay Round Agreements Act, the eight implemented free trade agreements, and the three negotiated free trade agreements represent a more comprehensive approach to international trade regulation and demonstrate that the legal domains of trade have expanded into areas not envisioned by Congress in 1980. Although Congress expanded the court's jurisdiction in 1980 because "[t]he primary statutes governing the United States Customs Court [had] not kept pace with the increasing complexities of modern day international trade litigation,"[71] it has failed to take similar, much needed action since then. The complexity of contemporary international trade law necessitates that the subject matter jurisdiction of the CIT must hold a multidisciplinary view of commerce between the United States and other nations, as well as of the subject matter inherent in disputes arising from these transactions.

C. A NEW SUBJECT MATTER JURISDICTION FOR THE CIT

Congress should expand the subject matter jurisdiction of the CIT to account for contemporary international trade law as encompassed in post-1980 multilateral and bilateral trade agreements, which center on eight principal areas: intellectual property, services, sanitary and phytosanitary measures, investment, government procurement, labor, environment, and national security measures. Ideally, the CIT would hear cases or controversies arising from international transactions that involve any of the eight mentioned areas. For example, with respect to intellectual property, the court would

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[70] *See* Office of the United States Trade Representative, Colombia Free Trade Agreement: Final Text, http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text (last visited Feb. 1, 2010); Office of the United States Trade Representative, Korea-United States Free Trade Agreement: Final Text, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (last visited Feb. 1, 2010); Office of the United States Trade Representative, Panama Trade Promotion Agreement: Final Text, http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text (last visited Feb. 1, 2010).

[71] House Report, *supra* note 2, at 18.

address a claim arising from a cross-border transaction that concerns the validity, infringement, or the administration or enforcement of a patent, copyright, or trademark.[72] The Commission currently hears such claims in the first instance, and the Federal Circuit resolves any appeal from a final determination of the agency.[73] Similarly, the CIT would address a claim under the Endangered Species Act (ESA) that contests an agency's assessment of whether certain imported species merit endangered status.[74]

Five justifications support an expansion of the CIT's jurisdiction. First, a CIT operating under the new jurisdictional bounds would realign the court with its intended purpose and ensure uniformity among all duties of the United States.[75] Second, the new subject matter

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[72] The CIT also would decide a claim concerning an international transaction for services or concerning the administration or enforcement of service measures that affect trade in services, including decisions relating to the legal status of immigrant workers. The expanded jurisdiction also would authorize the court to hear cases that address the administration or enforcement of certain sanitary and phytosanitary measures, such as cases involving imported goods or services in connection with regulations on public health, food, and safety. Disputes that involve cross-border investment, or that concern the administration or enforcement of investment measures in those types of transactions, would also fall within the court's new jurisdiction. The court also would hear disputes over transactions that concern the administration or enforcement of national security measures affecting trade, and Congress also would extend the court's subject matter jurisdiction to include those cases on the government procurement of certain goods and services that affect trade, like the "Buy American" provisions in the American Recovery and Reinvestment Act of 2009. *See* Pub. L. No. 111-5, div. A, tit. XVI, § 1605, 123 Stat. 115, 303 (2009). Under this expanded view, the court would resolve cases that address environmental regulations that affect trade and hear actions on the administration and enforcement of labor measures that affect employment and labor conditions in trade-related industries.

[73] 19 U.S.C. § 1337(a), (c) (2006).

[74] Section 4 of the ESA states that the Secretary of Commerce or of the Interior, whichever is appropriate, must determine and list which species deserve "threatened" or "endangered" designation. 16 U.S.C. §§ 1532(15), 1533(a) (2006). Section 7(a)(2) of the ESA requires every federal agency to act in concert with either Secretary to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by [either] Secretary" to be critical. 16 U.S.C. § 1536(a)(2) (2006).

[75] U.S. CONST. art. I, § 8, cl. 1 (requiring uniformity in all "Duties, Imposts, and Excises . . . throughout the United States"); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 705 (2002) (defining "duty" as "a

jurisdiction would reconstitute a comprehensive system for judicial review of civil actions arising out of import transactions and federal statutes affecting international trade[76] and promote the uniform judicial review of those laws, thereby creating a body of jurisprudence narrowly tailored to the expertise of the court. The body of law to flow from the CIT in its decisions will provide much needed expertise in disputes involving international transactions that touch on non-goods areas of trade. Under current federal law, United States district courts have the first opportunity[77] to hear all disputes that touch on intellectual property, environmental, or service issues,[78] a case allocation that prevents the uniform resolution of the legal issues affecting international trade. Providing the CIT with the opportunity to resolve these issues in the first instance would help avoid jurisdictional splits over certain issues that currently prevent uniform resolution.[79]

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payment or service imposed by law or custom"); *id.* at 792 (defining "excise" as a "tax, duty, or impost levied upon the manufacture, sale, or consumption of a commodity"); *id.* at 1136 (defining "impost" as "something imposed or levied"); *id.* at 2345 (defining "tax" as a "pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes").

[76] *See* House Report, *supra* note 2, at 20.

