Customs Court Jurisdiction in International Trade Cases

Jonathan S. Brenner
University of Michigan Law School

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The range of customs matters which are litigated before federal courts has expanded markedly in recent years. Many novel customs actions\(^1\) have resulted from the increased use of antidumping\(^2\)

\(^1\) For a brief discussion of the increased use of the customs laws in the area of international trade see Cohn, Recent Decisions Concerning Jurisdiction, Scope of Review and Permissi

\(^2\) Dumping is the practice by a foreign manufacturer of selling its merchandise in the United States for less than it charges in its home market. Fisher, The Antidumping Law of the United States: A Legal and Economic Analysis, 5 LAW & POL'Y IN INT'L BUS. 85 (1973). Antidumping duties are imposed by the United States to equalize the cost of the merchandise in the two markets, and thereby eliminate what many consider to be the unfair and harmful effects of dumping. Id. at 93-94. The procedures for imposing antidumping duties had been codified in 19 U.S.C. §§ 160-171 (1976). The key determination which must be made by the Secretary of the Treasury is whether the merchandise is or is likely to be imported into the United States at "less than fair value" (LTFV). 19 U.S.C. § 160(a) (1976). Once an affirmative LTFV determination has been made, the United States International Trade Commission (USITC) must make a determination as to whether an American industry is or is likely to be injured by the dumping. Id. If the injury determination is also affirmative, the antidumping duties are imposed on all merchandise covered by the investigation that is imported at less than fair value. The substance of the above was not changed by the Trade Agreements Act of 1979, but the antidumping provisions were moved to §§ 731-746 of the Tariff Act of 1930. The imposition of antidumping duties was mandated by statute once the necessary determinations had been made. This is apparent from both the language of the statutes and administrative practice. See 19 U.S.C. §§ 160-71 (1976); Department of the Treasury, Anti-dumping Duties, reprinted in 1 COMMISSION OF INTERNATIONAL TRADE AND INVESTMENT POLICY, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 395 (1971) [hereinafter referred to as WILLIAMS COMMISSION]. The new law makes an exception to mandatory imposition of duties if the exporters of substantially all of the merchandise under investigation agree to cease exports or revise their prices to eliminate LTFV pricing, or, under extraordinary circumstances, agree to eliminate the injurious effects of exports. Tariff Act of 1930, §§ 734(b)-734(c) (1979). See note 1 supra.

The actual procedures for initiating investigations, publishing results, and imposing the duties are quite technical and are largely irrelevant to this article. The now-outdated procedures could be found, however, in 19 U.S.C. §§ 160-71 (1976) and the new ones in the Tariff Act of 1930, §§ 732-740 (1979). See note 1 supra.
and countervailing duty laws\(^3\) as well as the United States government’s use of Orderly Marketing Agreements (OMAs).\(^4\) In addition

\(^3\) Countervailing duties are imposed by the United States to offset the effects of foreign export subsidies. They are imposed in response to the action of a foreign state rather than that of a foreign manufacturer or industry, as is the case with antidumping duties. Department of the Treasury, *Countervailing Duties, reprinted in WILLIAMS COMMISSION, supra* note 2, at 409. The procedures for imposing countervailing duties are codified in 19 U.S.C. § 1303 (1976). The imposition of such duties under the old procedures required no showing of injury, but merely a determination by the Secretary of the Treasury that a “bounty or grant” was being bestowed upon the manufacturer or exporter. 19 U.S.C. § 1303(a) (1976). In the case of imports that were duty free, the USITC was required to make a determination that an American industry was or was likely to be injured by the subsidized imports. 19 U.S.C. § 1303(b) (1976). Countervailing duties, like antidumping duties, were mandated by statute once the necessary findings had been made. 19 U.S.C. § 1303 (1976). See Department of the Treasury, *Countervailing Duties, reprinted in WILLIAMS COMMISSION, supra* note 2, at 409. The procedures for investigating and imposing the duties under prior law are technical and are codified in 19 U.S.C. § 1303 (1976).

The Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979), made one major substantive change in countervailing duty law by requiring a USITC injury determination if the subsidy comes from a “country under the Agreement” as defined in § 701(b) of the Tariff Act of 1930, or a national thereof. Tariff Act of 1930, § 701(a)(1) (1979). See note 1 supra. The 1979 Act also eliminated the mandatory nature of countervailing duties by allowing, instead of the imposition of duties, an agreement with the exporting nation or the exporters of substantially all of the merchandise under investigation to eliminate the subsidy, or, under extraordinary circumstances, to eliminate the injurious effects of exports. Tariff Act of 1930, §§ 704(b)-704(c) (1979). See note 1 supra.

\(^4\) Orderly Marketing Agreement (OMAs) are executive agreements negotiated by the United States with foreign nations to limit that nation’s exports to the United States. Metzer, *Injury and Market Disruption from Imports, reprinted in WILLIAMS COMMISSION, supra* note 2, at 167, 168-73 (1971). An OMA has essentially the same impact as a discriminatory import quota. Authority to enter into OMAs is frequently delegated to the President by statutes which may contain procedural prerequisites that must be satisfied prior to exercising that authority.

The Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979), uses OMAs as an alternative to imposing countervailing and antidumping duties. An OMA used to eliminate all exports of the merchandise can be made with the exporters or exporting country in the case of countervailing duties, Tariff Act of 1930, § 704(b) (1979), or with the exporters in the case of antidumping duties. *Id.* § 734(b). See note 1 supra. Interestingly, an agreement for purposes of avoiding countervailing duties which restricts but does not eliminate the flow of imports into the United States so as to eliminate the injurious effects of exports to the United States can only be signed with a foreign government and not with an exporter. *Id.* § 704(c)(3). The 1979 Act contains the standards which OMAs must meet, *id.* §§ 704(d), 734(d), procedures for involving the petitioners, *id.* §§ 704(e)(1), 734(e)(1), and a requirement of administrative review of OMAs upon information which shows changed circumstances, *id.* § 751(b)(1). The initial impact of an OMA is to suspend the countervailing or antidumping duty investigation. *Id.* §§ 704(a), 734(a). If either an interested party (as defined in § 771(9) of the Tariff Act of 1930) or a party to the OMA so requests, the investigation can be continued despite the OMA. *Id.* §§ 704(g), 734(g). In such cases, the outcome either voids the OMA (in the case of a negative determination) or suspends the countervailing or antidumping order (in the case of an affirmative determination). *Id.* §§ 704(f)(3), 734(f)(3).

The Trade Act of 1974, 19 U.S.C. §§ 160-171, 2101-2487 (1976) utilizes OMAs to remedy the problem of imports which disrupt the economy. Such remedies are proclaimed by the President as part of an escape clause action. *Id.* § 2253(a)(4). An escape clause action is brought by an American union, manufacturer, or trade association claiming that foreign imports are disrupting the market for the goods which it or its members manufacture. *Id.* § 2241(a). When a claim is filed, the USITC must determine the relevant product and geographic markets which should be examined to determine the effect of the imports, whether in fact the market is disrupted, whether imports have caused the disruption, and finally the relief which should be granted. *Id.* § 2251(b)(1)-(3). The determinations and public hearings are prerequisites to the import relief which the President can provide to the affected industry in the form
to presenting new substantive questions as to customs law, these cases have posed unusual jurisdictional conflicts within the Customs and district courts. This article discusses the specific problems involved in Customs Court jurisdiction. After outlining in Part I these jurisdictional problems and the court’s failure to deal with them, the article, in Part II, proposes an analytic framework that focuses attention on the relevant criteria for ascertaining Customs Court jurisdiction. This framework is built upon the exclusivity of Customs Court jurisdiction and exhaustion of the administrative review process. The distinct rights of importers and manufacturers are also discussed and the special problem of cases which do not meet the procedural prerequisites for Customs Court jurisdiction are explored. Finally, Part III of this article presents the argument that both the jurisdiction and the powers of the Customs Court need to be expanded to include all customs cases. The article proposes a model of a unified Customs Court jurisdiction in lieu of the patchwork jurisdictional model which presently exists.

I. OUTLINING THE PROBLEM

To some extent Customs Court jurisdiction is counter-intuitive in that it neither extends to all customs complaints nor to all parties having such complaints.

A. Basic Jurisdiction of Customs and District Courts

The jurisdiction of the Customs Court is defined very specifically in the Customs Court Act of 1970. The statute defines jurisdiction

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\text{of duties, tariff-rate quotas, quotas, OMAs, or a combination of these devices. } \text{Id. } \S 2253(a)(1)-(5). \]

Section 204 of the Agricultural Act of 1956 differs from the Trade Act of 1974 in its use of OMAs by not providing any procedural prerequisites for their use. The Act simply provides that

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\text{the President may, whenever he determines such action appropriate, negotiate with representatives of foreign governments in an effort to obtain agreements limiting the export from such countries and the importation into the United States or [sic] any agricultural commodity or product manufactured therefrom or textiles or textile products . . . .} \]


(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classifica-
by reference to specific causes of actions allowed to specific classes of plaintiffs under the Tariff Act of 1930; thus standing as

(a) ... [D]ecisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
(4) the exclusion of merchandise from entry or delivery under any provision of the customs laws;
(5) the liquidation or reliquidation of an entry, or any modification thereof;
(6) the refusal to pay a claim for drawback; and
(7) the refusal to reliquidate an entry under section 1520(c) of this title, shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Customs Court in accordance with section 2632 of Title 28 within the time prescribed by section 2631 of that title. When a judgment or order of the United States Customs Court has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the appropriate customs officer, who shall take action accordingly.

The Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1101(b)(4)(B)(i), 93 Stat. 305-306 (1979), amended 28 U.S.C. § 1582 by giving the court jurisdiction over all countervailing and antidumping cases brought by "interested parties under sections 516 and 516A" of the Tariff Act of 1930, as amended. Thus the limitation of standing in such cases to importers and United States manufacturers has been eliminated. Standing is now conferred on any "interested party," which includes foreign manufacturers or exporters of merchandise under investigation, the government of the country in which such merchandise is produced, and an American union or trade association whose members are engaged in manufacturing competitive products as well as those who had standing under the prior law. Tariff Act of 1930, § 771(9) (1979). See note 1 supra. The new Act extends the prerequisite of exhaustion of administrative remedies to the procedures under section 516A of the Tariff Act of 1930, as amended. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001(b)(4)(B)(ii), 93 Stat. 306 (1979).

well as jurisdiction is governed by the terms of the Tariff Act. Two types of customs cases are not within the Customs Court's jurisdi-

(b)(1) . . . [E]xcept as otherwise provided in section 1557(b) of this title, protests may be filed by the importer, consignee, or any authorized agent of the person paying any charge or exaction, or filing any claim for drawback, or seeking entry or delivery, with respect to merchandise which is the subject of a decision in subsection (a) of this section.

(2) A protest of decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—

(A) notice of liquidation or reliquidation, or

(B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

(c) The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the customs officer upon any question not involved in such reliquidation.

The Trade Agreements Act of 1979, Pub. L. No 96-39, § 100l(b)(3), 93 Stat. 305 (1979), amended § 514 of the Tariff Act of 1930, 19 U.S.C. § 1514 (1976), by removing from its purview challenges to countervailing or antidumping duties. Challenges to those duties will now be brought under § 516A, which was added by the 1979 Act. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 100l(a), 93 Stat. 300-305 (1979). This section allows any interested party, as defined in § 771(9) of the Tariff Act of 1930 (discussed in note 5 supra), who is a party to an antidumping or countervailing duty investigation to sue in Customs Court after exhausting administrative remedies. Id. The changes apparently do not, with one exception, alter the right to Customs Court review as that right has been interpreted under prior law, but merely conform the prerequisites to the exercise of that right to the new procedures of Title VII of the Tariff Act of 1930. The exception stems from the omission of the "legality of all orders and findings" language from the section. The Customs Court now apparently lacks jurisdiction over any procedural action involving countervailing or antidumping duties. See Parts II. B. & C. infra. The Tariff Act of 1930, § 516, 19 U.S.C. § 1516 (1976), prior to the 1979 Act, read in pertinent part:

(a) The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, the additional duty described in section 1303 of this title (hereinafter in this section referred to as "countervailing duties"), if any, and the special duty described in section 161 of this title (hereinafter in this section referred to as "antidumping duties"), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties or antidumping duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper and (3) the reasons for his belief that countervailing duties or antidumping duties should be assessed.

(b) If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low, that the classification of the article or rate of duty assessed thereon is not correct, or that countervailing duties or antidumping duties should be assessed, he shall determine the proper appraised value or classification, rate of duty, or countervailing duties or antidumping duties and shall notify the petitioner of his determination. Except for countervailing duty and antidumping duty purposes, all such merchandise entered for consumption more than thirty days after the date such notice to the petitioner is published in the weekly Customs Bulletin shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 1303 of this title shall apply. For antidumping duty purposes, the procedures set forth in section 160 of this title shall apply.

(c) If the Secretary decides that the appraised value of classification of the articles or the rate of duty with respect to which a petition was filed pursuant to sub-
tion. The first are those brought by plaintiffs not having a cause of action under the Tariff Act. These plaintiffs may, for example, be United States manufacturers, who are authorized by the statute to pursue only a limited number of causes of action, or foreign exporters, who are not granted any causes of action by the Tariff Act, and hence have no standing before the court. Customs Court jurisdiction is also denied to cases that fail to meet certain procedural requirements. This category consists of cases seeking pre-enforcement review of matters that would eventually ripen and meet the procedural prerequisites of Customs Courts jurisdiction, and those that, by their very nature, will never meet these prerequisites.

The district courts are granted jurisdiction to hear those customs matters not within the statutorily defined jurisdiction of the Customs Court. This residual jurisdiction conferred on the district

section (a) of this section is correct, or that countervailing duties or antidumping duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than thirty days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties or antidumping duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty or that countervailing duties or antidumping duties should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon failure to assess countervailing duties or antidumping duties upon, such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated.

(d) Within 30 days after a determination by the Secretary—

(1) under section 160 of this title, that class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or

(2) under section 1303 of this title that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

The Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001(b)(1), 93 Stat. 303-304 (1979), amended § 516 in two important respects. Standing under the section is no longer limited to American manufacturers, producers, or wholesalers but extends to any domestic interested party as defined in §§ 771(9)(C), (D), & (E) of the Tariff Act of 1930. Id. See note 5 supra. The Act also eliminated challenges to countervailing or antidumping duties from the purview of § 516 in creating § 561A.


8 28 U.S.C. § 1340 (1976) reads as follows: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court."
courts implies that all justiciable customs actions can be adjudicated in one forum or another. Unlike the Customs Court's jurisdictional grant, however, that of the district courts does not contain any statutory restrictions upon standing or causes of action. Hence the existence of a cause of action in the district court depends upon the usual notions of reviewability. Similarly, standing in district court is based on traditional standards rather than any peculiarities of the customs laws.

B. The Struggle to Get into District Court

Despite the apparent simplicity of the statutory scheme, distinguishing in practical terms between district court and Customs Court jurisdiction is difficult. The line can theoretically be drawn in a relatively accurate manner on the basis of the statutes, which specify those substantive customs matters which are reviewable by the Customs Court. The courts, however, have not always used theoretically sound or internally consistent criteria in ascertaining whether a case is outside of the Customs Court's jurisdiction. There has thus been a persistent stream of plaintiffs seeking to bring their customs claims in district court rather than in Customs Court where they belong. These attempts indicate problems in both the power of the Customs Court and the clarity with which the two jurisdictions are delineated. The manner in which the courts have dealt with these problems indicates the lack of an analytic framework for determining customs jurisdiction.

1. The problem of limited powers—Many of the difficult customs cases have arisen in the context of a plaintiff seeking injunctive re-

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9 See, e.g., J.C. Penney Co. v. United States Treasury Dep't, 439 F.2d 63 (2d Cir.), cert. denied, 404 U.S. 869 (1971) (where an unspoken premise of the court's holding was that there were no unreviewable cases); Timken Co. v. Simon, 539 F.2d 221 (D.C. Cir. 1976).
11 In Association of Data Processing Servs. Organization v. Camp, 397 U.S. 150 (1970), the Supreme Court expanded the notion of standing to include anyone who had suffered an injury in fact, be it economic or otherwise, who sought to protect an interest arguably within the zone of interests to be protected or regulated by the statute being challenged. When this standard is applied to parties challenging administrative action, "[p]resumptively, any class of interests which the administrator is required by statute (either implicitly or explicitly) to consider in framing agency policy is entitled to standing." Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1726-27 (1975). In Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976), the Court restricted standing by holding that the relevant inquiry was whether "the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." Id. at 38. See generally K. Davis, supra note 10, at 419; L. Jaffe, supra note 10, at 459-500.
lie against the Treasury Department. 12 The Customs Court, however, because it was established by a statute giving it limited jurisdiction, lacks equitable powers. 13 Surprisingly, neither the courts nor the legislative histories of the relevant statutes mention the issue. The impact of the lack of injunctive powers 14 is minimized by the fact that manufacturers' procedural claims 15 are outside the purview of the Customs Court, 16 and those cases are perhaps the

12 See, e.g., Sneaker Circus, Inc. v. Carter, 556 F.2d 396 (2d Cir. 1977); SCM Corp. v. United States Int'l Trade Comm'n, 549 F.2d 812 (D.C. Cir. 1977); Timken Co. v. Simon, 539 F.2d 221 (D.C. Cir. 1977); J.C. Penney Co. v. United States Treasury Dep't, 439 F.2d 63 (2d Cir.), cert. denied, 404 U.S. 869 (1971).

13 "[N]either the United States Customs Court nor this court [Customs and Patent Appeals] has been clothed with the authority of courts of equity . . . ." Jacksonville Paper Co. v. United States, 30 C.C.P.A. 159, 165, cert. denied, 320 U.S. 737 (1943). See also American Mail Lines v. United States, 34 C.C.P.A. 1, 7-8 (1946) ("Courts cannot, in the face of a mandatory statute, permit the doing of something to bring about equity where, in the absence of a statute, it might be permissible."); Cohn, supra note 1, at 189.

Most cases cited for the proposition that the Customs Court lacks equitable powers would not have had different outcomes if the court had such power. Vance, Proposed Legislation - Equity Power for the Customs Courts, reprinted in 72 F.R.D. 239, 381, 384-85 (1976) (presented to the Third Annual Judicial Conference of the Court of Customs and Patent Appeals). See id. (discussing Cumins-Corwin Distilleries v. United States, 20 Cust. Ct. 93 (1948) and Julius E. Wolff, 58 Treas. Dec. 404 (1930)). Vance has pointed out that the court, without citing its lack of equitable powers, has in fact strained to do equity when necessary. Id. at 381.

14 While the court does not possess injunctive powers, it may, by virtue of the All Writs Act, issue writs, including writs of mandamus. 28 U.S.C. § 1651 (1976). That Act applied to the "Supreme Court and all courts established by Act of Congress." See text accompanying note 64 infra. Vance, supra note 13, at 387. Furthermore, the failure to mention the writ power in the Customs Court Act could hardly revoke that power as affirmatively granted in the All Writs Act. See Part II. C. infra.

15 The distinction between substantive and procedural challenges is one which will arise repeatedly in this article. A substantive challenge is one which questions the factual accuracy of a Customs Service determination. For example, an importer or manufacturer might challenge the Customs Service's classification or valuation of imported goods or might challenge the imposition or failure to impose countervailing or antidumping duties on the grounds that the statutory criteria for imposing such duties were not met. A procedural challenge questions the legality of a determination on the basis of the procedures used to arrive at that decision. For example, an importer might challenge the validity of import restrictions on the grounds that they were imposed without following the applicable statutory procedures.

The procedural/substantive dichotomy is not explicit in either the statute granting jurisdiction to the Customs Court or those granting manufacturers and importers the right to challenge customs decisions. The Customs Court and the district courts speak of the distinction without defining it. The classification suggested here is interpolated from the cases. See text accompanying note 64 infra.

16 See Part II. C. infra. Under the new § 516A of the Tariff Act of 1930, however, all procedural claims arising out of the imposition of countervailing or antidumping duties are outside of the jurisdiction of the Customs Court. See note 6 supra.
most amenable to injunctive relief. By comparison, an importer will never need injunctive relief in a case falling within the Customs Court’s jurisdiction, as the plaintiff seeks either a money judgment against the United States or the voiding of a quota. In short, there do not appear to be any cases within the Customs Court’s jurisdiction which would require an injunctive remedy to provide adequate relief. This is not to say that plaintiffs before the court would not benefit from the flexibility afforded by the court having the option of exercising injunctive powers. The fact that the lack of such relief may affect the ability of the court to remedy a given situation, and that plaintiffs feel that they need such relief, suggests that injunctive relief should at least be available in any given case. The expansion of the court’s subject matter jurisdiction proposed in this article would necessitate the availability of injunctive remedies.

2. The Inadequate Remedy doctrine—The Customs Court’s inability to provide the relief sought by plaintiffs encourages them to file their claims in district court. The basis for the district courts’ taking jurisdiction lies in the “Inadequate Remedy” doctrine, which by its name purports to grant an exception to the exclusivity of Customs Court jurisdiction when no adequate remedy exists in that court. No court has affirmatively defined what constitutes an

17 A manufacturer’s procedural complaint, because it alleges that the government followed the wrong procedures in reaching a given outcome or did not initiate a necessary procedure, cannot always be remedied by voiding a government decision not to impose duties or to impose inadequate duties. The plaintiff frequently needs an injunction requiring the government to initiate a procedure or reopen a hearing for the purpose of taking specific testimony so that the correct decision can be reached via the necessary procedure.