[77] In some instances, a federal agency may decide the issue in the first instance. *See, e.g.*, 19 U.S.C. § 1337(b)-(c) (2006) (stating that the Commission shall determine first whether imported merchandise offends various intellectual property laws).

[78] *See, e.g.*, 16 U.S.C. § 1540(c) (2006) (conferring jurisdiction to U.S. District Courts over claims made pursuant to Endangered Species Act).

[79] *See, e.g.*, Sean A. Barry, *Gamut Trading Co. v. U.S. International Trade Commission: Expanding the Gamut of Trademark Protection*, 2 SAN DIEGO INT'L L.J. 209, 220-21 (2001) (discussing the Federal Circuit's failure to deal with the jurisdictional split between the Federal Circuit and other U.S. courts of appeals regarding application of common control exception in trademark infringement cases involving imported second-hand and gray-market goods). The new subject matter jurisdiction would also render moot a motion currently before the U.S. Court of International Trade in *Xerox Corp. v. United States*, No. 07-cv-00337 (Ct. Int'l Trade filed Sept. 7, 2007). In that case, the United States filed a motion to dismiss alleging that Xerox's claim—whether certain goods are products of the United States suitable for government procurement—did not fall within the Court's subject matter jurisdiction under 28 U.S.C. § 1581(e) (2006). Government's Mot. to Dismiss at 1-3, *Xerox Corp. v. United States*, No. 07-cv-00337 (Ct. Int'l Trade Jan. 14, 2010). Instead, the Government stated that the court has jurisdiction under that provision over only a determination about whether a product is from a designated foreign country and thus qualifies for government procurement. *Id.* In the underlying

Third, given the unique nature of its existing subject matter jurisdiction and its familiarity with the nuances of import transactions, the CIT has more experience and is consequently in a better position than other federal courts to resolve the legal issues that affect the nation's international commerce. Moreover, even upon expansion of the CIT's subject matter jurisdiction, three checks—the Federal Circuit, the Supreme Court, and Congress[80]—would maintain the authority to correct an erroneous decision from the court. Fourth, Congress can expand the CIT's jurisdiction without having to create an entirely new court to decide actions arising under the expanded jurisdiction; rather, Congress can maintain continuity in the adjudication of these claims and simply supplement the court with additional judgeships.[81] Finally, the judges[82] of the CIT have tremendous experience in rendering decisions on legal issues outside of the international trade law arena, with most having sat by designation on U.S. courts of appeals[83] and

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determination, Customs found that the imported merchandise had not undergone a substantial transformation and therefore did not constitute a domestic product for purposes of government procurement. *Id.* at 8-9. Under the new subject matter jurisdiction, the court would unambiguously have the authority to hear this case because it involves a cross-border transaction and concerns government procurement.

[80] The Federal Circuit would still have authority to hear appeals from the court, 28 U.S.C. § 1295(a)(5) (2006), and Congress could enact legislation to correct a decision from either the CIT or Federal Circuit or ultimately the Supreme Court. *See generally* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

[81] *See, e.g.*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990).

[82] Welcome to the Website of the United States Court of International Trade, Judges of the United States Court of International Trade, http://www.cit.uscourts.gov/Judges/judges.htm (last visited Feb. 1, 2010).

[83] *See, e.g.*, Dunlap v. Burge, 583 F.3d 160 (2d Cir. 2009) (Stanceu, J.) (reviewing denial of writ of habeas corpus); Semple v. Fed. Express Corp., 566 F.3d 788 (8th Cir. 2009) (Goldberg, J.) (deciding wrongful termination action under South Dakota law); Noriega v. Pastrana, 564 F.3d 1290 (11th Cir. 2009) (Restani, J.) (deciding case under Military Commissions Act), *cert. denied*, 130 S. Ct. 1002, (2010); Willsey v. Peake, 535 F.3d 1368 (Fed. Cir. 2008) (Pogue, J.) (reviewing decision of Board of Veteran Affairs); United States v. Novak, 443 F.3d 150 (2d Cir. 2006) (Eaton, J.) (reviewing conviction for, *inter alia*, making false statements under Employee Retirement Income Security Act); Old Line Life Ins. Co. of Am. v. Garcia, 411 F.3d 605 (6th Cir. 2005) (Carman, J.) (addressing insurance misrepresentation under Michigan law); United States v. Parmelee, 319 F.3d 583 (3rd Cir. 2003) (Wallach, J.) (reviewing sentence of individual charged with possession of child pornography); Maytronics, Ltd. v. Aqua Vac Sys., Inc., 277 F.3d 1317 (11th Cir. 2002) (Musgrave, J.) (addressing

district courts.[84] The breadth of the judges' experience evinces their skill and familiarity with all fields of law, which is sufficient for addressing legal questions in areas outside of the international trade and administrative law arena.