18 Importers are always protesting government action in the form of the imposition of a duty or the exclusion of goods. When the Customs Service has imposed a duty, it must be paid prior to the importer’s filing of a protest. 28 U.S.C. § 1582(c)(2) (1976). Hence all importers’ actions regarding classification or valuation of goods, or countervailing or antidumping duties, are seeking a refund of duties paid: a money judgment against the government. Even when an importer’s action contests a procedural matter, such as the legitimacy of a USITC hearing, he is essentially contesting the duty which he paid as a result of the outcome of that hearing and the subsequent administrative action. A suit for money damages obviously does not require a court to exercise injunction powers. Similarly, a suit challenging the exclusion of merchandise as the result of an import quota merely asks the court to void the quota, which does not require an injunction.

19 See text accompanying note 152 infra.

20 The “Inadequate Remedy” doctrine is erroneously based upon the case of Waite v. Macy, 246 U.S. 606 (1918). See J.C. Penney Co. v. United States Treasury Dep’t, 439 F.2d 63, 68 (2d Cir.), cert. denied, 404 U.S. 869 (1971). In Waite, an importer of tea sought an injunction in district court against the Tea Board (which approved imports of tea) to prevent it from testing the tea which the plaintiff sought to import. The testing of the tea would have resulted in its exclusion from the country under Treasury standards which plaintiff challenged as being beyond the statutory authority of the Secretary to promulgate. The sole question at issue was the appropriateness of injunctive relief. There was no issue of jurisdiction raised. The Supreme Court held that an injunction was appropriate since plaintiff lacked an adequate remedy at law - the traditional standard for equitable relief. See E. Kinkead, Exposition of Common Law and Equity Pleading 69 (1900). Waite hardly supports the assertion that one court loses its exclusive jurisdiction and another court, the jurisdiction of
“inadequate remedy.” A remedy is not inadequate simply because another remedy would be more expeditious or desirable. One court has stated that the district court’s jurisdiction is limited to procedural matters in which the relief sought is in the nature of mandamus. If this is so, the remedy available in Customs Court is only inadequate when the plaintiff seeks mandamus. This definition is perhaps too restrictive, though it does focus upon what appears to be an essential element of an inadequate remedy: the plaintiff’s need for equitable relief that cannot be obtained in Customs Court. The plaintiff’s need for a prohibitory injunction arguably also meets the inadequate remedy standard.

There are no cases in which the finding of jurisdiction in the district court was based explicitly on the inadequate remedy doctrine. *J.C. Penney Co. v. United States Treasury Department* and *SCM Corp. v. United States International Trade Commission* noted the doctrine in dicta, but both held that jurisdiction lay in Customs Court. In *Timken Co. v. Simon* and *Sneaker Circus, Inc. v. Carter*, the courts found jurisdiction in district court, but the former was a manufacturer’s procedural complaint and the latter a case which could never meet the statutory prerequisites to Customs

which is mutually exclusive of the first court, gains jurisdiction by virtue of the inadequacy of the remedy in the first forum. See also *Sneaker Circus, Inc. v. Carter*, 566 F.2d 396 (2d Cir. 1977); *SCM Corp. v. United States Int’l Trade Comm’n*, 549 F.2d 812, 815 (D.C. Cir. 1977); *Timken Co. v. Simon*, 539 F.2d 221 (D.C. Cir. 1976); *J.C. Penney Co. v. United States Treasury Dep’t*, 439 F.2d 63 (2d Cir.), cert. denied, 404 U.S. 869 (1971).


24 See text accompanying note 14 infra.

25 See *Sneaker Circus, Inc. v. Carter*, 566 F.2d 396 (2d Cir. 1977), where the court found jurisdiction in the district court, noting that plaintiff had no remedy in Customs Court because government action prevented the court’s jurisdictional prerequisites from being met. Plaintiff had sought a prohibitory injunction, the only remedy that would have removed the impediment to its importation of merchandise.


27 549 F.2d 812 (D.C. Cir. 1977).

28 539 F.2d 221 (D.C. Cir. 1977).

29 566 F.2d 396 (2d Cir. 1977). Davis Walker Corp. v. Blumenthal, 460 F. Supp. 283 (D.D.C. 1978), was also a case involving a plaintiff who would never meet the procedural prerequisites to Customs Court jurisdiction. Plaintiff was protesting the Trigger Price Mechanism (TPM) which it alleged resulted in goods never reaching the United States. For an explanation of the TPM, see Note, *The Trigger Price Mechanism: Limitation on Administrative Discretion under the Antidumping Laws*, 11 U. Mich. J.L. Ref. 443 (1978). The effect of the TPM, so far as Customs Court jurisdiction is concerned, is the same as that of an OMA. Thus, while the district court in *Walker* stated that it had jurisdiction because “no adequate remedy existed in the Customs Court,” 460 F. Supp. at 290, it was not relying on the “Inadequate Remedy” doctrine, but on the principle of *Sneaker Circus, Inc. v. Carter*, 566 F.2d 396 (2d Cir. 1977), that the Customs Court could never acquire jurisdiction. 460 F. Supp. at 290. See text accompanying notes 108-11 infra. The “Inadequate Remedy” doctrine, however, is based on the proposition that the district courts can acquire jurisdiction over a case which lies within the Customs Court’s jurisdiction. See text accompanying notes 20-23 supra.
Court jurisdiction. Hence each can be explained on purely statutory grounds.\textsuperscript{30} United States v. Hammond Lead Products, Inc.,\textsuperscript{31} cited for the inadequate remedy doctrine in Timken,\textsuperscript{32} never approached the jurisdictional question by way of remedy; rather, it held that plaintiff's complaint presented a question that was unreviewable in Customs Court.

If the inadequacy of Customs Court remedies turns upon the need for injunctive relief, the distinction drawn between Customs Court and district court jurisdiction by the "Inadequate Remedy" doctrine is not significantly different from that drawn by statutory construction. Since the manufacturer is usually protesting government inaction in a procedural complaint, and those claims almost by definition require injunctive relief, his claim is within the district court's jurisdiction under either theory. Cases that fail to meet the statutory prerequisites are also almost universally seeking injunctive relief.\textsuperscript{33}

The problem with the "Inadequate Remedy" doctrine, then, is not that the line it draws is incorrect, but that it arrives at the correct result for the wrong reasons. The Customs Court's jurisdiction is exclusive as to certain matters by statute. The complaints before the court under that jurisdiction can generally be remedied by the powers of the Customs Court.\textsuperscript{34} Even if there is a case for which this assertion is inaccurate, the adequacy of relief provided by the Customs Court should be irrelevant to the exclusivity of its jurisdiction.\textsuperscript{35} That the situations in which the doctrine could be applied

\textsuperscript{30} See text accompanying notes 91-96 & 118-20 infra.
\textsuperscript{31} 440 F.2d 1024 (C.C.P.A.), cert. denied, 404 U.S. 1005 (1971).
\textsuperscript{32} 539 F.2d at 226 n.7.
\textsuperscript{34} See text accompanying note 18 supra.
\textsuperscript{35} The adequacy of relief available in Customs Court raises a due process issue. The Tariff Act of 1930, 19 U.S.C. §§ 1202-1654 (1976) (as amended), grants certain classes of litigants a right to judicial review. If the means provided to vindicate that right cannot remedy the violation, the plaintiff is arguably deprived of due process of law. This would occur in a customs case if the plaintiff's only means of redress was through injunctive relief, but his cause of action fell within the exclusive jurisdiction of the Customs Court, which lacks the powers necessary to grant that relief. See note 13 and accompanying text supra.

No court has yet addressed the relationship between the Customs Court's exclusive jurisdiction, its lack of equitable powers, and due process. The court in Michelin Tire Corp. v. United States, C.R.D. 79-6, ___ Cust. Ct. ___ (Feb. 26, 1979), did apply a due process standard in holding that the scope of review of the Customs Court in countervailing duty cases allowed for de novo review. Id. (slip opinion at 37). The possibility therefore exists that the court will use this standard in the future in responding to a jurisdiction problem.

The touchstone of due process is that once Congress creates a property entitlement it cannot deny that right without constitutional due process. Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (Powell, J. concurring); Perry, Constitutional "Fairness": Notes on Equal Protection and Due Process, 63 VA. L. REV. 383, 420 (1977). Thus the determination of whether due process requirements apply hinges on the nature of the interest at stake. Board of Regents v. Roth, 408 U.S. 564 (1972). The right of an importer to recover an illegally assessed duty is a
happen to also be those which are, by statutory construction, outside of the scope of Customs Court jurisdiction, is mere coincidence. The two jurisdictional tests address separate and distinct problems.36

3. The problem of judicial myopia—The Customs Court Act, as

statutory property entitlement based upon the common law cause of action against the Collector of Customs. Michelin Tire Corp. v. United States, C.R.D. 79-6, __ Cust. Ct. __ (Feb. 26, 1979) (slip opinion at 27); Cary Curtis, 44 U.S. (3 How.) 236 (1845) (Story, J., dissenting). The right of an importer to challenge the exclusion of merchandise and the right of a United States manufacturer to protest the failure to impose a duty are arguably also property entitlements because, by the language of §§ 514 and 516 of the Tariff Act, these rights are unqualified except by procedural prerequisites to their assertion. 19 U.S.C. §§ 1514, 1516, (1976), quoted at note 6 supra.

A two-prong test can be used to ascertain whether the denial of a property entitlement violates due process: does the deprivation in fact accomplish a government purpose and is that purpose legitimate. Perry, Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases, 71 NW. U.L. Rev. 417, 422 (1976). Thus a deprivation the purpose of which is to save money by not extending a program to a given group, and which in fact saves money, will usually be upheld absent other factors such as an unreasonable classification of the group to be deprived. Perry, supra, 63 VA. L. Rev. at 400. Applying this analysis to the problem of denial of a meaningful remedy is difficult given that there is no articulated reason for denying injunctive remedies to plaintiffs before the Customs Court. The court's lack of equitable powers does not stem from an affirmative denial of power, but from the absence of a statutory grant of power. See note 13 and accompanying text supra. Without knowing what policy might be asserted by the government as a legitimate reason for denying injunctive relief, the means/ends relationship cannot be ascertained.

No cases have been found in which the inadequacy of a remedy, resulting from a limitation on the court's power, has been addressed in due process terms. Assuming, however, that the court would find a due process violation in the granting of exclusive jurisdiction of a case to a court lacking the power to give the necessary relief in that case, the consequence of such a finding is unclear. The court might hold that the Customs Court Act impliedly gives the court all powers necessary to effectuate its exclusive jurisdiction. While no court has implied its own powers from a statute, courts have implied causes of action from statutes to effectuate constitutional or congressional purposes. See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (implying a cause of action from the fourth amendment when it is violated by federal agents); J.I. Case Co. v. Borak, 377 U.S. 426 (1963) (implying a cause of action under § 14 of the Securities Exchange Act of 1934). Implying a power in the court differs qualitatively from implying a right in the plaintiff. This difference may render the argument that such changes be left to Congress even more appealing here than in cases implying a cause of action. See Bivens, 403 U.S. at 411 (Burger, C.J., dissenting).

The more likely result of the court finding a due process violation would be for it to hold that the Customs Court Act is unconstitutional. The district courts would then have jurisdiction over customs matters by virtue of 28 U.S.C. § 1340, since there would not be any customs matter left within the exclusive jurisdiction of the Customs Court. See note 8 supra. The practical harm of such a holding would probably be short lived, as Congress would undoubtedly pass corrective legislation immediately.

Whatever the result of this hypothetical case, the mere existence of this possibility buttresses the argument that the Customs Court should be given equitable powers. See text accompanying note 152 infra. Simply stated, a court which lacks a full range of powers may be incapable of protecting the due process rights of litigants at some point in the future.

36 The fact that jurisdiction is granted to the Customs Court by statute is crucial, for the common law, by contrast, linked jurisdiction to remedy. E. KINKEAD, supra note 20, at 50. Prior to the merger of law and equity, the jurisdiction of courts of equity was dependent upon the inadequacy of the remedy at law just as modern courts, possessing both legal and equitable powers, can only exercise their equitable powers upon a finding that no adequate remedy exists at law. Id. at 69. The dependent relationship of jurisdiction and remedy in pre-merger common law does not provide a pertinent analogy to a purely statutory scheme, in which the relationship is fixed and independent.
mentioned previously, relates standing, causes of action, and, by reference to the Tariff Act, procedural prerequisites, to jurisdiction.\textsuperscript{37} The failure of a court to recognize this interrelationship can produce absurd results, as the recent case of \textit{Consumers Union v. Committee for the Implementation of Textile Agreements}\textsuperscript{38} illustrates. The court of appeals in that case held that the district court lacked jurisdiction because plaintiff could, but did not, meet the jurisdictional prerequisites to Customs Court jurisdiction.\textsuperscript{39} The court also questioned plaintiff's standing before the district court without passing on that issue. In holding that plaintiff belonged in Customs Court, however, the court of appeals disregarded the fact that plaintiff unquestionably lacked standing before the Customs Court. Plaintiff was a consumers' rights organization; Customs Court jurisdiction is limited by statute to cases brought by importers or United States manufacturers.\textsuperscript{40} If plaintiff could bring its case at all, it could do so only before the district court, as that court has jurisdiction over customs matters not within the exclusive jurisdiction of the Customs Court.\textsuperscript{41} The \textit{Consumers Union} court failed to recognize this problem because of its one dimensional view of Customs Court jurisdiction as being dependent solely upon procedural prerequisites. Jurisdiction is in fact a multi-faceted inquiry, requiring the court to examine the standing of the plaintiff to bring the particular cause of action and then to consider whether the procedural prerequisites of that cause of action have been met.\textsuperscript{42}

Each of the above discussed problems indicates a weakness in the court's approach to the question of jurisdiction in customs cases. The courts seem to lack an analytic framework that focusses attention on the relevant factors in ascertaining the jurisdiction of a court over customs matters.

\textsuperscript{37} See text following note 6 supra.
\textsuperscript{38} 561 F.2d 872 (D.C. Cir. 1977), cert. denied, 435 U.S. 933 (1978).
\textsuperscript{39} See text accompanying notes 121-31 infra.
\textsuperscript{40} 28 U.S.C. § 1582 (1976).
\textsuperscript{42} In rendering decisions on questions of jurisdiction in customs cases, courts have also evidenced a propensity for sweeping language which purports to cover situations broader than that within which the case arose. For example, in one case the court stated that Customs Court jurisdiction extended to both substantive and procedural protests. \textit{J.C. Penney Co. v. United States Treasury Dep't}, 439 F.2d 63, 65 (2d Cir.), cert. denied, 404 U.S. 869 (1971). That statement is correct only insofar as it applies to cases brought by importers, such as the plaintiff in that case. The sweep of the court's language, however, would include cases brought by United States manufacturers, a clearly incorrect result. See Part II. C. infra. The court's failure to limit its holding to the facts of the case suggests that it is not quite sure whether its holding is so limited.
II. AN ANALYTIC FRAMEWORK FOR CUSTOMS COURT JURISDICTION

A. The Basis of Customs Court Jurisdiction: Administrative Review and Exclusivity

1. The administrative review process—The Customs Court Act of 1970 grants the court exclusive jurisdiction over enumerated types of cases. The court's jurisdiction extends to "all civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied" by the appropriate customs official. Thus, the exclusivity of the Customs Court's jurisdiction is confined to cases which arise out of the administrative review process of the Tariff Act.

Prior to the recent changes, the Tariff Act provided three separate avenues for challenge: one for the importer under section 514, and two for United States manufacturers under section 516. An importer could file a protest to any decision of a customs official enumerated in section 514(a), but only with regard to a specific entry of merchandise into the country. If the protest was denied, he could file suit in Customs Court.

Another mechanism allowed a United States manufacturer to obtain information from the Secretary of the Treasury as to the classification, rate of duty, and countervailing or antidumping duties imposed on imported merchandise which was of a "class or kind" manufactured by him. He could then challenge the accuracy of any of those determinations by filing a petition with the Secretary. If the petition was denied, the manufacturer was required to notify the Secretary that he desired to challenge the matter in Customs Court.

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43 "Within the subject matter jurisdiction granted to the Customs Court by Congress, it is the exclusive, unlimited, and unrestricted forum for the determination of all relevant issues of fact and law." Michelin Tire Corp. v. United States, C.R.D. 79-6, Cust. Ct. (Feb. 26, 1979) (slip opinion at 6). See note 5 supra.
45 See Michelin Tire Corp. v. United States, C.R.D. 79-6, Cust. Ct. (Feb. 26, 1979) (slip opinion at 5) (stating that "the content of the administrative activity defines the subject matter jurisdiction of the Court.").
46 The Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001, 93 Stat. 300-306 (1970), limited §§ 514 and 516 to challenges not arising out of the countervailing or antidumping duty investigations. Those duties are now challenged under § 516A. The alternative dispute mechanism previously available to American manufacturers under § 516(d) of the Tariff Act of 1930, discussed in the text accompanying note 55 infra, has been eliminated.
47 The statute speaks of "American manufacturers, producers, or wholesalers," 19 U.S.C. § 516(d) (1976), quoted at note 6 supra. Here, as throughout this article, the term "manufacturer" is intended to include producers and wholesalers as well.
49 19 U.S.C. § 1514(a) (1976), quoted at note 6 supra.
Court. Upon receipt of such notice, the Secretary was required to publish his original decision and the petitioner's desire to contest that decision. The petitioner could only contest one entry at one port in a given action.\textsuperscript{51}

The third dispute mechanism was a less complex one designed to enable American manufacturers to challenge negative less than fair value (LTFV),\textsuperscript{52} injury,\textsuperscript{53} or bounty\textsuperscript{54} determinations. The manufacturer needed only file a challenge, which was required to be published by the Secretary, before commencing action in Customs Court.\textsuperscript{55}

While the Customs Court will have jurisdiction only when a protest or petition is in fact filed, the exclusivity of Customs Court jurisdiction preempts any other court from acquiring jurisdiction in any case in which a challenge could be filed. For example, if an importer seeks to challenge the valuation of its goods, it must first file a protest and then litigate the matter in Customs Court. The importer cannot sue in district court because the Tariff Act provides for administrative protest of valuations. The plaintiff cannot set up its own failure to pursue administrative remedies as grounds for the district court's jurisdiction. Since the importer could file a challenge, the Customs Court will have exclusive jurisdiction over the controversy.

2. The mutual exclusivity of Customs Court and district court jurisdiction—The Customs Court has exclusive jurisdiction only over those cases which arise under the Tariff Act; it has no jurisdic-

\textsuperscript{51} Id. § 516(c), 19 U.S.C. § 1516(c) (1976), quoted at note 6 supra.

\textsuperscript{52} Id. § 516(d), 19 U.S.C. § 1516(d) (1976). A less than fair value (LTFV) determination is made by the Treasury Department in the course of an antidumping investigation. 19 U.S.C. § 160(a) (1976). The determination involves a comparison between the price at which the merchandise is being imported and the foreign market value. Treasury uses the "purchase price," id. § 163, as the measure of the import price. The foreign market value is determined by the market price in the country of manufacture or in a third country. Id. § 164(a). If this value is less than the cost of production, foreign market value is determined by a "constructed value" based on the cost of materials and labor plus a profit margin. Id. §§ 164(b), 165. When the cost to the importer is less than the foreign market value, the Treasury publishes an affirmative LTFV determination, and the USITC then makes an injury determination. Id. § 160(a). If Treasury finds that the importer's cost is equal to or greater than the foreign market value, it renders a negative LTFV determination and the antidumping investigation is closed.

\textsuperscript{53} Id. § 160(a). The USITC must determine whether "an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation" of the merchandise in violation of the antidumping laws, 19 U.S.C. § 160(a) (1976), or the countervailing duty statute, 19 U.S.C. §§ 1303(b)(1)(A) (1976).

\textsuperscript{54} An injury determination is made by the USITC as part of an antidumping investigation after Treasury has made an affirmative LTFV determination, see note 52 supra, or as part of a countervailing duty investigation, see note 3 supra, after Treasury has determined that a "bounty or grant" is being paid on duty-free goods, see note 54 infra. The USITC must determine whether "an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation" of the merchandise in violation of the antidumping laws, 19 U.S.C. § 160(a) (1976), or the countervailing duty statute, 19 U.S.C. § 1303(b)(1)(A) (1976).

\textsuperscript{55} Tariff Act of 1930, § 516(d), 19 U.S.C. § 1516(d) (1976), quoted at note 6 supra.
tion over any other cases. Hence the residual jurisdiction of the district courts is also exclusive.

The only jurisdictional grant to the district courts to hear customs matters is contained in 28 U.S.C. § 1340 because it predicates that jurisdiction on the absence of Customs Court jurisdiction and thus implicitly acknowledges a sphere of exclusivity within which the Customs Court operates. No other sections of Title 28 acknowledge this exclusivity, yet these sections must be harmonized, as a matter of statutory construction, with the exclusivity of the jurisdictional grant to the Customs Court. This harmonization is achieved by holding, as one court has, that section 1340 preempts other Title 28 sections since it is more narrowly drawn.