Importantly, this article offers an expanded subject matter jurisdiction that goes beyond other recent proposals that do not account for the realities of contemporary international trade and that would continue to limit the CIT's jurisdiction to disputes over the importation or exportation of goods. In recent years, a prominent organization within the U.S. international trade law community has worked with the CIT to facilitate legislation to improve the judicial review of federal laws affecting international trade. The organization's proposal seeks to (1) "correct jurisdictional anomalies that have come to light in case law" since Congress created the CIT; (2) "mesh the Court[']s jurisdiction more closely with current agency procedures"; (3) "expand the Court[']s jurisdiction to include more U.S. statutes governing international trade"; and (4) "rebalance the workload in the federal judiciary by giving the Court jurisdiction over areas of the law . . . logically related to its current role."[85] Notwithstanding these cogent

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breach of contract claim under Florida law); Martinez v. Bally's La., Inc., 244 F.3d 474 (5th Cir. 2001) (Barzilay, J.) (discussing claim for sexual harassment made under Jones Act); Tejada v. Apfel, 167 F.3d 770 (2d Cir. 1999) (Tsoucalas, J.) (analyzing decision of Commissioner of Social Security).

[84] *See, e.g.*, Heffernan v. Straub, 655 F. Supp. 2d 378 (S.D.N.Y. 2009) (Pogue, J.) (denying violation of First Amendment); Papyrus Tech. Corp. v. N.Y. Stock Exch., 653 F. Supp. 2d 402 (S.D.N.Y. 2009) (Barzilay, J.) (addressing patent validity and infringement); Chem. Weapons Working Group v. U.S. Dep't of Def., 655 F. Supp. 2d 18 (D.D.C. 2009) (Eaton, J.) (resolving issue under National Environmental Policy Act); RSM Prod. Corp. v. Fridman, 643 F. Supp. 2d 382 (S.D.N.Y. 2009) (Wallach, J.) (granting dismissal of claims for tortious interference with contract and prospective business advantages, as well as civil conspiracy to commit tortious interference); Fernandez v. N. Shore Orthopedic Surgery & Sports Med., 79 F. Supp. 2d 197 (E.D.N.Y. 2000) (Carman, J.) (resolving claims under Title VII of Civil Rights Act of 1964); Miller v. United States, 841 F. Supp. 305 (D.N.D. 1993) (Goldberg, J.) (resolving dispute over reimbursement for tax deficiency assessment); Howes v. Great Lakes Press Corp., 698 F. Supp. 1120 (S.D.N.Y. 1988) (Restani, J.) (addressing patent infringement).

[85] CUSTOMS AND INT'L TRADE BAR ASSOC., SUMMARY OF THE PROPOSED "UNITED STATES COURT OF INTERNATIONAL TRADE IMPROVEMENT ACT" 1 (Sept. 2008), *available at* http://www.citba.org/documents/CIT-ACT-SUMMARY-SEPT2008.pdf [hereinafter SUMMARY OF THE PROPOSED "INTERNATIONAL TRADE IMPROVEMENT ACT"].

and well-written aims, the text modestly proposes an expanded jurisdiction that would not extend the CIT's jurisdiction beyond disputes covering goods.[86] Instead, the proposal focuses predominantly on certain procedural and substantive issues in customs and antidumping and countervailing duty cases. For example, it would authorize the CIT to hear additional government-initiated cases, including "(1) all [Customs] civil penalties rather than simply the currently enumerated penalties, (2) [Customs] seizures (except in narcotics cases), and (3) other government rights of action in customs and trade law such as enforcement of [Customs] and [Commission] subpoenas."[87] The organization's suggestions effectively address some of the gaps in the CIT's current jurisdiction, and those important efforts should not go unnoticed. However, the new subject matter jurisdiction should account more aggressively for the growing importance of non-goods sectors within international trade, the economy of the United States, and the legal disputes arising out of international transactions in those sectors. The expanded subject matter jurisdiction proposed in this article would achieve that result where others have not.

IV. CONCLUSION

The realization of uniform judicial review of import transactions in the United States rests with Congress. The legislative branch has not harmonized the subject matter jurisdiction of the court with the expanded reach of international trade regulation, and without action from Congress, the jurisprudence of the CIT will remain focused narrowly only on those transactions involving dutiable merchandise.[88] If Congress eschews its duty to act in accordance with the aims of the Customs Courts Act of 1980 and Article I of the Constitution, further jurisdictional splits over the laws that affect international trade likely will emerge and add to the fragmentation and inefficiencies within the United States market. Congress should expand the subject matter

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[86] *See id.* at 1-2; *see also* CUSTOMS AND INT'L TRADE BAR ASSOC., SUMMARY OF THE U.S. COURT OF INTERNATIONAL TRADE IMPROVEMENTS ACT 1-2 (June 30, 2009) *available at* http://www.citba.org/documents/CIT-ACT-SUMMARY-2009-CHANGES.pdf.

[87] SUMMARY OF THE PROPOSED "INTERNATIONAL TRADE IMPROVEMENT ACT," *supra* note 85, at 2.

[88] *See, e.g.*, Former Employees of Elec. Data Sys. Corp. v. U.S. Sec'y of Labor, 350 F. Supp. 2d 1282 (Ct. Int'l Trade 2004) (determining that software on carrier medium constitutes a good and, therefore, dutiable merchandise under the Harmonized Tariff Schedule of the United States).

jurisdiction of the CIT to reflect the growing multi-industrial character of international commerce within the nation's contemporary economy.