The fact that district court jurisdiction over customs matters is

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57 The present district court jurisdiction over customs matters is apparently the vestigial remnant of the court's complete customs jurisdiction, which existed prior to 1890. The various Customs Court acts since 1890 have gradually removed classes of customs cases from the district courts' jurisdiction and added them to that of the Customs Court. See Riccomini v. United States, 69 F.2d 480, 483-84 (9th Cir. 1934); W. FUTRELL, THE HISTORY OF AMERICAN CUSTOMS JURISPRUDENCE 133 (1941). Certainly the manner in which the Customs Court's exclusive jurisdiction over American manufacturers' countervailing duty claims were effectuated by the Trade Act of 1974, § 331(b), 19 U.S.C. § 1516(d) (1976) (adding that section to the Tariff Act of 1930) indicated that the Riccomini court was correct in its assessment of the gradual decline of district court jurisdiction. See note 82 infra. The district courts' jurisdiction over customs matters thus does not represent Congress' purposeful control over a coherent category of cases, but of those customs matters which Congress has neglected to examine.


In Sneaker Circus, Inc. v. Carter, 566 F.2d 396 (2d Cir. 1977), plaintiff attempted to base jurisdiction in the district court upon 28 U.S.C. §§ 1331 & 1337. The appellate court did not analyze the source of district court jurisdiction but relied on J.C. Penney Co. v. United States Treasury Dep't, 439 F.2d 63, 68 (2d Cir.), cert. denied, 404 U.S. 809 (1971), to establish jurisdiction under 28 U.S.C. § 1331. In Penney, the court stated that 28 U.S.C. § 1331 would be an adequate source of jurisdiction but for the exclusive jurisdiction of the Customs Court in that case. In so stating, the court seems to beg the question of whether the exclusivity of the Customs Court's jurisdiction renders § 1331 invalid in all cases.

In Timken v. Simon, 539 F.2d 221 (D.C. Cir. 1976), the court stated: Timken asserts that the District Court had jurisdiction over the action pursuant to a number of statutory provisions, including 28 U.S.C. §§ 1331, 1340, 1361 (1970) and 5 U.S.C. §§ 702-06 (1970). We have no doubt that the District Court had jurisdiction, especially pursuant to either the mandamus statute or the Administrative Procedure Act, to entertain an action to require the Secretary to perform statutory duties of a ministerial nature.

Id. at 226-27 n.7. While the court came to the conclusion that it had jurisdiction under the Mandamus Act or the Administrative Procedure Act, the issue was not contested. Id. Timken contradicts National Milk Producers, but it does not buttress its conclusion with any analysis, nor does it mention National Milk Producers. Given that National Milk Producers analyzed the jurisdictional issue as a statutory construction problem, 372 F. Supp. 745, 756 (D.D.C. 1974), the conclusions of that case are far more persuasive than those of Timken.

predicated on the absence of Customs Court jurisdiction is significant because it explicitly denies potential plaintiffs a choice of fora. That is, by the very language of Title 28, the jurisdictions of the two courts are mutually exclusive.

B. Importers' Rights in Customs Court

The causes of action granted to importers under section 514 of the Tariff Act are coextensive with the exclusive jurisdiction of the Customs Court over importers' challenges under section 110(a) of the Customs Court Act. Thus, the Customs Court only has jurisdiction over those importers' claims that are enumerated in section 514, and its jurisdiction is exclusive of any other court. Furthermore, the procedural requirements of section 514 serve as a prerequisite to Customs Court jurisdiction.

The enumerated causes of action in section 514 are broad. A statutory and case law analysis of this section indicates that they include protests on both substantive and procedural grounds. In J.C. Penney Co. v. United States Treasury Department an importer of television sets filed a procedural challenge seeking to enjoin the Treasury Department from conducting an antidumping investigation. The court of appeals affirmed the district court's dismissal for lack of subject matter jurisdiction, holding that the Customs Court had jurisdiction over both substantive and procedural protests. In so holding, the court explicitly rejected plaintiff's contention that Customs Court jurisdiction was limited to substantive matters.

Although the holding in Penney was not expressly limited to an importer's challenges, it must be so limited to reconcile it with Timken Co. v. Simon. In Timken, an American manufacturer sought to enjoin the Secretary of the Treasury from refusing to impose antidumping duties. The Secretary had refused to publish an affirmative LTFV determination, which would have led to with-
holding appraisement on the merchandise. Plaintiff claimed that such action was beyond the Secretary’s statutory authority. The district court granted relief, and its jurisdiction was upheld on appeal.\footnote{The court of appeals characterized the manufacturer’s claim as procedural because it asserted that the Secretary had acted beyond his statutory authority. 539 F.2d at 226.}

The only relevant distinction between \textit{Penney} and \textit{Timken} is the type of plaintiff that was involved. The Customs Court Act contains different provisions for these two classes of plaintiffs, which is arguably the basis for the different jurisdictional decisions.\footnote{\textsuperscript{1} This distinction has been eliminated as to actions challenging countervailing and antidumping duty investigations. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001, 93 Stat. 300-306 (1979). Importers can no longer challenge procedural matters pertaining to such investigations in Customs Court. \textit{See} note 6 \textit{supra}.} Section 110(a), which applies to importers,\footnote{Although nothing in that section limits its application to only one class of plaintiffs who have claims pursuant to the Tariff Act, the intent of Congress was that the subsection should apply only to importers who bring actions pursuant to \$ 514 of the Tariff Act, 19 U.S.C. \$ 1514 (1976). The House Report states that the language of \$ 110(a), 28 U.S.C. \$ 1582(a) (1976), was inserted to parallel \$ 514 of the Tariff Act, which only applies to importers. H. R. REP. No. 267, 91st Cong., 2d Sess. (1970), reprinted in [1970] U.S. CODE CONG. & AD. NEWS 3188, 3202. \textit{See} Timken Co. v. Simon, 539 F.2d 221 (D. C. Cir. 1977).} allows challenges to the “‘legality of all orders and findings.’”\footnote{\textsuperscript{2} 28 U.S.C. \$ 1582(a) (1976), quoted at note 5 \textit{supra}.} This phrase also appears in section 514 of the Tariff Act,\footnote{19 U.S.C. \$ 1514 (1976), quoted at note 6 \textit{supra}.} but does not appear in the sections which apply to manufacturers, section 516 of the Tariff Act\footnote{19 U.S.C. \$ 1516 (1976), quoted at note 6 \textit{supra}.} and section 110(b) of the Customs Court Act.\footnote{28 U.S.C. \$ 1582(b) (1976), quoted at note 5 \textit{supra}.} No explication of this phrase appears in the statute or in its legislative history. \textit{Penney} singled out this phrase in finding Customs Court jurisdiction over an importer’s procedural complaint without discussing its direct bearing on the issue.\footnote{439 F.2d at 65.} In \textit{Michelin Tire Corp. v. United States},\footnote{C.R.D. 79-6, \textit{____ Cust. Ct.} \textit{____} (Feb. 26, 1979).} a case that dealt with the Customs Court’s scope of review in an importer’s countervailing duty action, the court stated that the “‘legality of all orders and findings’ phrase was “‘an indication of the enduring Congressional intention that the entire fabric of the duty determination is to be subject to judicial scrutiny.’”\footnote{\textit{Id.} (slip opinion at 54-55) (footnotes omitted).} While the court was not passing upon the applicability of the phrase to the procedural/substantive distinction, its interpretation of that phrase as allowing complete review of all issues which arose in the importer’s action suggests that the absence of the phrase restricts the court’s jurisdiction. The plain meaning of the phrase, the different jurisdictional outcomes for manufacturers and importers in the \textit{Timken} and \textit{Penney} cases, the hints dropped in \textit{Penney} and
Michelin as to the phrase’s significance, and the selective inclusion of this phrase in the statutes, indicate that by allowing challenges to the “legality of all orders and findings” rather than the mere factual accuracy of the underlying determinations, section 110(a) provides for both procedural and substantive challenges by importers in Customs Court.

C. Manufacturers’ Rights in Customs Court

As in the case of importers, the exclusivity of Customs Court jurisdiction over actions brought by United States manufacturers is circumscribed by the provisions of the Tariff Act, specifically section 516. Exhaustion of the administrative remedies found in section 516 is a prerequisite to Customs Court jurisdiction. Similarly, the court’s preemptive jurisdiction is limited by the scope of the administrative review process. The Customs Court Act itself requires that the procedures in section 516 be followed.

A United States manufacturer can challenge in Customs Court substantive decisions of Customs officials pertaining to goods with which its merchandise competes, but it cannot challenge the procedures used to reach those decisions. Decisions which are deemed to be substantive for purposes of a manufacturer’s challenge are not limited to final rulings, but include negative LTFV, bounty, and grant determinations by the Secretary of the Treasury, and negative injury determinations made by the USITC.

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76 19 U.S.C. § 1516 (1976). See notes 5 & 6 supra (explaining that under the new law, those manufacturers’ causes of action pertaining to countervailing and antidumping duties are now in § 516A of the Tariff Act and that standing has been expanded from manufacturers to all interested parties).
77 28 U.S.C. § 1582(c) (1976), quoted at note 5 supra.
78 19 U.S.C. § 1516(c) (1976). Section 516(c) of the Tariff Act of 1930, 19 U.S.C. § 1516(c) (1976), which enables a manufacturer to contest Treasury decisions, is limited to cases arising under § 516(a), 19 U.S.C. § 1516(a) (1976). The precise language of that section allows a United States manufacturer to obtain information pertaining to “imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him.” Id. This language has been interpreted to include goods which are “directly competitive with, and substitutable for” those manufactured, produced, or sold at wholesale by the petitioning party. Golding-Keene Co. v. United States, 183 F. Supp. 947, 951 (Cust. Ct. 1960). The Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001(b)(1), 93 Stat. 303-304 (1979), expands standing from American manufacturers to any domestic interested party. See note 5 supra.
79 See Timken Co. v. Simon, 529 F.2d 221, 226 (D.C. Cir. 1976), and text accompanying notes 62-67 supra.
81 See note 52 supra.
82 See SCM Corp. v. United States, 450 F. Supp. 1178 (Cust. Ct. 1978). This action was filed by SCM after the court of appeals reversed a decision of the district court on the grounds that the district court lacked jurisdiction and remanded the case with instructions that the district court retain jurisdiction until the Customs Court ruled as to whether it had subject matter jurisdiction over the case. See SCM Corp. v. United States Int’l Trade Comm’n, 549 F.2d 812 (D.C. Cir. 1977), rev’d 404 F. Supp. 124 (D.D.C. 1975).
The absence of Customs Court jurisdiction over procedural challenges is based on the restrictive language of section 110(b) of the Customs Court Act. 83

An analysis of *SCM Corp. v. United States* 84 and *Timken Co. v. Simon* 85 illustrates the jurisdictional importance of the procedural/substantive dichotomy in cases brought by manufacturers. In *SCM*, plaintiff manufacturer filed a petition claiming that typewriters were being dumped on the American market. The Secretary of the Treasury made an affirmative LTFV determination, but the USITC found no injury. Plaintiff's suit in district court to set aside the USITC determination was dismissed for lack of subject matter jurisdiction, as exclusive jurisdiction lay in Customs Court. 86

On appeal, the issue was whether section 516(d) of the Tariff Act, 87 allowing challenges to the Secretary's LTFV determination to be brought in Customs Court, could be construed as covering the USITC's findings. 88 The court emphasized that a challenge to the factual accuracy of a USITC determination, which it denominated as a substantive claim, must be brought in Customs Court. 89

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83 28 U.S.C. § 1582(a) (1976). *Compare* § 110(b) with § 110(a) (which applies to importers). Subsection (b) does not include the language of subsection (a) allowing for challenges to the "legality of all orders and findings." *See* text accompanying notes 68-72 supra.


85 539 F.2d 221 (D.C. Cir. 1976).


The court relied heavily on the House Ways and Means Committee Report's statement that the absence of amendments to § 516 of the Tariff Act with respect to antidumping cases "should not be construed to mean that negative antidumping findings are not subject to judicial review," as such review was already available under that section. 549 F.2d at 816. *See* H. R. REP. No. 571, 93d Cong., 2d Sess. 74 (1974). *See also* North America Cement Corp. v. Anderson, 284 F.2d 591 (D.C. Cir. 1960). As negative antidumping findings include both LTFV and injury determinations, both were deemed reviewable in Customs Court.
The court of appeals reversed and remanded the case, ordering the district court to retain jurisdiction until the Customs Court could determine whether it had jurisdiction. That court held that it did have jurisdiction, as the intent of Congress was to render all substantive issues pertaining to countervailing and antidumping duties reviewable in Customs Court.\(^80\)

In *Timken*, the district court's jurisdiction over procedural claims was upheld. Specifically, plaintiff manufacturer claimed that Japanese roller bearings were being dumped, and accordingly filed a complaint with the Secretary. The Treasury Department published an affirmative LTFV determination and ordered withholding of appraisement on the merchandise. The USITC then made an affirmative injury determination which the Secretary did not publish. Rather, he ordered appraisement of the goods. This action contravened the established procedures of the Antidumping Act of 1921,\(^91\) which governed the assessment of antidumping duties. Plaintiff obtained injunctive relief against the Secretary in district court. On appeal, the court of appeals affirmed, holding *inter alia* that the Customs Court lacked jurisdiction because section 516 of the Tariff Act does not provide means of challenging the Secretary's actions as being beyond his statutory authority.\(^92\)

The analysis from which the exclusion of manufacturer's procedural complaints from Customs Court jurisdiction derives parallels that of importers' procedural complaints.\(^93\) The denial of Customs Court jurisdiction over a manufacturer's procedural claim has its genesis in the limiting language of the two statutes authorizing manufacturers to bring actions in Customs Court and allowing that court to hear such claims.\(^94\) Neither one provides for protests to the "legality of all orders and findings" as do the statutes governing importers' claims.\(^95\) If the presence of that phrase explains why an importer can bring a procedural claim in Customs Court, logically its absence explains why a manufacturer cannot bring such a


\(^{91}\) 19 U.S.C. § 160(b)(1)(B) (1976). See Timken Co. v. Simon, 539 F.2d 221, 230-31 (D.C. Cir. 1976). That section requires that appraisement of the goods be withheld until such time as the Secretary either closes the antidumping investigation or publishes an affirmative injury determination. The publication of an affirmative injury determination is mandatory, and appraisement after the date of publication implies the imposition of antidumping duties if the particular merchandise being assessed is valued at less than fair value. See note 2 supra.

\(^{92}\) Timken Co. v. Simon, 539 F.2d 221, 226 (D.C. Cir. 1976).

\(^{93}\) See notes 68-75 and accompanying text supra.


claim in that court. These decisions indicate that the district courts are the proper fora for manufacturers' claims challenging the procedures by which the customs laws are administered. Factual determinations made in the course of administering those laws, however, present questions of accuracy cognizable only in Customs Court.

D. Nonsatisfaction of Customs Court Procedural Prerequisites

Customs Court jurisdiction also depends upon the satisfaction of certain procedural prerequisites. The jurisdictional statute itself denies the Customs Court jurisdiction unless, in the case of an importer, a protest has been filed and denied pursuant to sections 514 and 515 of the Tariff Act, or, in the case of a United States manufacturer, all remedies prescribed in section 516 of the Tariff Act have been exhausted. The issue therefore arises whether a plaintiff can bring an action in district court to protest Treasury action in customs matters before meeting the procedural prerequisites to Customs Court jurisdiction.

Cases which fail to meet the procedural prerequisites for Customs Court jurisdiction and yet raise issues which are usually decided in that court present policy dilemmas. Though the absence of Customs Court jurisdiction is clear, district courts are concerned that by their own assertion of jurisdiction they may be subverting the exclusivity of Customs Court jurisdiction. Thus, the district courts generally do not assert jurisdiction over cases failing to meet the jurisdictional prerequisites because of the manner in which the plaintiff has filed suit. The plaintiff cannot elect to take its case before a district court by not following the Customs Court procedure; in fact, to come before a district court the plaintiff may have to prove the impossibility of ever meeting the jurisdictional pre-

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96 See text accompanying notes 68-75 supra.
99 28 U.S.C. § 1582(c) (1976), quoted at note 5 supra.
101 The district courts have similarly not taken jurisdiction over cases which are not yet ripe for Custom Court adjudication. Examples of these situations include an importer's attempt to protest the initiation of a Treasury Department antidumping or countervailing duty investigation, or an importer's attempt to challenge an affirmative LTFV, subsidy, or injury determination. See J.C. Penney Co. v. United States Treasury Dep't, 439 F.2d 63, 65 (2d Cir.), cert. denied, 404 U.S. 869 (1971), discussed in text accompanying note 103 infra.
requisites to Customs Court jurisdiction.\(^{102}\)

An illustrative case is *J.C. Penney Co. v. United States Treasury Department*.\(^{103}\) In that case, plaintiff importer alleged that the affirmative LTFV determination rendered by the Treasury Department lacked due process. Plaintiff could not have filed a protest pursuant to section 514 of the Tariff Act until the USITC made an affirmative injury determination and the Secretary had published a final affirmative dumping determination. By filing in district court plaintiff essentially hoped to avoid the expense of opposing a USITC injury investigation. The district court held that lack of ripeness in the Customs Court did not divest that court of jurisdiction.\(^{104}\) This decision is consistent with the congressional desire that importers litigate both their substantive and procedural complaints in Customs Court.\(^{105}\) The policy supporting an integrated, smooth-functioning system of customs law in a statutorily prescribed forum\(^{106}\) does not change depending upon whether the importer challenges the procedures of the Treasury Department before or after a final substantive decision is reached. It should not be allowed to choose its forum by the timing of its protest.

The decision in *Penney* is also consistent with general notions of ripeness.\(^{107}\) In *Toilet Goods Association v. Gardner*,\(^{108}\) the Supreme Court enunciated a three-prong test of ripeness: agency action must be final, it must present issues appropriate for judicial resolution, and denial of relief at the present time must result in hardship to the parties. One major case noted the possible inapplicability of *Toilet Goods* to many trade cases since it arose under the *Administrative Procedure Act*.\(^{109}\) That same court, however, acknowledged that the usual ripeness standards applied since under the Article III case or controversy requirement\(^{110}\) courts will not consider a case unless government action has been for-

\(^{102}\) See text accompanying notes 125-28 infra.

\(^{103}\) 439 F.2d 63 (2d Cir.), cert. denied, 404 U.S. 869 (1971).

\(^{104}\) Id. at 68.

\(^{105}\) Id. at 65.

\(^{106}\) See Part III. A. infra.


\(^{109}\) Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771, 781 (E.D.N.Y. 1978). This decision was made on remand from the Second Circuit. See note 58 supra. While the Sneaker Circus court did not explain the inapplicability of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1976), Michelin Tire Corp. v. United States, C.R.D. 79-6, ___ Cust. Ct. ___ (Feb. 26, 1979) clarified the issue. That case held that a civil action in the Customs Court was not a review of administrative action, but was a trial *de novo* to which the APA had no application. Id. (slip opinion at 25).

\(^{110}\) Cf. K. DAVIS, supra note 10, at 396 (discussing the case or controversy requirement in the context of declaratory judgments).
malized and has actually affected the plaintiff. This is clearly not the case when a plaintiff seeks preenforcement review in countervailing duty or antidumping cases. By definition, the agency action lacks concrete effect on the plaintiff until the duties are imposed or at least until a final determination has been made as to the applicability of such duties. Consequently, the plaintiff will not have an adjudicable case in district court even if the Customs Court does not possess exclusive jurisdiction over the final "ripened" case.

Among cases that are not yet ripe for adjudication, the district courts have distinguished between those that do not meet the jurisdictional prerequisites for Customs Court jurisdiction, and those that will never meet those prerequisites. This latter class of cases has been held to be within the jurisdiction of the district courts pursuant to 28 U.S.C. § 1340 and hence reviewable. The paradigm case arises in the context of Orderly Marketing Agreements (OMAs) negotiated between the United States and a foreign government limiting the export of goods from that country to the United States. If such an agreement is enforced abroad, the merchandise it covers will never reach American ports, and hence will not be "excluded" from entry. An importer in the United States can only challenge an import quota under section 514(a)(4) of the Tariff Act, which turns upon the "exclusion of merchandise from entry or delivery under any provision of the customs law." Thus, unless there is an attempted entry of merchandise in violation of the import quota and a resulting exclusion, the importer will not have an opportunity to file a protest under section 514 even though it will be harmed in the same manner and to the same extent as if the quota were on American imports. Since section 514(a) of the Tariff Act requires that the importer protest a specific decision of a Customs officer, and section 110(c) of the Customs Court Act makes such a protest a prerequisite to Customs Court jurisdiction, an OMA export quota will never allow the importer an opportunity to legally satisfy the procedural prerequisites of Customs

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113 See note 120 and accompanying text infra.
114 See note 4 supra.
117 28 U.S.C. § 1582(c) (1976), quoted at note 5 supra.
Court jurisdiction. The only way in which such prerequisites could be met would be to violate the export quotas of the foreign nation. Courts have recognized, however, that an American importer should not be required to violate foreign laws as a prerequisite to adjudicating its claim against the United States government. 118 Sneaker Circus, Inc. v. Carter, 119 a case that closely resembled the paradigm, found jurisdiction in district court after following the above reasoning to its conclusion that the Customs Court could never acquire jurisdiction. 120

The recent case of Consumers Union v. Committee for the Implementation of Textile Agreements 121 applied to slightly different facts the same standard as was applied in Sneaker Circus, 122 but found jurisdiction in the Customs Court. In that case, the President, pursuant to section 204 of the Agricultural Act of 1956, 123 had negotiated the multilateral Arrangement Regarding International Trade in Textiles. 124 In accordance with that Arrangement, he negotiated bilateral agreements limiting the exportation of textiles from Hong Kong, Korea, and India to the United States and imposing corresponding import quotas in the United States. Plaintiff in Consumers Union challenged the President's authority to enter into voluntary agreements with foreign nations, the effect of which limited exports to the United States, without making appropriate prior determinations as to possible injury to United States markets. 125 The district court order granting the defendant's motion

118 See, e.g., Sneaker Circus, Inc. v. Carter, 566 F.2d 396, 401 (2d Cir. 1977).
119 566 F.2d 396 (2d Cir. 1977).
120 The case challenged the validity of an OMA limiting the exportation of footwear from South Korea and Taiwan. The export restrictions were enforced by heavy civil and criminal sanctions. Plaintiff importers of such footwear argued that the OMA was void in that it was not concluded in accordance with the procedures prescribed in the Trade Act of 1974, 19 U.S.C. §§ 160-71 (1976). The district court dismissed for lack of subject matter jurisdiction. The Court of Appeals reversed, holding that:

The point is not that the dispute is not presently ripe for adjudication [in the Customs Court], but rather that the case will never ripen sufficiently to meet the statutory requirements for jurisdiction in the Customs Court. When this situation occurs, jurisdiction over a customs matter which presumptively inheres in the Customs Court reverts to the District Court under 38 U.S.C.A. §§ 1331 and 1337. 566 F.2d at 399-400. The court was incorrect in basing the district court's jurisdiction on 28 U.S.C. §§ 1331 & 1337 rather than on 28 U.S.C. § 1340. See notes 58-59 and accompanying text supra. This error exemplifies the confusion surrounding jurisdictional issues in international trade cases.
122 Sneaker Circus was decided after the Court of Appeals for the District of Columbia Circuit decided Consumers Union, but before the Supreme Court denied certiorari in that case.
125 The Agriculture Act of 1956, § 204, does not require that any prior determination be made. 7 U.S.C. § 1854 (1976). Plaintiff sought to imply a requirement of a "market disruption" determination on the grounds that the purpose of the Act was to protect the domestic
for summary judgment on the merits was reversed and remanded on appeal with instructions to dismiss for lack of subject matter jurisdiction. 126 The circuit court held that plaintiff could file an action in Customs Court pursuant to section 514 of the Tariff Act. 127 In so holding, the court did not discuss either the difficulty in exporting the merchandise so that it would reach the American ports and be "excluded," or the possibility that foreign export laws might be violated.

In unsuccessfully seeking Supreme Court review, plaintiff in Consumers Union alleged that the quota under attack precluded merchandise from ever reaching the United States. 128 In light of Sneaker Circus this was a crucial jurisdictional fact. The Solicitor General, however, responded that petitioner's assertion was not alleged in its complaint, not raised at trial, and was not correct. 129 The absence from the record in Consumers Union of the facts upon which the Sneaker Circus standard allows for district court jurisdiction may explain the seemingly contrary holdings, 130 and the Solicitor General's assertion that Consumers Union and Sneaker Circus stand for the same rule. 131

market from disruption by imports. Plaintiff claimed that such a requirement must be implied in order to uphold the constitutionality of the Act's delegation of power. The district court held for the defendant on all of the above points. Consumers Union v. Committee for the Implementation of Textile Agreements, No. 74-968 (D.D.C. Oct. 20, 1975).


127 Id. at 874.

128 Specifically, the plaintiffs alleged that:

[U]nder the challenged restraint program, merchandise in excess of the quotas never comes to the United States; it is not excluded by the Customs Service; there can be no protest to the Service regarding merchandise on which it has never acted; and without such a protest no suit in the Customs Court is possible.


129 The government challenged that "[p]etitioner's bald assertion that merchandise 'never comes to the United States' appears for the first time in its petition for certiorari. It was not alleged in petitioner's complaint or at any other point before the district court, nor was it raised in the court of appeals." Memorandum for the Respondents in Opposition at 3, Consumers Union v. Committee for the Implementation of Textile Agreements, cert. denied, 435 U.S. 933 (1978).

130 While this omission from the record may explain why the court dealt with the procedural prerequisites issue as it did, there is no ready explanation for why the court held that the Customs Court had jurisdiction over a case brought by a plaintiff who completely lacked standing before the Customs Court. See Part I.B.3. supra. As the Customs Court only has jurisdiction over cases which arise under the Tariff Act, which in turn are limited to those brought by importers or American manufacturers, that court could not have jurisdiction over Consumers Union. The case clearly should fall within the residual jurisdiction of the district courts, where the usual standing criteria would be applicable. See note 11 supra.

131 The Solicitor General's brief stated the following:

This case and Sneaker Circus thus recognize the same general rule — a rule that, in order to maintain a uniformity of decisions that may be essential to the foreign
Finally, the failure to meet necessary procedural prerequisites can occur when government action prevents the plaintiff from meeting those prerequisites. In *Timken*, for example, plaintiff sought to challenge the government's failure to publish an affirmative antidumping finding, but could not protest pursuant to section 516 because the government's publication of a finding was a prerequisite to filing such a protest. The court of appeals upheld district court jurisdiction on the grounds that plaintiff had no adequate remedy in the Customs Court. A more cogent rationale, however, was that plaintiff could never meet the statutory requirements for a cause of action before the Customs Court.

The above discussion indicates that the district courts will have jurisdiction over two non-mutually exclusive types of cases. The first are those cases in which a party seeks to bring a cause of action which is not provided for in the Tariff Act. Such a case may involve a party granted standing for some other cause of action pursuant to the Tariff Act, or a party who has no such standing. The second class of cases are those in which the plaintiff seeks to bring an action provided for in the Tariff Act, but, due to the nature of the case, will never satisfy the procedural prerequisites for that cause of action. The plaintiff bears a heavy burden of proof, however, in asserting inability to meet these requirements.

III. TOWARDS A COMPREHENSIVE CUSTOMS COURT JURISDICTION

A. Policies Supporting Revision of the Jurisdictional Statutes

Sound policy reasons support the proposition that all customs matters should be included within the jurisdiction of the Customs Court. The court was intended to provide a complete system of justice. Customs matters are often quite technical and involve a
unique body of law. Questions of classification, valuation, or the applicability of countervailing or antidumping duties require reference to highly technical statutes and rules of construction not applicable to other bodies of law. Substantial benefits would result from having a specialized adjudicatory panel which could utilize its expertise in these matters.

Penney Co. v. United States Treasury Dep't, 439 F.2d 63, 66 (2d Cir.), cert. denied, 404 U.S. 869 (1971); Davis L. Moss v. United States, 103 F.2d 395, 397 (C.C.P.A. 1939); Patchouge-Plymouth Mills v. Durning, 101 F.2d 41 (2d Cir. 1939); Cottman v. Dailey, 94 F.2d 85, 88 (4th Cir. 1938); Riccomini v. United States, 69 F.2d 480, 483 (9th Cir. 1934). See note 53 supra.

The forerunner of the Customs Court, the Board of General Appraisers, was formed to deal with the technical problems of classification and valuation. Administrative Customs Law of 1890, § 12, Pub. L. No. 51-145, 26 Stat. 131 (1890); F. Frankfurter & J. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 149 (1928). The Board was also expected to remedy the lack of uniformity and the expense of the previous system of district court adjudication. R. Sturm, A Manual of Customs Law 11 (1976). The Court of Customs and Patent Appeals was created over opposition fearing the narrowness and partiality of a specialized court. Frankfurter & J. Landis, supra at 151; 44 Cong. Rec. 4187 (1909). See Payne-Aldwich Tariff Act of 1909, Pub. L. No. 61-5, § 28, 36 Stat. 111 (1909). The institution of a specialized appellate court for customs matters over opposition to that type of court — for the very reason of its specialization — indicates that Congress viewed the adjudication of customs matters as distinct from that of other areas of the law and suitable for its own system of justice.

The purpose declared in a recent bill to modify the Customs Court's jurisdiction indicates that the view of customs matters as fit subjects for a separate system of justice continues.

Congress declares that the purposes of the Act are (1) to provide for a comprehensive system of judicial review of matters directly affecting imports, utilizing, whenever possible, the specialized expertise of the United States Customs Court and Court of Customs and Patent Appeals, and the opportunity for ensuring uniformity afforded by the national jurisdiction of these courts.


There is a longstanding controversy over the desirability of specialized federal courts. While the debate is quite interesting as a theoretical matter, it has only limited bearing upon the subject of Customs Court reform for several reasons. Most of the dialogue centers on the merits of specialized courts of appellate review for tax and patent cases. A canvas of the literature indicates that the desirability of specialized trial courts is nowhere questioned. Furthermore, none of the detractors of specialized courts have challenged the desirability of the present Customs Court or Court of Customs and Patent Appeals. Even those authorities that discuss these two courts in the context of specialization have nothing but praise for the system. F. Frankfurter & J. Landis, supra note 136, at 152; H. Friendly, Federal Jurisdiction: A General View 161 (1973).

The most important of the reasons why the specialization argument is inapplicable to customs adjudication is that the decision to specialize was made 90 years ago. The vast majority of customs cases are and have always been in Customs Court. Those matters cognizable in district court are no less appropriate for adjudication by a specialized forum than are those in Customs Court. They are cognizable in district courts not by virtue of the congressional action, but as a result of congressional inaction. See note 51 supra. The appropriate question in the context of customs jurisdiction is not whether to specialize, but how to adapt the specialized system that already exists to the new challenges which it faces.

The distinctions between customs cases and patent or tax cases may also underscore the inapplicability of the specialization arguments to customs matters. Both tax and patent cases are more integrally involved with other areas of business law and are more dependent upon
In addition to providing expertise, a single jurisdiction over customs matters would provide greater uniformity,\textsuperscript{140} and hence predictability. The problem of one court misinterpreting another court's opinion even when attempting to follow its precedent is compounded when the court is required to consider technical subject matter.\textsuperscript{141} Admittedly, the present system of jurisdiction theoretically runs the risk of nonuniformity only on the issue of jurisdiction, because no other customs issue is cognizable in more than one court. If a court errs on the jurisdictional question, however, it will rule on a matter of substantive law that is not cognizable before it, thereby running the risk of injecting nonuniformity into that substantive question.

Convenience is another advantage obtained by a single customs jurisdiction. The Customs Court's jurisdiction is statutorily mandated as to causes of action, ripeness, and standing.\textsuperscript{142} The problems that arise in ascertaining jurisdictional grounds occur most in the context in which they arise than are customs cases. Tax law frequently involves ascertaining the substance of a transaction in the context of a business decision. Patent cases are integrally related to the law of contracts and torts. Rifkind, \textit{A Special Court for Patent Litigation? The Danger of a Specialized Judiciary}, 37 A.B.A.J. 425, 425 (1951). Customs law, by contrast, operates in a virtual vacuum; other areas of the law or the business context of a transaction have no bearing on the outcome of a customs matter. One of the major concerns of opponents of specialized tax and patent courts is that judges on those courts would lose touch with the breadth and diversity of the law necessary to keep patent and tax law in the mainstream of judicial thought. That is, their concern focusses on the isolation of specialized judges from other areas of the law which ought to bear upon their decisions. \textit{Id.} See also \textit{Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change}, June, 1975, reprinted in 67 F.R.D. 195, 234 (1975) [hereinafter cited as \textit{HRUSKA COMMISSION REPORT}]. Since customs decisions do not depend upon other areas of the law, the isolation of customs judges, if in fact that occurs, is largely irrelevant to the quality of justice that they dispense.


\textsuperscript{140} Cf. \textit{HRUSKA COMMISSION REPORT}, \textit{supra} note 139, at 217-19 (discussing the consequences of uncertainty in the federal judicial system); Haworth & Meador, \textit{supra} note 139, at 210-11 (discussing the consequences of nonuniformity on tax and patent law).

One court has even stated that the exclusivity of Customs Court jurisdiction "finds its genesis not only in congressional enactments, but also in the constitutional mandate that 'all Duties, Imposts and Excises shall be uniform throughout the United States.'" SCM Corp. v. United States, 450 F. Supp. 1178, 1189 (Cust. Ct. 1978). While uniformity in customs matters is of central importance, the court seems to have overstated the point. A separate customs jurisdiction did not exist until 1890, yet there is no reason to believe that the prior system of district court adjudication of customs claims was unconstitutional.

\textsuperscript{141} For a discussion of this problem in the slightly different context of patent courts, see \textit{Commission on Revision of the Federal Court Appellate System, 1975 Hearings} 834 (1975) (statement of professor Gumbrell).

\textsuperscript{142} \textit{See} 28 U.S.C. § 1582 (1976), quoted at note 5 \textit{supra}. 
often when a customs problem is not explicitly included within the statutory grant of jurisdiction. These problems can be eliminated by expanding the statutory grant of jurisdiction.

With respect to the treatment of American manufacturers under the current jurisdictional model, the bifurcation of a manufacturer's causes of action into those that must be brought before the Customs Court and those over which the district courts have jurisdiction does not serve the policies upon which section 516 and the Customs Court Act are based. Section 516 is quite obviously a protectionist statute; its effect, and, by inference, its purpose, is to afford American industry defense against injurious import competition. American manufacturers are harmed whenever goods enter the country without being assessed the proper duties. Whether this error is due to inaccurate valuation or classification, or the failure to impose countervailing or antidumping duties where applicable, is immaterial. Equally irrelevant is whether this failure to assess the correct duty is due to an inaccurate substantive decision or to a violation of the statutory procedures which are to be used in reaching the substantive decisions. In either case, the United States manufacturer is harmed; yet in one instance it must take its complaint to the Customs Court via a circuitous administrative procedure, while in the other it can go directly to district court. Furthermore, section 516 does an inadequate job of protecting manufacturers by only allowing them to protest substantive claims in Customs Court. The fact that they can take their procedural complaints to district court is small consolation, since they lose the flexibility of alternative causes of action, as well as the convenience and uniformity that would result from trying all matters in Customs Court. This situation frustrates the policy of providing a complete system of justice in the Customs Court.

A final policy consideration supporting a unified customs juris-

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145 One possible explanation for the exclusion of procedural protests from the ambit of § 516 is that such procedural complaints are similar to non-customs complaints brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-05 (1970). The district courts routinely rule on such protests, and, therefore, this breadth of expertise is preferable to the narrow expertise of the Customs Court. The same argument applies, however, to procedural complaints instituted by importers. Congress nonetheless gave the Customs Court jurisdiction over such actions. Furthermore, the very existence of the Customs Court indicates that a court with technical expertise was deemed to be a more desirable means of dealing with customs matters than a court of general jurisdiction. Conferring jurisdiction over manufacturers' procedural complaints on the Customs Court would simply make § 516 of the Tariff Act consistent with § 514 and would further the policies underlying a separate and distinct Customs Court.
diction is efficiency. Vesting jurisdiction in alternative fora exposes litigants to the risk of wasted time and money when cases are brought in the wrong forum. This situation is particularly probable where the criteria for jurisdiction among courts are not sharply delineated. While this efficiency factor is not in itself sufficient to scrap an otherwise sound, bifurcated system of customs jurisdiction, it combines with other policies described above to militate for a unified customs jurisdiction. The present confusion can be remedied by expanding Customs Court jurisdiction to include all customs matters, thereby making it a truly complete system of justice.

B. Proposed Legislative Changes

The practical problems in ascertaining the jurisdiction of the Customs Court could be resolved in either of two ways. The present jurisdiction of the district courts could be ended by simply granting the Customs Court comprehensive jurisdiction over all customs cases. Alternatively, district court jurisdiction could be retained and clarified.

Comprehensive jurisdiction could be accomplished by amending the Customs Court Act and the Tariff Act of 1930 to include within Customs Court jurisdiction all customs claims brought by United States manufacturers and importers. Similarly, section 516 of the Tariff Act could be aligned with section 514 of that Act and

146 Efficiency was one of the goals of the initial establishment of the Customs Court and the Court of Customs and Patent Appeals. Graham, The Court of Customs and Patent Appeals: Its History, Functions and Jurisdiction, FED. B.A.J., October, 1932, at 35. See R. STURM, supra note 136, at II (discussing the problem of the expense of proceeding under the pre-1890 system).

147 S. 2857, 95th Cong., 2d Sess. (1978), was introduced to resolve the problems of customs jurisdiction. The purpose of the bill was consistent with earlier congressional efforts to provide a comprehensive system of reviewing customs matters. See id. § 101; note 136 supra. The virtues of such a system cited by the drafters were the expertise of the court, the uniformity of decisions, and the prevention of jurisdictional conflicts. Id. See note 136 supra.

The exclusive jurisdiction of the Customs Court is delineated more clearly, though not expanded, in the proposed legislation. S. 2857, 95th Cong., 2d Sess. § 302 (1978). District court jurisdiction over customs matters would continue under the proposed bill, but that court could transfer such cases to the Customs Court. Id. § 703. The Customs Court would therefore have non-exclusive jurisdiction over residual customs cases. While in one sense non-exclusive jurisdiction would be preferable to none, as the plaintiff can take advantage of the expertise of the court if he so desires and can avoid uncertainty, it would lead to forum shopping and would fail to provide uniformity. In fact, the resultant forum shopping and lack of uniformity in customs law would add to the customs field the very weakness that has resulted in an outcry for reform in the patent and tax areas. See H. FRIENDLY, supra note 139, at 154; Haworth & Meador, supra note 139, at 211.

Hearings were held on the proposed legislation, but no further action was taken. See Customs Court Act: Hearings on S. 2857 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (1978).


149 Id. §1514, quoted at note 6 supra.
section 110(a) of the Customs Court Act to allow manufacturers to bring procedural complaints before the Customs Court. The most far-reaching approach, however, would be to amend the Customs Court Act to expand the jurisdiction of the court to include all customs matters. This would necessitate writing new provisions into the Tariff Act to provide causes of action covering all customs matters. These new causes of action should specify procedures for those situations that cannot meet the current procedural prerequisites, and indicate which cases are to be covered by each procedure. One possibility would be to retain the current procedures only for cases involving duties and related problems of classification, valuation, and assessment. These procedures would apply to countervailing and antidumping duties as well as conventional duties. In addition, a new provision should allow challenges to quotas and other non-tariff barriers (NTBs) without requiring any prior administrative review or attempted entry of merchandise. This procedural difference would reflect the differences between the two types of cases. The impact of a quota or other NTB is apparent long before the merchandise reaches an American port; entry of goods is not dependent upon a discretionary payment, it is absolutely prohibited. No purpose is served by shipping the goods to the United States so that they can be rejected at the border. Therefore, these restrictions ought to be challengeable in vacuo. Standing requirements will still assure that the challenge will be made by one affected by the prohibition and having a legitimate interest in protesting that restriction.

In addition to expanding Customs Court jurisdiction, the Customs Court’s remedial powers should be expanded to be commensurate with its jurisdiction. The court should be given equitable powers enabling it to grant necessary relief in cases not presently within its jurisdiction. If the court is to deal with a United States manufacturer’s procedural challenges, it must be capable of issuing mandatory injunctions to administrative agencies. The court could be more effective in redressing the harm caused by illegal OMAs if it could enjoin the operation of such an agreement rather than simply void it. Furthermore, one commentator has suggested that the court is in a better position to dispense justice in customs matters if it can exercise equitable powers short of injunctive relief.

150 28 U.S.C. § 1582(a) (1976), quoted at note 5 supra.
151 Section 110(c) of the Customs Court Act, 28 U.S.C. § 1582(c) (1976), would have to be amended to take account of the new procedures outlined above.
153 See text accompanying note 13 supra.
154 Vance, supra note 13, at 389.
An alternative solution to the jurisdictional problem would be to preserve and strengthen the present division of jurisdiction by means of more precise statutory language. This approach would elucidate the substantive/procedural dichotomy in the treatment of American manufacturers’ causes of action, draw the dividing line between the jurisdiction of the Customs Court and district courts more precisely, and clarify the Customs Court’s lack of equitable powers. This approach, however, is obviously a second best solution.

IV. CONCLUSION

The initial establishment of a special court of original jurisdiction for the adjudication of customs disputes acknowledged the need for special expertise in the resolution of customs matters. The current system, however, does not allow the Customs Court to hear all customs cases, and has caused confusion in determining which cases are properly brought in that court and which belong in the district courts. This system distorts the model of a comprehensive customs jurisdiction which is both conceptually and pragmatically appealing. The time has come to realign the law with the model. The best way to proceed towards achieving consistency with the policies underlying the initial creation of a single Customs Court is to expand the jurisdiction and authority of the court, thus breaking down the conceptually artificial barriers which currently surround the Customs Court.

— Jonathan S. Brenner